EMPLOYMENT TRIBUNALS

Claimant: Mrs A Barron

Respondent: Farrell Heyworth Limited

Heard at: Manchester Employment Tribunal (by CVP)

On: 17 March 2023

Before: Employment Judge Dunlop

Representation

Claimant: In person
Respondent: Ms H Bottomley

RESERVED JUDGMENT

1. It was not reasonably practicable for the claimant to present her claim of unfair dismissal within the time limit contained in Section 111(2)(a) Employment Rights Act 1996 (as extended by Section 207B). The claim was presented within such further period as was reasonable.

2. The Tribunal therefore has jurisdiction to consider the claim, which will proceed to a final hearing.

REASONS

Introduction

1. This is a claim of constructive unfair dismissal. The hearing was a preliminary hearing to consider whether the Tribunal had jurisdiction to consider the claim, given the date on which it was presented.

The Hearing

2. The hearing took place by video. I was provided with an agreed bundle of documents of 66 pages. Mrs Barron gave evidence and was questioned by Ms Bottomley. There were no other witnesses.

3. At the end of the hearing, I informed the parties that I would reserve my Judgment. I explained that there may be a short delay in promulgating the Judgment as I had a period of leave coming up. Unfortunately, it was not possible to finalise the Judgment before that period of leave, and I apologise to the parties that it has taken a little longer for them to receive this Judgment than I would have liked.

The Issues

4. This case had a preliminary hearing for case management before Employment Judge Parkin on 1 February 2023. Employment Judge Parkin set out the issues for determination at this hearing as follows:
   4.1 Whether the claimant's unfair dismissal claim was presented in time, having regard to Section 111(2)(a) and Section 207B of the Employment Rights Act 1996?
   4.2 If not, whether it was reasonably practicable to present it in time?
   4.3 If it was not reasonably practicable to present it in time, whether it was presented in such further period as the tribunal considers reasonable.

Findings of Fact

1. The claimant worked for the respondent, which is an estate agency. Following issues with a colleague which she considered had not been resolved satisfactorily, she tendered her resignation. The parties agree that the claimant's effective date of termination was 10 October 2021. Without any adjustment for early conciliation, the deadline for presentation of her claim would therefore have been 9 January 2022.

2. The claimant did engage in early conciliation, as she is required to do. The ACAS certificate shows that the date when she commenced Early Conciliation ('Day A') was 3 December 2021. The date when the certificate was issued ('Day B') was 16 December 2021.

3. The respondent had initially suggested that the deadline for the presentation of the claimant's unfair dismissal claim was 19 January 2022. We discussed this in the hearing as I could not understand the calculation. Having taken some time, Ms Bottomley confirmed that the respondent had initially been working to a termination date of 8 October 2022. Using 10 October 2022 she agreed with my calculation that the claim should have been presented, at the latest, on 22 January 2022, which was a Saturday. Mrs Barron was unsure as to how the calculation worked. She did not disagree with the 22 January date, or put forward any alternative.

4. It was agreed by the parties that the claim was presented on 27 January 2022, when it was date-stamped by the ET Central Office (see further below). By agreement, therefore, the determination of the first issue is that the claim was not presented within the primary time limit.

5. During the conciliation period, Mrs Barron had engaged with ACAS by sending emails and having calls with a particular conciliator, Mr Williams.

6. Following her engagement with ACAS, Mrs Barron knew that there was a deadline for the claim to be presented, but she wasn't entirely sure how this was calculated. She believed that she was working towards a deadline of either 19th or 20th January. ACAS had told her how dates were calculated, but had not given a specific deadline.

7. I accept Mrs Barron's evidence that at the time of bringing the claim she did not have access to a laptop, PC or tablet and that her means of accessing the internet was by mobile phone. She could send and receive emails using her mobile phone. She was also able to use the gov.uk website to find out information about presenting her claim.

8. Although the ACAS conciliation process had closed on 16 December 2021, Mrs Barron did not act immediately to present her claim. She was initially distracted by the Christmas holidays. Over Christmas her daughter, who was pregnant, was ill with covid. She remained ill into the early new year and this was a significant worry for Mrs Barron during this period. Realistically, I consider that most people in Mrs Barron's circumstances would have put off completing and submitting a claim form until the new year.

9. Mrs Barron was also working full time (Tuesday to Saturday) in a new job with a different estate agency. This also meant that it took a little longer than it might otherwise have done for her to turn her attention to the claim.

10. I pause to note that there are two ways in which the claim form can be completed. Claimants can make a claim online, which is done via the website and involves inputting answers to questions which correspond with various sections of the form. The answers provided are then used to generate the completed claim form which is sent to the parties and put on the Tribunal's file. This is how most claim forms are completed and claimants are encouraged, by wording on the website, to complete it in this way. Alternatively, however, the website allows users to download the form as a pdf document, which can then be printed out and completed by hand. Claimants who chose to download the entire form must then submit it by post to an address given on the website (there is one for England and Wales and one for Scotland). The form cannot be submitted by email, nor can it be delivered to regional offices.

