EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104027/2018

Held in Glasgow on 16 August 2018

Employment Judge: F J Garvle

Mr S Boag	**Claimant** **In Person**
Association Of Chartered Certified Accountants	**Respondent** **Represented by:** **Ms J Skeoch - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that under section 111 of the Employment Rights Act 1996 the Tribunal does not have jurisdiction to hear the claim which is therefore dismissed.

REASONS

Background

1. In his claim, (the ET1) presented on 15 April 2018, the claimant alleges that he was unfairly dismissed. He gave his dates of employment as 18 June 2007 to 8 September 2017 at section 5 of the ET1, (R2) on page 4 of the ET1.

2. ~~At section 8 on page 6 of the ET1) he ticked the box— I was unfairly~~ dismissed".

3. At section 8.2 on page 7 of the ET1 , he set out further information. At page 8 on section 9.1 , he ticked “compensation only" and he ticked the box marked, “if claiming discrimination, a recommendation (see Guidance)”.

4. He then set out information under additional information at section 15 on page 12 of the ET1 and then on a continuation sheet which ends as follows:

> “I have contacted ACCA CEO Helen Brand on these matters since by redundancy but have received no comment in reply. I have not yet contacted ACCA’s Governing Council on matters of discrimination within the workplace.”

5. The ET 1 was accepted and a letter dated 16 April 201 8 informed the claimant that it had been accepted. A letter was also sent to the respondent, advising them that if they wished to defend the claim, they had to submit the ET3 by 14 May 2018. The letter to the claimant explained that the claim appeared to be brought out with the period within which claims should be brought.

6. The respondent lodged a response, (the ET3) and they set out a Paper Apart which has a number of headings with the first being PRELIMINARY ISSUE - TIMEBAR followed by LIMITED RESPONSE, next RESTRUCTURE/REDUNDANCY EXERCISE, UNFAIR DISMISSAL, REMEDY, DISCRIMINATION and finally a section marked, “GENERAL”.

7. At section 7.1 under the heading “DISCRIMINATION”, they state:

> “The Claimant has not ticked the box at question 8.1 of his claim form to indicate that he is making a claim for discrimination. However, reference is made in his particulars of claim to allege discriminatory behaviour and “*matters of discrimination within the workplace".* The Respondent contends that, when read as a whole, the Claimant’s claim form does not contain a valid complaint of discrimination, and this element of his claim should accordingly be dismissed.”

8. In the alternative, reference was made to the time limit under section 123 of the Equality Act 2012 (the Equality Act) and the respondent's submission was that the Tribunal does not have jurisdiction to hear this complaint and further, it would not be just and equitable to extend time in the circumstances.

9. The file was referred to Judge Claire McManus who was asked was the jurisdiction noted correct as only unfair dismissal (UDL being the jurisdiction code for which the Tribunal Office that is HMCTS staff had registered the claim) was used. In reply, she noted "Possible discrimination claim, identification of nature of claims to be determined". She also directed that the hearing on time bar should consider that issue as well as time bar itself.

10. A case management order was issued by Judge Robert Gall on 1 June 2018 and Judge Mark Whitcombe directed that the claim should proceed and this was confirmed in letters of 7 June 2018 to the parties.

11. There was then further correspondence and Notices for the Preliminary Hearing were issued on 10 July 2018, directing that the Preliminary Issues for determination would be "time bar and identification of nature of the claim".

The Preliminary Hearing

12. At the start of the Preliminary Hearing, Miss Skeoch provided a bundle of documents. The claimant also had a number of documents to which he wished to refer.

13. It was confirmed with the claimant that there were two issues for consideration, namely time bar and whether a complaint of discrimination was made.

14. It became clear that the claimant does not bring a complaint of discrimination. It was explained to him that there are two different tests where a claim is in relation to alleged unfair dismissal as opposed to one where the complaint is of alleged discrimination.

15. The claimant accepted that he knew his claim was presented out with the three months' time limit. He explained that he had previously submitted an earlier claim which he then withdrew because he wanted to wait until another colleague with whom he had worked at the respondent's organisation had left the respondent's employment.

16. The claimant knew that he had contacted ACAS outwith the three months' Time limit. Miss Skeoch provided a copy of a document from ACAS entitled, "Conciliation Explained" which is dated May 2018. The claimant appeared to recognise that document.

