



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105410/2022

Held at Dundee on 16 January 2023

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Employment Judge W A Meiklejohn

Mr Thomas Sidowra

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Claimant
In person

Sense Scotland

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Respondent
Represented by:
Mr B Doherty –
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's complaint of unfair dismissal was presented out of time and accordingly the Tribunal does not have jurisdiction to deal with it, and it is dismissed.

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REASONS

1. This case came before me for an open preliminary hearing. In the Notice of Hearing, the issue to be decided was expressed in these terms –
35 *“Whether the claim for unfair dismissal was commenced within the period set out in section 111 of the Employment Rights Act 1996 such that the Tribunal has jurisdiction to hear it”*. The claimant appeared in person,

accompanied for support by his wife. The respondent was represented by Mr Doherty.

Agreed chronology of events

2. At the start of the hearing both sides agreed the following chronology of events –
- Date of commencement of claimant’s employment with respondent - 23 December 2019
 - Date of termination of claimant’s employment with respondent – 1 June 2022
 - Date of claimant’s Early Conciliation (“EC”) notification to ACAS – 5 August 2022
 - Date of issuing by ACAS of EC certificate – 8 August 2022
 - Date of expiry of time limit for presentation of claimant’s complaint of unfair dismissal – 7 September 2022
 - Date of actual presentation of claimant’s complaint of unfair dismissal – 5 October 2022

Evidence and findings in fact

3. I heard evidence from the claimant. The claimant’s work history prior to his period of employment with the respondent included employment for a total of some 14 years as a night shift manager with Safeway, operating his own business as a handyman for 1 year, employment with Primero Contracts, a shop fitting firm, for some 3.5 years and working as a self-employed taxi driver for around 8 years.
4. The claimant became a member of Unison from the time his employment with the respondent commenced. He remained a member of that trade union. He had not previously been a trade union member.
5. On 10 January 2022 the claimant submitted a grievance. At the same time he was suspended because, according to their ET3, the respondent had

decided prior to submission of the grievance to initiate a disciplinary process. The respondent dealt with the grievance and then commenced disciplinary action against the claimant which led to his dismissal without notice on 1 June 2022.

- 5 6. The claimant appealed against his dismissal. He was supported in the grievance and dismissal/appeal processes by Mr S Hope of Unison. The claimant said that, not long after his dismissal, he talked to Mr Hope about possibly going to an Employment Tribunal. The claimant said that although Mr Hope prepared his appeal letter, he (Mr Hope) was reluctant to take matters further on his behalf.
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7. About a week after his dismissal the claimant contacted the Citizens Advice Bureau (“CAB”) in both Dundee and Arbroath. His purpose in doing so was to find out if they would represent him at an Employment Tribunal. He was advised that he could not get Legal Aid for representation at a Tribunal. He was given a list of the names of legal firms. Of these he made contact with one (Digby Brown) and, the claimant said, was told that they “*did not do Tribunals*”. The claimant did not recall getting any advice about time limits from the CAB. He did not discuss the details of his case when he spoke to Digby Brown, and did not discuss time limits with them.
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8. The claimant contacted ACAS. He thought he had been advised by the CAB to do so. I found that this most probably happened when he initiated EC on 5 August 2022. The claimant did not really understand what ACAS told him, and he called them back. I found that this most probably happened on 8 August 2022 when the EC certificate (R204925/22/24) was issued.
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9. According to the claimant, ACAS referred to “*the quick way*” and “*the long way*”. The claimant understood “*the quick way*” to mean EC and “*the long way*” to mean the Employment Tribunal. The claimant said that he “*must have said I wanted to go down the other road*” by which he meant the Employment Tribunal. That was consistent with the period of EC being only 3 days.
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10. The claimant accepted that ACAS mentioned time limits to him. According to the claimant, they told him that there was a time limit of 30 days. The claimant believed that ACAS would submit an Employment Tribunal claim

on his behalf. The claimant was asked during cross-examination about the last sentence of the EC certificate which reads *“Please keep this Certificate securely as you will need to quote the reference number (exactly as it appears above) in any Employment Tribunal application concerning this matter”*. This did not convey to the claimant that it was up to him to deal with his own Tribunal application. The claimant could not recall the terms of the covering email when he received his EC certificate from ACAS.

