



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107289/2019

5

Held in Glasgow on 11 September 2019

Employment Judge L Doherty

10 **Mrs Y Lees**

**Claimant
In Person**

15

Thornhill Glass & Glazing Limited

**Respondent
Represented by:
Ms D Alexander -
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that time should not be extended under section 111 (2)(b) of the Employment Rights Act 1996 (ERA) to consider the claimant's complaint of unfair dismissal.

REASONS

- 30
1. This was a preliminary hearing (PH) to consider whether the tribunal had jurisdiction to determine the claimant's complaint of unfair dismissal on the grounds that the claim had been lodged with the tribunal outwith the statutory time limit.
 2. The claimant appeared in person, and the respondents were represented by their solicitor, Ms Alexander.

E.T. Z4 (WR)

3. At the outset of the hearing, Mrs Lees confirmed that her claim is confined to one of unfair dismissal, and that she is not making a claim for a redundancy payment.

4. It is not in dispute that the claimant's employment came to an end on 26 October 2018, and that the claim was presented to the employment tribunal on 11 June 2019. The issue the tribunal has to consider is whether time should be extended under section 111 (2) (b) of the ERA, in order to determine the claim of unfair dismissal.

5. The claimant gave evidence on their own behalf, and a joint bundle of documents was produced.

Findings in Fact

6. The Tribunal made the following findings in fact.

7. The claimant was employed by the respondents, Thornhill Glass & Glazing Limited, from May 2010. She handed in her resignation from that employment on 19 October 2018 and worked a weeks' notice, her employment terminating on 26 October 2018.

8. Further to her employment coming to an end, the claimant had a discussion with a friend, in which the claimant explained that she had been unhappy at work. It was suggested to her that she may have a complaint of constructive dismissal. The claimant thereafter carried out research on the internet, using Google to investigate the position, and discovered that constructive dismissal was also regarded as unfair dismissal.

9. The claimant carried out research on how she should bring a claim and having done so, decided to contact the CAB. The claimant contacted the CAB and booked an appointment to discuss the circumstances in which she tendered her resignation from her employment. She attended the CAB on 14 November 2018, after which she contacted ACAS. The claimant contacted ACAS on 19 November, and she began the early conciliation notification process. The claimant received a response immediately from ACAS acknowledging receipt of notification for early conciliation. The email advised

the claimant that more information about early conciliation could be found on ACAS' website. The claimant read this email and looked at the website.

10. On 22 November, the claimant was contacted by ACAS via email. She was asked to call them, as they needed to speak to her in order to establish details of her claim. The claimant did so, explaining the circumstances which led to her resignation. Following her conversation with ACAS, the claimant received an email from ACAS advising that a conciliator had been appointed, and a designated conciliator would contact her within one week to discuss matters further. The email provided the claimant with a link to a booklet on early conciliation which explained the process in detail. The claimant read this.
11. On Monday 26 November, the claimant received an acknowledgement from an ACAS conciliator, Mr Scott Mackell, who advised that he was the appointed conciliator. Over the next month, the claimant made a number of telephone calls to Mr Mackell, who told her that he had made attempts to speak with her ex employer but had been unable to do so. On Tuesday 18 December, Mr Mackell contacted the claimant by telephone and advised her that as he has no response from her ex employer, she should now complete and return her employment tribunal claim form, the ET1. He advised he would forward an ET1 form to her, along with the early conciliation certificate. The claimant was advised by Mr Mackell that she was responsible for checking the timescales for the return of the completed ET1 claim form.
12. Mr Mackell's emailed the claimant stating: *'Here is your Certificate which is evidence that you notified Acas before making a tribunal application. Please keep this safe as you will need to quote the reference number in full (including the last 2 numbers) if you fill in a tribunal application.*
- Acas cannot advise you about when a tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time.'*
13. The ACAS early conciliation certificate was issued on 18 December 2018.

14. The claimant checked the time limit for the submission of the claim, by carrying out internet research, and was aware of the three month time limit for presenting a claim.
15. The claimant completed the ET1 form and returned it to Mr Mackell on 10
5 January 2019.
16. Mr Mackell emailed the claimant on 11 January 2019 stating; *'thank you for your email. When your ET1 is received and processed by the employment tribunal service, I will be notified and offer further conciliation'*.
17. The claimant emailed Mr Mackell on 4 February to find out the progress of the
10 case, advising that she would be out of the country for a period and provided contact details. Mr Mackell responded on the same day stating; *'I have not made any further contact with Paul McNally since my involvement does not recommence until the Tribunal has confirmed they have accepted your claim. When that is done, I will make contact with everyone again to offer conciliation.'*
- 15
18. The claimant emailed Mr Mackell again on 15 March 2019 asking if any progress had been made. Mr Mackell responded on 18 March 2019 again advising the claimant that he had not made contact with anyone regarding the claim since he had not been contacted by the Tribunal Service confirming that
20 her claim had been accepted. He advised that when the Tribunal Service had confirmed this to him, he would offer conciliation again.
19. The claimant emailed Mr Mackell again on 29 May 2019 enquiring where they were with this case. In between the emails, the claimant had telephoned Mr Mackell enquiring the progress on a number of occasions.
- 25 20. On Friday 7 June 2019, the claimant received a telephone call from Mr Mackell, who enquired if she had received a response and the claimant said that she had not. He provided her with a telephone number of the Employment Tribunal Service and suggested that she call it immediately. The claimant did so and was advised that no claim had been registered. She thereafter

obtained an ET1, which she completed and submitted to the Employment Tribunal Service on 9 June 2019.