17. The claimant also understood that as his complaint is in relation to unfair dismissal, the test is as set out in section 111 of the Employment Rights Act 1996, (the 1996 Act). As the Tribunal understood it, the claimant's position appeared to be that he wished to refer to documents which had been sent to other colleagues but he did not want to jeopardise their position(s) prior to their leaving the respondent's employment.

18. It was explained that there is a two stage test which applies where a claim is accepted out of time as set out in terms of section 111 (1) of the 1996 Act.

19. The claimant was asked whether he wished to take time to consider matters further. He did not wish to do so. Miss Skeoch indicated that she would wish to refer to written submissions and a judgment of the Employment Appeal Tribunal, **Birmingham Optical Group pic** v **Johnson** 1994 ICR 459. A copy was provided to the claimant to consider. After further discussion, the claimant confirmed that he would take time to consider his position. It was explained that, if he wished to proceed with his claim then it would be necessary to hear evidence from him in order that the Tribunal could then make relevant findings offsets.

20. Following an adjournment, the claimant confirmed that he did wish to give evidence. The Tribunal duly heard evidence from the claimant. No evidence was led for the respondent.

Findings of Fact

21. The Tribunal found the following essential facts to have been established.

22. The claimant's employment with the respondent ended on 8 September 2017. His employment was terminated by way of redundancy. The claimant completed his ten weeks' notice (that is he worked his notice period) and so his last date of employment was 8 September 2017.

23. The claimant had attended what he described as a "Town Hall Meeting" in the office where he worked in Glasgow along with colleagues. The purpose of that was to explain that the respondent was going to be restructuring. There was then a further meeting which appears to have taken place on 17 May 2018, (C's bundle at Production A). This referred to a further meeting and a video conference link with people in London. There were then consultation meetings, (C's bundle, again at Production A) where there is a heading, "Main issues regarding fairness of redundancy which are not relevant".

24. Under the heading, "Time bar issue", the claimant had specified this:

> "It is my assertion that this entire exercise has been a sham and there was no chance for me to avoid redundancy.
>
> Because I have asked many questions of HR and had almost had all ignored, my intention at a full hearing is to submit some responses that colleagues received where ACCA demonstrated several inconsistencies, as well as the main consistency of refusal to share crucial documentation that would be key to an appeal.
>
> Given that my colleagues who left the business did so at different times, I was extremely nervous about submitting a claim that may incriminate or directly affect their redundancy status or even opportunity to remain with ACCA.

This is evidenced by my first submission where I made several phone calls to Glasgow ET to withdraw as I had to ensure that all colleagues involved had left ACCA before I started any proceedings.

This is why I feel it was not reasonable for me to submit before then."

25. The claimant confirmed that he had considered the terms of the Equality Act 2010 and, while he considers that he has an "unseen disability" and he could be within one of the protected groups, it was not the nature of his claim that he based it on discrimination. Accordingly, he confirmed again that he does not bring a complaint on the ground of discrimination.

26. The claimant contacted ACAS. He did so on or around 23 February 2018, (R1). The date of receipt by ACAS gives a notification date of 23 February 2018 and a date of issue of 2 March 2018.

27. The claimant accepted that the ACAS dates would be correct. He further accepted that he was aware that in contacting ACAS, as at 23 February 2018, this was well beyond the expiry of the primary time limit of three months from the termination of his employment. The claimant understood that, as his employment had ended on 8 September 2017, the three months ran until 7 December 201 7. He further understood that, had he contacted ACAS during that period i.e. up to and including 7 December 2017, then any further period spent with ACAS would have been applied and so the "stop the clock" provisions would have applied. The claimant accepted that he did not do so. The claimant's explanation as why he did not do so is as set out in the document in his bundle referred to as Production A above.

28. The claimant had been the first of those affected by redundancy to leave the respondent's employment. He worked with four colleagues but, as indicated, he was the first to leave the respondent's employment.

29. The claimant did not directly contact the Citizens Advice Bureau. Instead, he looked at their website. He had accepted an offer from the respondent to take advice from a consultant but no discussion about time limits took place.

30. The claimant subsequently submitted a claim to the Employment Tribunal which he thought was at some point in March 2018 but he then decided that he should not have done so. He therefore contacted the Tribunal Office and asked that his claim be treated as withdrawn. It was explained to the claimant that the Tribunal does not have a record of this on the Tribunal file for this case and, until the claimant mentioned this on 16 August 2018, the Judge was unaware of this earlier application.