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11. The claimant had no personal experience of the Employment Tribunal system. He did not know anyone who had been to an Employment Tribunal. He described his general knowledge of Employment Tribunals as “zero”. The claimant said that he was *“not good”* with computers. He had used Google but had not done any online research into doing something about his dismissal. He had submitted his ET1 claim form online but his wife had done this for him.

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12. At some point, probably in late September or early October 2022, the claimant had telephoned the Employment Tribunal to find out what was happening regarding his claim. His recollection was that he had been advised to contact ACAS. When the claimant contacted ACAS he was told that he had to submit his own claim and that he was now late to do so. He was advised to submit his claim as soon as possible. He lodged his ET1 claim form a day or two later.

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13. Towards the end of his cross-examination by Mr Doherty, the claimant raised the issue of his own mental health. As this had not been mentioned previously, it was agreed that the claimant should give further evidence and be further cross-examined about this.

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14. The claimant said that he had been prescribed anti-depressant medication for approximately 2.5 years. In the latter part of 2021 he had a three month period of absence from work due to depression. His medication was increased following his suspension on 10 January 2022. The claimant said that his ability to submit his Tribunal claim on time had been affected by his mental health. At times he would not speak to anyone including his wife. He would shut himself away in his bedroom. He said that his illness had made it difficult for him to deal with his dismissal and his Tribunal claim.

15. The evidence also disclosed that the claimant and his wife were married on 12 August 2022. They went on honeymoon for two weeks.

Comments on evidence

- 5 16. The claimant did his best to provide an accurate account of events relating to the submission of his Tribunal claim. He struggled to recall the sequence of events which meant that his evidence was a little confused and/or contradictory at times. However, he was in broad terms a credible witness.

Submissions

- 10 17. It was agreed that Mr Doherty would make his submissions first. He reminded me of the terms of section 111(2) of the Employment Rights Act 1996 ("ERA") and argued that it had been reasonably practicable for the claimant to present his claim in time.

- 15 18. Mr Doherty observed that the claimant was not contending that he was unaware of the time limit in this case. His evidence was that he knew he had 30 days to submit his claim once he got his EC certificate. That meant it had been reasonably practicable for him to do so. The claimant's reason for not submitting his claim in time was that he believed that ACAS were going to do it for him.

- 20 19. Mr Doherty did not accept that the claimant's mental health had contributed to his inability to submit his claim timeously. His evidence had been more about how his dismissal had impacted on him and how he was struggling to deal with that. When he learned that his claim had not been submitted and was advised by ACAS to submit it as soon as possible, he was able to do so within a day or two. There was no evidence of a downturn in the claimant's mental health after he received the EC certificate. Mr Doherty noted that this period coincided with the timing of the claimant's marriage and honeymoon.

- 25 30 20. Mr Doherty argued that the claimant's misunderstanding about who would submit his Tribunal claim was not reasonable. The final paragraph of the EC certificate made clear that the responsibility lay with the claimant. The covering email from ACAS would have provided similar information.

21. Mr Doherty highlighted the support which had been available to the claimant –

- He had the support of Mr Hope of Unison during the dismissal and appeal process.
- 5 • He had contacted the CAB twice.
- He had contacted Digby Brown, whose details he had obtained from the CAB.
- He had contacted ACAS.

10 Mr Doherty invited me to find that it was highly improbable that ACAS would have given the claimant the impression that they would submit his claim. It had, he argued, been reasonably practicable for the claim to be submitted in time.

15 22. Mr Doherty sensibly intimated that he would not be contending that the claimant had delayed unreasonably in submitting his claim in the event that I found it had not been reasonably practicable for him to do so within the statutory time limit. He accepted that the claimant had acted promptly when he became aware of the need to do so.

20 23. The claimant contrasted the respondent taking, as he saw it, 5 months to dismiss him while criticising him over a matter of a few days. He had not understood what ACAS had told him and had believed that they would submit his claim. He submitted that, after what he had been through, he should be given the chance to say what happened. He said that he could obtain a letter from his GP to confirm that his depression was work-related.