21. The ET1, which the claimant completed contains a section headed 'Employment Tribunal Checklist'. This includes the statement; 'send the completed form to the relevant office address' and goes on to provide that a list of the office contact details can be found at the hearing centre page of the employment tribunal website. The ET1 also states that that if a claimant is unsure about which office to contact, he should call the Employment Tribunal Customer Contact Centre who can provide general information about the employment tribunal.
22. The claimant made no distinction between ACAS, and the Employment Tribunal Service, and she viewed them as all part of one government body. She took the view that as ACAS had forwarded the ET1 form to her, it was appropriate to return it to them.

15 Submissions

Claimants Submissions

23. As the Tribunal understands it, the claimant's position is that as a lay person, she was ignorant of the fact that ACAS and the Employment Tribunal Service were separate bodies. She considered it appropriate to return the ET1 form to ACAS, as they had forwarded the ET1 to her. The only person she had contact with was Mr Mackell from ACAS, and she was relying upon him.
24. The claimant submitted that the case law relied upon by the respondents were irrelevant to her case, as the facts referred to in those cases were the not the same or similar to the facts of her case.

25 Respondents Submissions

25. Ms Alexander presented a written submission, which she supplemented with oral submissions. She took the Tribunal to the relevant law on exercise of discretion to extend time limits for an unfair dismissal claim. She submitted the onus rested with the claimant to justify the extension (*Porter v Bandridge Ltd 1978 IRLR 271*).

26. Ms Alexander dealt with the not reasonably practicable test and referred to the judgment of Lord Denning in *Walls Meat Company Ltd v Khan* 1978 IRLR 499, in which he repeated and confirmed the test in the case of *Deadman v British Building and Engineering Appliances Ltd* 1974 All ER 520. The effect of that is that ignorance of rights or the existence of time limits is not a just cause or excuse, unless it appears that the claimant or his advisors could not reasonably be expected to have been aware of them. Ms Alexander also referred to Lady Smith's judgment in *Asda Stores Ltd v Causer* EAT0 165/07, in which she explained the test in the following way - *'the relevant test is not simply a matter of looking at what was possible, but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.'*
27. Ms Alexander submitted that the reason for the delay was a misunderstanding on the part of the claimant, as opposed to any miscommunication on the part of ACAS. There was evidence to show that Mr Mackell of ACAS was responsible for the miscommunication, and it was the claimant's personal responsibility to ensure the claim form was sent to the correct address. There was an abundance of guidance available online designed to assist individuals who are aware they have a potential claim, but do not have legal representation. The claimant was able to take steps to identify that she had a potential claim in the first place, taking advice from the CAB, and making contact with ACAS, so it must have been that she could have also done the same thing in relation to the completion and submission of the claim form.
28. Ms Alexander drew the tribunal's attention to the terms of the ET1 form itself, which stated a copy of the claim form may be copied to the other party and ACAS for the purpose of tribunal proceedings or to reach a settlement of the claim. A reasonable individual would take care to read the final checks section of the ET1, which is undoubtedly an important document, and would query why a copy might be sent to to ACAS, if in the fact it was ACAS to whom the ET1 was to be sent in the first place.
29. Ms Alexander also referred to the ET1 check list at page 13 of ET1 which requires a perspective claimant to 'send the completed form to the relevant

office address' and details of the offices contact details. Had the claimant checked this, it would become apparent that the claim form required to be sent to the tribunal office and not ACAS.

30. The claimant had taken no steps to ensure that her claim was correctly lodged. Even it was possible to show that the ACAS conciliator had contributed in some material way to this miscommunication, there is a substantial body of case law which confirmed that the claimant will not be able to successfully argue that it was not reasonably practicable to make a complaint to an employment tribunal where a skilled advisor failed to advise correctly. (*Governing Body of Sheredes School v Davies* UKEAT/0196/16/JOJ).

31. Ms Alexander acknowledged that a claimant may be able to rely on a failure to act in reliance on advice from ACAS (*DHL Supply Chain v Fazackerly* UKEAT/0019/18/JOJ). In that case, it was held not to be reasonably practicable for the complaint to be raised in time where the claimant relied on incorrect advice from ACAS. There was nothing however in the claimant's pleadings on evidence to suggest that ACAS gave incorrect advice.

32. Ms Alexander submitted that in the event the tribunal found that it was not reasonably practicable for the claim to be lodged on time, then it was not lodged in a reasonable period thereafter, and in this connection referred to the cases of *Cullinae v Beatty Engineering Services Ltd* UKEAT/0537/10/TA, and *Golaub v University of Sussex* 1981 WL6971 7.