31. The reason that the claimant did not submit the ET1 until 15 April 2018 was that he wanted to wait until the last of his colleagues had left the respondent's employment. The respondent pays its employees on the 15th of each month. The claimant received his final pay on 15 October 2017 but there was then a correction to that on 15 November 2017. It appears that by waiting until his final colleague had left, this meant that the claimant wanted to wait until that person had received their final pay which he understood would have been on 15 April 2018, that individual having left the respondent's employment on or around 15 March 2018.

32. The claimant accepted that he knew of the right to bring a complaint and that he was aware that he could obtain advice logging onto the Citizens Advice Bureau website. The claimant did not have faith in the respondent's process and so decided not to appeal but rather to wait and bring an action after he had left their employment. The claimant accepted that he had made this decision in principle before his effective date of termination of 8 September 2017.

33. At one point during the discussion before evidence was given on 16 August, there was reference to a redundancy payment which has a longer time limit of six months in terms of section 164 of the 1996 Act. The claimant accepted that he had received a redundancy payment. It was not immediately dear

whether or not he was now suggesting that he had, in fact, six months to apply in relation to unfair dismissal but the claimant then accepted that he was aware there is a three months' time limit for unfair dismissal claims. He did not seek to suggest that he had thought it was a six months' time limit for unfair dismissal claims.

34. The claimant was referred to a document produced by him which is marked, D2. This is email correspondence between the claimant and the respondent. The claimant accepted that, in his email of 7 March 2018 timed at 17:53 hours, the penultimate paragraph from him reads as follows:

> "In closing, I am fully aware that the standard 3 month ACAS and tribunal appeal period has passed, but would remind you that the decision on whether to investigate further after this time period lies entirely at the discretion of the Employment Tribunal, where ACCA will be legally obligated to provide this evidence."

35. The claimant accepted that he knew this, having spoken to ACAS. As indicated above he contacted ACAS on 23 February 2018.

36. The claimant's position, as he had previously explained, was that he elected not to submit his claim and he was "happy with that. It is a decision I made not to submit until my colleagues had left the business. My conscience is clear with that."

37. The claimant confirmed he had not spoken to any one from the CAB but he had looked at their website.

38. In relation to the document, D1 which is a letter from the claimant addressed to the respondent, it is not dated. It appears to be a three page letter. On the first page, there is reference to:

"Citizens Advice outlined to me a number of applicable reasons why a tribunal might find an instance of redundancy to be unfair or discriminatory:

- The employer must state why there is a need for redundancy
- The employer must outline how you were chosen for redundancy
- The employer should outline why they are considering you for redundancy
- Who made evaluations of roles and responsibilities
- The employer should make reasonable effort to find employment elsewhere
- The employer has a process that does not contain enough information
- The employer has a process but does not follow it"

39. The claimant thought that perhaps his use of the word, "outlined" was incorrect given he had accepted that he did not speak to anyone at the CAB but rather he had looked at their website.

40. The claimant accepted that it was physically possible for him to have submitted a claim but he decided not to do so because of his reasoning as set out above which he considered was a logical decision that he had made as he did not want to jeopardise colleagues' employment.

41. The claimant further accepted that as at 2 March 2018, it would have been feasible for him to submit a claim as by then he had the requisite ACAS Certificate. Again, the claimant accepted he could have done so but he still did not wish to jeopardise other colleagues' employment.

42. He further accepted that he could not prove that his decision would have had any impact on colleagues.

43. At the conclusion of the evidence, it was agreed that Miss Skeoch would present her closing submission first and then the claimant would have the opportunity to address the Tribunal on any points that he wished to make in addition to what had already been stated.

Respondent's Submission

44. Miss Skeoch referred the Tribunal to a written submission. This is a detailed document and it was agreed that she would then submit this separately so that it could be incorporated into the reasons set out in this Judgment. It is set out below.

INTRODUCTION

45. As confirmed in the Notice of Hearing to parties dated 10 July 2018, the purpose of the Preliminary Hearing is to determine two preliminary issues: whether the Claimant's claim was presented outwith the applicable time limit under section 111(2)(a) of the Employment Rights Act 1996, and accordingly

- whether the Tribunal has jurisdiction to hear it; and
- the identification of the nature of the claims submitted by the Claimant.