25 24. The claimant said that he was unhappy about the way he had been represented by Unison. He intended to raise his concerns with them. The claimant said that he had attended every meeting with the respondent. He had tried to phone the right people to obtain help.

Applicable statutory provisions

30 25. Section 111 ERA (**Complaints to employment tribunal**) provides, so far as relevant, as follows –

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

5 (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*

10 (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.*

15 (2A) *Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)....*

26. **Section 207B ERA (Extension of time limits to facilitate conciliation before institution of proceedings) provides as follows –**

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

20 (2) *In this section –*

(a) *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 the proceedings are brought, and*

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

30 (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 (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.*

Case law

10 27. The Court of Appeal in England in ***Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53***, said, with reference to the then applicable statutory provision equivalent to what is now section 111(2)(b) ERA, that it should be given a *“liberal construction in favour of the employee”*.

15 28. What is reasonably practicable is a question of fact for the Tribunal to decide. In ***Wall’s Meat Co Ltd v Kahn 1979 ICR 52*** the Court of Appeal (per Shaw LJ) said this –

20 *“The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer’s complications into what should be a layman’s pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive.”*

25 29. In ***Palmer and another v Southend-on-Sea Borough Council 1984 ICR 372*** the Court of Appeal reviewed the authorities and concluded that *“reasonably practicable”* does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like *“reasonably feasible”*. In ***Asda Stores Ltd v Kauser EAT 0165/07*** the
30 Employment Appeal Tribunal (per Lady Smith) explained it in these terms –

“...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”.

30. In the **Dedman** case the Court of Appeal, when considering the situation where a claimant pleads ignorance of his/her rights, held that the ignorance must itself be reasonable. The Court (per Lord Scarman) said that the Tribunal must ask further questions – “*What were his opportunities for finding out that he had rights? Did he take them? If not, why not?*” In **Porter v Bandridge Ltd 1978 ICR 943** the majority of the Court of Appeal, after referring to Lord Scarman’s comments in **Dedman**, held that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them.
31. Illness may justify late submission of a claim. In **Schultz v Esso Petroleum Co Ltd 1999 ICR 1202** the Court of Appeal found that the claimant had been too depressed during the last 6 weeks of the three month time limit to instruct solicitors and held that it had not been reasonably practicable for him to have presented his claim in time.
32. In **Riley v Tesco Stores Ltd and another 1980 ICR 323** it was found to have been reasonably practicable for the claim to be presented in time because the claimant had “*engaged skilled advisers*”, in that case the CAB. However the Court of Appeal stressed that it was not material whether the advisers were “*skilled*” nor whether they had been formally “*engaged*”. Rather, the key factor was that the claimant had taken advice and this was relevant as part of the overall general circumstances of the claim being lodged late.
33. Incorrect advice from Employment Tribunal staff or ACAS does not automatically prevent a claimant from showing that it was not reasonably practicable to present his/her claim in time. In **Rybak v Jean Sorelle Ltd 1991 ICR 127** the EAT held that incorrect advice from a Tribunal employee about the final date for lodging a claim had rendered it not reasonably practicable for the claimant to present the claim in time.

Discussion

34. This was not a case where the claimant was completely ignorant of his right to bring a claim of unfair dismissal. His evidence confirmed that he had, not long after his dismissal, discussed with his trade union representative the possibility of bringing an Employment Tribunal claim. His evidence also confirmed that he had spoken to the CAB shortly after his dismissal about representing him at an Employment Tribunal.
35. This did not sit comfortably alongside the claimant's description of his general knowledge of Employment Tribunals as "zero". I believed that the claimant's evidence about his dialogue with his trade union representative and the CAB indicated that he had, at or around the time of his dismissal, an awareness of Employment Tribunals and of his right to complain of unfair dismissal.
36. From speaking to the CAB the claimant became aware of the need to contact ACAS. He did so on 5 August 2022 (as confirmed by the EC certificate). This meant that he brought himself within the "stop the clock" provisions in section 207B ERA.
37. Two key points emerged from the claimant's evidence about his conversations with ACAS. The first was that he accepted that ACAS told him about there being a time limit of 30 days. This indicated that ACAS had in effect alerted the claimant to the operation of section 207B(4) ERA. This applies where the primary time limit for bringing a claim has not expired and has the effect of extending the time limit to one month after the date upon which the EC certificate is issued.
38. The primary time limit in this case was the period of three months referred to in section 111(2) ERA. The claimant was dismissed on 1 June 2022 and so the period of three months expired on 31 August 2022. The claimant contacted ACAS before that date and accordingly was "on track" to bring a complaint of unfair dismissal within the time limit. The effect of the EC period ending on 8 August 2022 was that the time limit for presenting his complaint to the Tribunal became 7 September 2022.
39. The second key point was that the claimant believed that ACAS would deal with the submission of his Tribunal claim. I agreed with Mr Doherty that it was highly improbable that ACAS would have given the claimant that