Consideration

33. Section 111 of the ERA provides as follows:

25 “(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 —*

30

(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. "*

34. As indicated above, there is no issue that the effective date of termination was 26 October 2018.

35. The ACAS early conciliation certificate was issued on 18 December 2018. Applying section 111 (2)(a) and section 207 B of the ERA, the claimant would have had to present her claim to the Tribunal on or before 23 February 2019. The ET1 was presented on 11 June 2019 and is therefore presented almost four months out with the statutory time limit.

36. That being the case, the Tribunal has to consider whether time should be extended under section 111(2)(b) of the ERA. Section contains 111 (2) (b) contains a two stage test.

37. The first test requires the tribunal to be satisfied that it was not reasonably practicable for the claim to be presented timeously. Secondly, if the tribunal is satisfied on this point it must then go on to consider whether the claim was presented within such further period as the Tribunal considers reasonable.

38. As submitted by Ms Alexander, the burden of the proof rests with the claimant, to establish that time should be extended. As the Tribunal understands it, the claimant's position is that she did not realise that she required to submit a completed ET1 claim form to the Employment Tribunal, and instead considered that it should be returned to ACAS, as it was the ACAS conciliator who had forwarded the blank ET1 to her.

39. The Tribunal was not persuaded in this case that there was any evidence to support the conclusion that ACAS had misrepresented the position to the claimant or advised her that the ET1 should be returned to them, as opposed to the Employment Tribunal. ACAS advised the claimant at an early stage

about their role in proceedings, and directed her to information about this, which she read. The emails from Mr Mackell to the claimant in February and March, made clear that he would not become involved again until such time as he was advised by the Employment Tribunal Service that her claim has
5 been accepted. The emails which were sent by Mr Mackell to the claimant, indicated that he could not do anything until he had heard from the Employment Tribunal Service, and these statements would have reasonably allowed the claimant to conclude that it was not Mr Mackell at ACAS, who was not dealing with her case against her employer, and that he would only be
10 involved in the conciliation process in the event a claim was accepted by the Employment Tribunal. Indeed, that is what Mr Mackell's email to the claimant states in terms.

40. Albeit Mr Mackell sent the claimant a blank ET1, he pointed out that she was responsible for checking the time limits for submitting the claim. His doing so
15 is inconsistent with the notion that it was somehow suggested by him to the claimant that it was appropriate for her to return the ET1 to him or to ACAS.

41. it would also have been reasonably practicable for the claimant to have discovered from her internet research that her claim would be dealt with by the Employment Tribunal and should be sent to it, and not ACAS.

20 42. Even if the claimant had not been able to ascertain from her internet research that a claim against an employer, was to be submitted to the Employment Tribunal Service, and that the Employment Tribunal would deal with such a claim, then on completion of the ET1 claim form, it should have reasonably become apparent to the claimant that the ET1 should be returned to the
25 Employment Tribunal Service, and not ACAS. The claimant completed and submitted an ET1, which contains a section headed '*Employment Tribunal Checklist*', which includes the statement; '*send the completed form to the relevant office address*' and provides that a list of the office contact details that can be found at the hearing centre page of the employment tribunal
30 website. It also provides that if a claimant is unsure about which office to contact, he should call the Employment Tribunal Customer Contact Centre who can provide general information about the employment tribunal.

43. In considering whether to extend time on the grounds that it was not reasonably practicable for the claim to be presented in time, the tribunal took into account the tests laid out in *Walls Meat, Dedman, Asda Stores*, referred to above.
- 5 44. The claimant submitted that these cases were irrelevant to her case, as the facts were not at all similar to the facts in her case, however the tribunal has to take into account the guidance given by the upper courts on issues of law, and the cases referred to by Ms Alexander were relevant to the statutory tests that the tribunal had to apply.
- 10 45. Applying the guidance given by Lady Smith in *Asda Stores*, the Tribunal considered whether on the facts found, it would be reasonable to expect that the claim could have been submitted in time.
46. On the basis of the facts found, the claimant had carried out internet research and had obtained information from that in relation to the presentation of her claim, including information about time limits; she had consulted with the CAB, and had been in contact with ACAS. She had received information from ACAS about the conciliation process which she read; and she had completed an ET1, which indicated that it was required to be returned to the Employment Tribunal Service. She was told by ACAS that they would not become involved until her claim had been accepted.
- 15 20
47. On this basis, the Tribunal was satisfied that it was reasonable to expect the claimant could have submitted her claim within the three month time limit, and that time should not be extended to consider the claim on the grounds that it was not reasonably practicable to submit it within the statutory time limit.
- 25 48. Having reached that conclusion, it was unnecessary for the Tribunal to go on to consider the second level of the test in section 111 (2)(b).

49. The effect of this conclusion is that the Tribunal has is no jurisdiction to consider the complaint of unfair dismissal.

Employment Judge: Laura Doherty
Date of Judgment: 19 September 2019
5 Entered in register: 25 September 2019
and copied to parties

15