46. It is the Respondent's position that the Tribunal does not have jurisdiction to hear the Claimant's claim and it should be dismissed in its entirety.

IDENTIFICATION OF CLAIM

47. The Claimant's ET1 claim form stated at question 8.1 that he was bringing a claim for unfair dismissal only. As outlined in the Respondent's ET3 Response, it is the Respondent's position that no claim for discrimination has been made out in the Claimant's ET1 Claim form, when read as a whole.

48. The Claimant was asked by the Tribunal to confirm whether he was seeking to bring a claim for discrimination against the Respondent and if so, upon what protected characteristic he sought to rely.

49. The Claimant confirmed in email correspondence to the Tribunal dated 13 July 2018 and copied to the Respondent's representative that he no longer seeks to bring a claim for discrimination under the Equality Act 2010 and that his claim is for unfair dismissal alone.

50. It is therefore clear in the Respondent's view that the only claim before the Tribunal is that of unfair dismissal.

TIME LIMITS - APPLICABLE LAW

51. Section 111(2) of the Employment Rights Act 1996 (the "ERA") states that a claim for unfair dismissal must be presented to an Employment Tribunal "before the end of the period of three months beginning with the effective date of termination" or "within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

52. Accordingly, it is submitted that there are three issues to be determined in respect of the question of timebar:

- Was the claim presented outwith the applicable three month time limit?
- If so, was it reasonably practicable for the Claimant to present his claim within the applicable three month time limit?
- If not, did the Claimant present his claim within a reasonable time after the expiry of the applicable time limit?

NON-COMPLIANCE WITH RELEVANT TIME LIMIT

53. The Ctaimant's employment came to an end by reason of redundancy on 8 September 2017, which is accordingly his effective date of termination. That is not disputed by the Claimant (question 5.1 and in the supporting statement

of the Claimant's ET1 Claim form). Accordingly, the primary time limit for him to submit his claim was therefore 7 December 2017.

54. The Claimant contacted ACAS in respect of the requirement to undertake Early Conciliation ("EC") on 23 February 2018 and he was issued with an EC Certificate by ACAS on 2 March 2018.

55. It is submitted that it is not possible to apply any extension to the primary limit to take account of the period of EC through ACAS as the Claimant did not contact them until 77 days after the expiration of that time limit.

56. This has not been disputed by the Claimant and is supported by the guidance provided by ACAS regarding the EC process which states: "When someone notifies Acas of their intention to make a tribunal claim, the clock stops ticking on their limitation period. The clock starts again once Early Conciliation ends and extra time is added to ensure everyone has at least one calendar month in which to present a tribunal claim after Early Conciliation ends. However, if someone is already late for making a tribunal claim by the time they notify Acas, they will still be late when Early Conciliation ends as no adjustment is made in these circumstances; if an ET1 is lodged, the Claimant would have to rely on the tribunal's discretion to allow a late claim." (emphasis added).

57. The Claimant submitted his claim to the Tribunal on 15 April 2018, 128 days after the expiration of the applicable time limit under the ERA, and 44 days after ACAS had issued him with an EC certificate.

58. The Claimant has accepted that his claim was submitted outwith the applicable time limit (email dated 8 June 2018 from the Claimant where he states "I accept the above as true" and "In short, I did submit outside the 3-month period").

59. It is accordingly clear and undisputed, in the Respondent's view, that the claim was submitted out of time.

REASONABLE PRACTICABILITY

60. Turning to the second issue to be determined by the Tribunal, the Respondents primary position is that it was, plainly, reasonably practicable for the Claimant to submit his claim on time but he chose to not to do so.

61. The question of whether it was reasonably practicable is one of fact and of course is a matter for the Tribunal to determine. However, the onus rests squarely with the Claimant to establish this (as outlined in Porter v Bandridge Limited 1978 ICR 943, CA). It is for the Claimant to satisfy the Tribunal of the precise reason for the delay.

62. The Claimant states in correspondence to the Tribunal of 28 June 2018: "My primary reason for delay is that a close colleague was made redundant as part of the same process, but was given a 6-month internal secondment at ACCA - with the agreement to retain redundancy payments and conditions at the end of that period. As some of the evidence that I would relate to in a full hearing will mention this colleague by name, I could not in good conscience risk his status, financial package or opportunity of retention with ACCA until his situation had been resolved either by retention or redundancy."