impression. It was more likely that, when advising the claimant that there was a time limit of 30 days, ACAS were telling him that he required to act within that period. That would be consistent with the language of the EC certificate when it informs the recipient that *“you will require to quote the reference number...in any Employment Tribunal application”* (my emphasis).

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40. Notwithstanding my view on what ACAS probably said to the claimant, it was clear that he formed a belief that ACAS would submit his Tribunal claim. His subsequent conduct was consistent with that belief. He contacted the
10 Tribunal to find out what was happening about his claim. This indicated that he thought ACAS would have submitted it on his behalf. The question I had to answer was whether that mistaken belief on the part of the claimant made it not reasonably practicable for him to present his claim within the statutory time limit.

15 41. The issue here was whether the claimant’s erroneous belief that ACAS would submit his Tribunal claim was reasonable. If it was, that belief arguably rendered it not reasonably practicable for the claimant to present his claim in time. If it was not, the claimant could not rely on his own mistake.

20 42. I decided that the claimant’s erroneous belief that ACAS would submit his unfair dismissal claim was not reasonable, for a number of reasons –

(a) It was inconsistent with the language of the EC certificate (see paragraph 39 above).

25 (b) The claimant’s evidence was that he did not really understand what ACAS told him. In those circumstances he should have taken some steps to clarify matters in his own mind.

(c) If the claimant had done anything by way of research on his own, as I believed his use of Google indicated he was capable of doing, he would have discovered that his belief was wrong.

30 (d) The claimant had access to advice from his trade union and from the CAB, and they would undoubtedly have told him that his belief was wrong.

(e) His belief that ACAS would submit his Tribunal claim was far-fetched (although I did not attach too much weight to this because what might appear far-fetched to someone with legal qualifications and experience of the Tribunal system would not necessarily appear so to a layman).

5 43. I did not believe it could be said that it was not "*reasonably feasible*" for a person (a) with as much experience of work as the claimant's employment history indicated he had, (b) with awareness of the existence of the Employment Tribunal and the right to claim unfair dismissal, (c) access to advice from a trade union and the CAB and (d) who had been told by ACAS
10 about a 30 day time limit, to present a claim to an Employment Tribunal within the statutory time limit.

44. This was not a case where the claimant's ability to present his claim in time had been impacted by erroneous advice from an adviser, skilled or otherwise, nor from the Tribunal staff or ACAS.

15 45. I considered whether the claimant's mental health had operated so as to prevent him from presenting his Tribunal claim in time, to an extent which meant that it had not been reasonably practicable for him to do so. I noted that, as soon as he became aware that his claim was late, the claimant was able to submit it promptly, and had assistance from his wife in doing so. I
20 did not have any evidence which might have allowed me to assess to what extent the claimant's mental health had affected his ability to understand what he was told by ACAS. I considered that it was no more than speculation that the claimant's state of mental health had in some way caused or contributed to his Tribunal claim being late.

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Decision

46. For the reasons set out above I was not satisfied that it had not been reasonably practicable for the claimant to present his unfair dismissal claim
30 within the statutory time limit. That meant that the Tribunal did not have jurisdiction to hear his claim, and that claim required to be dismissed.

Employment Judge: W Meiklejohn
Date of Judgment: 18th January 2023
5 **Date sent to parties: 24th January 2023**