EMPLOYMENT TRIBUNALS

Claimant: **Miss Merissa Hoyte**

Respondent: **Barclays Execution Services Limited**

Heard at: **East London Hearing Centre (via CVP)**

On: **7 September 2022**

Before: **Employment Judge Dias-Patel**

Representation

Claimant: **In person**
Respondent: **Mr Ohringer (Counsel)**

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. The claim of unfair dismissal was presented outside the primary time limit contained in section 111(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within that primary time limit; accordingly, the claim of unfair dismissal is struck out on the basis that it has no reasonable prospect of success.

REASONS

The Hearing

1. The issues to be determined by the Employment Tribunal were set out in the case management order of Employment Judge Russell as follows:

Was the complaint(s) presented outside the three-month time limit (as extended by any relevant ACAS Early Conciliation period) and if so:

(a) should the complaint(s) be dismissed on the basis that the Tribunal has no jurisdiction to hear it;

(b) *because of those time limits (and not for any other reason), should the complaint(s) be struck out under rule 37 on the basis that they have no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success?*

2. The Tribunal was provided with a bundle by the Respondent consisting of 47 pages, along with the Respondent's skeleton argument. The bundle consisted of pleadings, correspondence and payslips.

3. At the hearing it became clear that the Respondent had not seen the first ACAS certificate with reference number R127214/22/53 (see further below) and an email sent by the Claimant to the Tribunal on 1 September 2022. The hearing was adjourned for 30 minutes to allow the Respondent time to consider the information contained in those documents.

Findings of fact

4. The Claimant was employed by the Respondent from 16 June 2004 until 6 December 2021. The Claimant first contacted ACAS on 3 March 2022 and an Early Conciliation Certificate with reference number R127214/22/53 was issued to the Claimant on 13 April 2022. That certificate did not have the correct name for the Respondent – the name on the certificate was "Barclays Bank PLC" whereas the Respondent's correct name is "Barclays Execution Services Ltd".

5. When the Claimant received the Early Conciliation Certificate she noticed that the Respondent's name was incorrect. She spoke to ACAS about this who informed the Claimant that the certificate could not be amended; she received no further advice from ACAS on what to do about the error.

6. The Claimant did make a number of attempts, by email and by phone, to contact her trade union to seek advice on what she should do to about the error in the certificate. The Claimant stated to the Tribunal that every attempt to speak to a trade union representative failed. The Claimant initially stated that she did not seek advice from any legal advice centre because she was seeking to get advice from her trade union, however, later in the hearing the Claimant stated that on reflection she recalled that she did seek to engage Citizens Advice, without success. The Tribunal accepted that evidence.

7. The Claimant decided to contact ACAS again for a new certificate. This contact was made on 21 April 2022 and the certificate, with reference number R148404/22/45, was issued 12 May 2022. The Claimant presented a claim form (an "ET1") to the Tribunal on the basis of this certificate on 14 May 2022. The Claimant claimed unfair dismissal only.

The law

8. Section 111(2) of the Employment Rights Act 1996 ("ERA 1996") provides: "*an Employment Tribunal shall not consider a complaint…unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination*."

9. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

> "It was "not reasonably practicable" for the complaint to be presented in time; and
>
> The claim was nevertheless presented "within such further period as the Tribunal considers reasonable" (Section 111(2)(b), ERA 1996).

10. As Mr Ohringer pointed out, "reasonably practicable" has been held to be synonymous with "reasonably feasible": *Palmer v Southend on Sea BC* [1984] ICR 372. The following dicta of Brandon LJ in the case of *Wall's Meat Co. Ltd. v Khan* [1978] IRLR 499, at paragraph 60, is relevant:

> "*The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, 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 inquiries 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*.".

Submissions

11. The Claimant's position was that she did not present a claim to the Employment Tribunal within the three month time limit because she was trying to engage her trade union to advise her on her claim. She had made efforts before contacting ACAS and after she received the first certificate to obtain advice from her trade union, but these efforts had not been successful. The Claimant essentially believed that she was doing the correct thing in the circumstances to apply for another certificate given the defect in the first certificate. The Claimant stated that if she had known she could have presented a claim on the basis of her first certificate, she would have done so. In sum, it was not reasonably feasible for the Claimant to have presented a claim to the Employment Tribunal at an earlier time than 14 May 2022.

12. For the Respondent, Mr Ohringer's position was that it was "reasonably practicable" for the claim to have been presented on time. He stated that it was incumbent upon the Claimant to have entered the correct details on the ACAS notification in the first place. Moreover, even when the Claimant noticed that the name on the certificate was incorrect, there were options open to the Claimant which would not have resulted in the claim being out of time: for one, the Claimant could have presented a claim to the Employment Tribunal and made an application for the claim not to be rejected, applying rule 12(2A) of the Employment Tribunal Rules of Procedure 2013. Alternatively, the Claimant could have asked ACAS for a new certificate to be issued immediately and issued proceedings on the basis of that new certificate.

Conclusions

13. The Tribunal accepts the Claimant's evidence that she did attempt to seek advice from her trade union in respect of her claim, both before contacting ACAS and after she received the first ACAS certificate with the incorrect name for the Respondent. She made these attempts by telephoning and emailing the trade union.

14. The Claimant's evidence is also that she did make some effort to obtain advice from Citizens Advice.

15. In the Tribunal's judgement, the Claimant was not fully aware of the relevant legal rules and did make some efforts to find out what those rules were. However, as Lord Scarman commented in *Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA, the tribunal must ask "What were [a Claimant's] opportunities for finding out that he had rights? Did he take them?". In the present case, the Claimant did make efforts to engage her trade union for advice. However, by the time she contacted ACAS, which was two days before the expiry of the three month period set out in section 111(2)(a) of the ERA 1996, it was clear that, for whatever reason, the Claimant was not getting the advice she was seeking. Despite this, the Claimant did not contact a firm of solicitors for urgent advice. Whilst she did try to engage Citizens Advice at some point, without success, there were other bodies that the Claimant could have reasonably contacted to obtain the advice she was seeking. In the Tribunal's judgement, it was reasonably practicable for the Claimant to obtain advice on her claim in advance of contacting ACAS or, as a matter or urgency once she noticed the incorrect name on the first certificate. Instead, the Claimant persevered with trying to engage her trade union which, by the time she contacted ACAS, it would have been clear that the advice she required would not necessarily be forthcoming.

16. Accordingly, the Tribunal finds that it was reasonably practicable for the Claimant to have presented her claim within the primary statutory time limit set out in section 111 of the ERA 1996 on the basis that it was reasonably practicable for the Claimant to have obtained effective advice on what to do, both before she contacted ACAS and after she noticed that the name on the first certificate was incorrect; if she had done so, she would have been able to have submitted her claim within 3 months of the effective date of termination of

her employment contract. It follows that the Tribunal does not have jurisdiction to hear the Claimant's claim. For this reason the claim is struck out on the basis that it does not have reasonable prospects of success.

Employment Judge Dias-Patel
Date: 7 September 2022