63. The Respondent does not accept that the initiation of proceedings by the Claimant within the 3 month time limit would have had any impact, negative or otherwise, on any of its other employees. It is unclear what the Claimant is trying to suggest would have happened to his colleague but in any event it is entirely refuted that the present claim did or could have had any such impact. Furthermore, and in any event, it is respectfully submitted that this, the sole reason advanced by the Claimant, is undoubtedly not enough to persuade the Tribunal it was not reasonably practicable for him to submit his complaint in time.

64. Parallels can be drawn (to a certain extent) with the case of Birmingham Optical Group pic v Johnson [1995] ICR 459. In that case, the Claimant was reengaged as a consultant and did not raise a claim for unfair dismissal for

fear of jeopardising that arrangement. The EAT held that the Claimant's own commercial interests could not by themselves amount to reasonable impracticability, even where it was not "convenient" or "commercially sensible" to raise the proceedings. It is submitted that this argument can be applied, and indeed carries more weight, where the "commercial interests" in question are in fact another's.

65. Furthermore, the very nature of the reason that the Claimant has put forward for not submitting his claim makes it clear that he was aware of the option of pursuing Tribunal proceedings against the Respondent, and that they were within his contemplation. He chose not to do so; he was not prevented from doing so by any practical barrier.

66. Reasonable practicability is - evidently - about practicalities: was it feasible for the Claimant to get his claim in on time. We submit that this question can only be answered in the affirmative.

67. No other evidence has been put forward to suggest that the Claimant was precluded from submitting his claim in time, physically or otherwise. Indeed the Claimant stated in his email correspondence of 28 June 2018 that "I would not bring any evidence in addition to this hearing, and rely on the judgment of the Tribunal", so it would appear that the reason outlined above is the sole one submitted by the Claimant. That is a position he has maintained from his ET1 Claim Form.

68. The Claimant was employed in alternative employment from 11 September 2017, and has engaged in correspondence with the Respondent. It is clear, in the Respondent's view, that he was capable of submitting his claim within the relevant time limit.

69. It is submitted that the reasoning the Claimant has presented as to why he did not present his claim within the applicable time limit demonstrates, as a matter of fact, that it was indeed reasonably practicable for him to do so but

he elected not to. That, it is submitted, should be an end to the matter and the claim should therefore be dismissed.

FURTHER REASONABLE PERIOD

70. If, contrary to the Respondent's primary submission, the Tribunal were to determine that it was not reasonably practicable for the Claimant to submit his claim on time, the Respondent submits that he has nonetheless failed to do so within a reasonable period thereafter.

71. Again, we appreciate that this is ultimately a question of fact for the Tribunal to determine but, as highlighted in IDS Employment Law Handbook on ET Practice and Procedure (Chapter 5 - para 5.90) we note that ETs are unlikely to accept a late claim where the claimant fails to act promptly once the obstacle that prevented the claim being made in time in the first place has been removed. Furthermore, it is noted that the assessment by the Tribunal of this part of the test must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly and that litigation should be progressed efficiently and without delay. Would invite the ET to conduct its analysis through this lens, having particular regard to the length of the delay in this case.

72. As noted, the Claimant submitted his claim to the Tribunal on 15 April 2018, 128 days after the expiration of the primary time limit under the ERA, and 44 days after ACAS had issued him with an EC certificate. That is a substantial period of delay and, the Respondent submits, not a reasonable one when all things are considered.

73. The Claimant wrote to the Respondent's CEO on or around 2 March 2018 (after receipt of the EC certificate from ACAS). In that correspondence he stated that he had "taken advice", had consulted with Citizens Advice and that he intends to initiate proceedings for unfair dismissal unless he is provided with a "suitable outcome". The Claimant further states he will allow 7 days for

a response, namely by 9 March 2018, "before going to the next stage with a tribunal".

74. From this correspondence it is clear the Claimant had taken legal advice and was contemplating raising Tribunal proceedings in early March 2018. He delayed further by more than a month before submitting his claim on 15 April 2018 and it is the Respondent's position that that period of delay was plainly not a reasonable one.

75. To the extent that the Claimant seeks to rely on the fact that his colleague's redundancy payments would not be finalised until 15 April 2018 as the reason for the delay, it is submitted, for the reasons already outlined, that this is simply not a sufficient excuse when the relevant principles are considered.

76. In any event, the Claimant states that his colleague was made redundant in February 2018. His employment status had therefore been determined by that date but the Claimant nonetheless delayed in submitting his claim by over a month. The Respondent again strongly refutes any suggestion that the raising of proceedings by the Claimant would have any impact on its obligations to make a redundancy payment to the Claimant's colleague where they are entitled to receive it. Regardless, that is not the Claimant's concern and any purported failure by the Respondent to comply with its obligations to his colleague (which, for the avoidance of doubt, is entirely denied) would be between the Respondent and that colleague, and did not constitute an obstacle or impediment preventing the Claimant from submitting his claim.

CONCLUSION

77. In summary, the Respondent submits that:

- the sole claim before the ET is that of unfair dismissal;
- the claim has not been presented within the primary time limit;
- it was reasonably practicable for the Claimant to submit the claim on time; and

- in the alternative, if the Tribunal finds it was not reasonably practicable for the Claimant to submit his claim on time, he did not submit it within a reasonable time thereafter.

78. We respectfully submit that the Claimant's claim should be dismissed in its entirety on the basis that the Tribunal does not have jurisdiction

Respondent's Oral Submission

79. Miss Skeoch wished to amplify some points by way of an oral submission. She referred to the three stage test set out at section 111 of the 1996 Act. The key date was 7 December 2017 given the effective date of termination was 8 September 2017. The first contact was made with ACAS on 23 February 2018. The consultation document that she had referred to is available on the ACAS website.

80. According to Miss Skeoch's calculation, there was then a period of 128 days from the last date when the claim could have been presented in time namely 7 December 2017.

81. She next referred to the time limits as set out in the 1996 Act and that there had been non compliance with that time limit.

82. Next, she referred the Tribunal to the section entitled, "Reasonable practicability". In particular, she drew attention to section 5.8 of her submission and the claimant's email of 28 June 2018 when he stated:

> *"/ would not bring any evidence in addition to this hearing, and rely on the judgment of the Tribunal."*

83. She referred the Tribunal to the judgment of the Court of Appeal in **Porter v Bandridge Ltd** 1978 ICR 943 although she did not refer to any particular part of that judgment.

84. It was clear that on 28 June 2018, the claimant's primary reason for not wanting to impact on the status of colleagues was the reason that he did not present his claim within the applicable time limit, albeit it was reasonably practicable for him to have done so. Next, he accepted in his evidence that would support the Tribunal being satisfied that it was reasonably practicable for the claimant to have submitted his claim in time.

85. Miss Skeoch referred to the Birmingham judgment, (see above). There, the circumstances were different in that the employee concerned chose not to submit a complaint because he was concerned that, having entered into an arrangement with his former employer, he should not immediately issue proceedings against them.

86. Miss Skeoch referred the Tribunal to page 462 where there is a reference to the judgment in **Wall's Meat Co Limited v Khan** and Lord Justice Brandon at pages 60-61 as follows:

> "The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably presents or interferes with, or inhibits such performance. The impediment may be physical, for instance, the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

87. In the Birmingham judgment, (see above) the Employment Appeal Tribunal decided that the Tribunal at first instance had erred in treating as a sufficient excuse the explanation provided by the claimant as to why his commercial interests prevented his submitting a complaint within the time limit.

88. Next, she referred to page 464 as follows:

> "That, in our view, cannot by itself amount to something which is close to duress, something which makes it not practicable to issue the writ or make the complaint. It is something which makes it not convenient to do, as a general commercial consideration."

89. She also said that, while not entirely in point at page 465, paragraph D, it states:

> "If that submission were accepted then it would impossibly widen, it seems to us, the category of cases which can properly fall within the words "not reasonably practicable". We certainly do not accept the alleged principle that a person who is offered money, even very substantial sums, is merely by that deprived of free will, or that it can be said justly that it is not reasonably practicable for him to take a particular course."

90. In this case, the claimant has indicated that he wanted to bring a complaint but that he wanted to make sure of his colleagues' position rather than in that case a concern about the claimant's money he was receiving from the respondent (as a consultant) whereas, here, it was not the claimant's money that was involved and, accordingly this present circumstance can be distinguished from the Birmingham situation.

91. In her submission, the Employment Appeal Tribunal was satisfied that it was not, as a matter of law, open to the tribunal to extend time there.

92. That judgment was helpful and essentially it sets out how strict the time limits are and the approach that a tribunal must take when considering the concept of reasonable practicability. It may be that the claimant has set out why he had chosen not to submit a claim but his reason was not one justifying it being not reasonably practical. The test is on practicability.

93. Turning to section 5.6 of her written submission, the claimant has chosen not to present his claim and was not prevented from doing so by any practical barrier.

94. The claimant was aware of his option of bringing a complaint and he decided to bring it late, having candidly elected not to do so, within the timescale required.

95. Accordingly, there was no ignorance of the time limit and, indeed, the claimant had set out very clearly why he had submitted the complaint, (the ET1) out of time.

96. Next, she wished to refer the Tribunal to the IDS Employment Law Handbook on Employment Tribunal Practise and Procedure at Chapter 5, paragraph 46 and the reference there to **"Ignorance of the time limit".**

97. It reads as follows:

> **"Ignorance of the time limit.** Where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is aware of his or her rights will generally be taken to have been put on an inquiry as to the time limit. Indeed in Trevelyans (Birmingham) Ltd v Norton 1991 ICR 488, EAT, Mr Justice Wood said that, when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the tribunal to reject the claim."

98. Next, she referred to the claimant knowing that he had the entitlement and that he knew this before the effective date of termination of employment as he was aware of his rights and how to get advice and had taken the decision not to present his claim.

99. She further referred to his email of 28 June 2018, (see section 5.8 of her written submission).

100. The claimant had obtained new employment on 11 September 2017 so it was clear he was capable of submitting the claim. He had presented an earlier claim which he later withdrew and that, in her submission, was fatal to the argument of reasonable practicability. The fact was that he was able to do so and he submitted a claim before the present one which he now asks should be accepted, albeit late.

101. As a matter of fact, the claimant's evidence demonstrates that it was reasonably practicable to submit a claim in time but he elected not to do so.

102. Ms Skeoch then referred the Tribunal's attention to the section in her written submission marked, "FURTHER REASONABLE PERIOD" and, in particular, at 6.2 that the assessment by a tribunal of this part of the test must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly and that litigation should be progressed efficiently and without delay. She would therefore invite the Tribunal to conduct its analysis through this lens, having particular regard to the length of the delay in this case.

103. Next, she wished to refer the Tribunal to the IDS Handbook at paragraph 5.90 entitled, **"Presenting claim within further reasonable period".** Here, there had been 128 days' delay and 44 beyond the Acas Certificate having been issued. That is a very significant delay.

104. Miss Skeoch referred to paragraph 6.4 of her written submission where the claimant had written to the respondent's Chief Executive Officer on or around

22 March 2018 after receipt of the Acas Certificate, indicating that he had "taken advice", had consulted with Citizens Advice and that he intended to initiate proceedings for unfair dismissal unless he was provided with "a suitable outcome". He indicates he would allow seven days for a response namely by 9 March 2018, *"before going to the next stage with a tribune?.*

105. This underlines that the claimant accepted that he had made up his mind before his termination date that he would bring a complaint to the Employment Tribunals and this is critical in looking at his email at D2 and the reference there to his being fully aware of the standard three months' time limit to contact ACAS and that the appeal period had passed.

106. The claimant then waits more than another month, nearly six weeks before submitting his complaint. Accordingly, she did not need to repeat what was set out in her written submission.

107. In conclusion, the sole claim before the Tribunal was that of unfair dismissal but it had not been presented within the primary time limit: it was reasonably practicable for the claimant to have submitted the claim in time and, in the alternative, if the Tribunal found it was not reasonably practicable, then he did not submit it within a reasonable time thereafter.

108. Accordingly, she invited the Tribunal to dismiss the claim.

Claimant's Submission

109. In reply, the claimant said that he did not have much to add to what he had already said earlier to the Tribunal. He had covered extensively his reasons as to why he had waited so long. He thought the contents of the email raised what he had set out, that he had contacted ACAS but, the long and short of it, was that he had decided that as a moral decision, he would not submit his claim until his colleagues had left and, rightly or wrongly, in legal terms, he had decided to delay. He still, on reflection, took the view that he could not jeopardise colleagues who had not left before him.

110. He therefore had set out the reasoning why he had delayed submitting his claim and he had nothing further to add.

The Law

"Section 111 Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal -

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

and

Section 207B Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").

....

(2) In this section-

fa) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of the regulations made under subsection (11) of that section) the certificate issued under subsection (4) pf that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

Deliberation and determination

111. It is not in dispute that this claim was not presented in time. The referral to ACAS was made after the three months had expired and so the claimant cannot benefit from the time spent at ACAS by way of "stop the clock", provisions", (see above, section 207B of the Employment Rights Act 1996).

112. The Tribunal therefore has to consider whether it was not reasonably practicable for the claim to be presented before the end of that period.

113. Having given careful consideration to all that was said by the claimant as to his explanation as to why he did not submit the complaint in time, the Tribunal concluded that Miss Skeoch is correct that it is not possible to apply any extension to the primary time limit to take account of early conciliation as the claimant did not contact ACAS until 77 days after the expiry of that original date namely 7 December 2017 since he only made contact with ACAS on 23 February 2018.

114. His complaint was not submitted until 15 April 2018, being 128 days after expiry of the three months and 44 days after ACAS issued the EC certificate.

115. Miss Skeoch is correct that the question of whether it was reasonably practicable to submit the claim is one of fact and this is for the Tribunal to determine. She is also correct that the onus rests on the claimant to establish the reason for it. The claimant must satisfy the Tribunal of the reason for the delay.

116. Reference was made to the correspondence of 28 June 2018 from the claimant as follows:

> "My primary reason for delay is that a close colleague was made redundant as part of the same process, but was given a 6-month internal secondment at ACCA - with the agreement to retain redundancy payments and conditions at the end of that period. Some of the evidence that I would relate to in a full hearing will mention this colleague by name, I could not in good conscious risk his status, financial package or opportunity of retention with ACCA until his situation had been resolved either by retention or by redundancy."

117. The respondent, in response, does not accept that the initiation of proceedings would have had any impact, negative or otherwise on any of its employees. It was not clear to them what the claimant was trying to suggest would have happened but, in any event, they refuted that the submission of a claim did or could have had such an impact.

118. Further, it was submitted that it was not enough to persuade a Tribunal that it was not reasonably practicable for the claimant to submit his claim.

119. As indicated, reference had been made by Miss Skeoch to the judgment in the Birmingham case and some parallels which could be drawn with it to the present circumstances.

120. In this case, the claimant had chosen not to submit his complaint in time. Reasonable practicability is concerned with practicalities. Was it feasible for the claimant to get his claim in on time?

121. The respondent's position is that it was and, indeed the claimant does not dispute this was the case. Instead, his position is that he knew there was a time limit and he chose not to comply with it. He also chose not to make contact with ACAS until well after the three months had expired.

122. Accordingly, the Tribunal was not persuaded that it could conclude that it was not reasonably practicable for the claimant to have submitted his claim in time.

123. Whatever his motivation and whether that was for a moral or other reason as he saw it, the Tribunal has to apply the law and focus on the issue of reasonable practicability. There was nothing before the Tribunal to satisfy it that it was not reasonably practicable for the claimant to have submitted his claim in time nor was there anything which prevented the claimant from making contact with ACAS within the original three months and had he done so then he would have benefited from the "stop the clock provisions".

124. Having given careful consideration to all that was said by the claimant in support of why he chose to wait, knowing he was beyond the primary three months' limit before he contacted ACAS which was mandatory given the requirement to have an ACAS EC Certificate, the Tribunal was not satisfied that it was not reasonably practicable for the claimant to have submitted a claim in time. He deliberately chose not to do so but that is not the test to be applied. The test is whether it was not reasonably practicable to do so. Here, the Tribunal was not satisfied that it was not reasonably practicable for the claimant to have failed to submit the claim in time.

125. Since the Tribunal was not satisfied that it was not reasonably practicable, it does not require to consider the terms of section 2 (b) of section 111 of the 1996 Act. However, for completeness, had the Tribunal concluded that it had not been reasonably practicable to submit the claim in time, then it would not

have been satisfied that the claim was then submitted within a further period that was reasonable, given there was considerable further delay from the date of issue of the ACAS Certificate on 2 March 2018.

126. The Tribunal therefore concluded that the complaint of unfair dismissal, (the claimant having confirmed that he was not pursuing an additional complaint of discrimination), was not presented timeously.

127. Accordingly, the Tribunal concluded, applying the law to the above findings of fact, that it follows that this claim must be dismissed as the Tribunal does not have jurisdiction to consider it.

Employment Judge: FJ Garvie
Date of Judgment: 28 August 2018
Entered in register: 29 August 2018
and copied to parties