11. Mrs Barron found it "almost impossible" to complete the ET1 claim form on her mobile phone. The form was complicated and she kept running into difficulties with getting it to work. She couldn't tell me whether she was trying to complete the process of making a claim online, or whether she had downloaded the pdf version of the form and was trying to complete it. There was no evidence about what sort of phone she has and what its capabilities would be. In any event, I accept her evidence about the difficult she encountered because she appeared credible and reliable in the way that

she gave that evidence, but also because that account fits in with the actions which she then took.

12. Mrs Barron had access at work to a printer and scanner, which could be set to scan documents and deliver them directly to a recipient by email. She explained (and again I accept her evidence on this point) that should would not have felt it was appropriate to sit at her work computer to complete the entire form during her working time, but she did feel able to use that printer to print off a copy of the form which she could complete in her own time, and then use the printer for a few minutes on a later occasion to scan it for submission. That is quite a convoluted way of submitting the form and I find that Mrs Barron would not have embarked on it but for the genuine difficulties she had experienced trying to complete the form on her phone.

13. Mrs Barron cannot recall the exact date that she printed the form and completed it at home. She had done so, however, by Tuesday 18 January, when she took it back into work to scan and submit by email.

14. At this point, Mrs Barron made a crucial mistake. She emailed her ET1 form (via the work scanner) at 12.37pm to ACAS. It appears that she was using a general inbox address for ACAS and that the email automatically generated by the scanner did not include any case number or other reference.

15. As I have noted above, it is no longer possible for claimants to submit completed claim forms by email to the Tribunal. Mrs Barron did not appreciate this. Small print at the end of the form reminds claimants that forms submitted online are processed more quickly and provides a web address to do this. Claimants are instructed that, otherwise, completed forms must be “sent to the relevant office address” but the address is not given on the form itself. The form also does not expressly state that it cannot be submitted by email.

16. Mrs Barron’s evidence, which again I accept, was that she simply hadn’t appreciated that ACAS’s role in the proceedings had now ended and that she was now expected to engage with a different body. As far as she was concerned, by sending the form to the address she had used previously to communicate with ACAS, she was advancing her claim to the next stage.

17. Perhaps unsurprisingly, Mrs Barron received no immediate response to the email sent via the scanner. She acted diligently by emailing ACAS at 7.49pm on Thursday 20 January to ask if they had received the 18 January email.

18. Mr Williams, the conciliator whom she had been dealing with, replied at 10.41am on Friday 21 January. He confirmed the email had been received but went on to say “*Have you submitted this to the Employment Tribunal? It can only progress if you do this.*”

19. Mrs Barron replied at 11.06am, asking for the correct email address to send the form to.

20. Mr Williams replied at 1.32pm, saying "*The relevant information is on this website"* and providing a link to the employment tribunal claims section of the gov.uk website. He went on to say that the Tribunal would assign the claim to the local employment tribunal centre. There was some further correspondence between Mrs Barron and Mr Williams after submission of the claim, but I do not need to recount it.

21. On reviewing the gov.uk website, Mrs Barron realised that she would have to post the ET1 form instead of emailing it. She gave evidence (which I again accept) that she posted it first-class on her way home from work on Friday 21 January. It would therefore have been around 6pm when it was posted. There was no evidence about the collection times from the postbox she used.

22. The form is date-stamped as having been received at the Employment Tribunal Central Office on 27 January 2022 i.e. the following Thursday. The respondent suggested that this date of receipt means that it was unlikely that the form was posted first class on the evening on Friday 21. The claimant had suggested that there were postal delays at the time. Ms Bottomley challenged this assertion in her submissions (although she had not challenged it in cross examination). I found Mrs Barron's account to be credible and I accept that she posted the form as described. Regardless of whether there was any specific industrial action on that day, I do not consider it impossible, or even improbable, that a letter posted as described would have been received on 27 January.

Relevant Legal Principles

23. It is evident from what I have set out above that this claim was presented outside the primary time limit set out in s111(2)(a) Employment Rights Act 1996 ("ERA"), taking account of the extension of term under s207B ERA.

24. S111(2)(b) provides that the Tribunal can extend time for the presentation of the claim where it was "not reasonably practicable" for the claim to have been presented within the primary time period, and it was presented within such time thereafter as the Tribunal considers reasonable.

25. The "reasonably practicable" test is a strict one (in contrast with the discretion to extend time on "just and equitable" grounds which applies in some other types of claims, and is much broader). The onus of showing that it was not reasonably practicable to present the claim in time lies on the claimant.

26. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal). The question is not whether it was physically possible to present the claim in time, nor whether it was reasonable not to, rather the test lies between these two extremes.

27. Ignorance of one's rights can make it not reasonably practicable to present a claim within time, as long as that ignorance is itself reasonable: **Walls Meat Co v Khan [1979] ICR 52**. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488, EAT**.

28. The respondent relied on the case of **Cygnet Behavioural Health v Britton EAT 108/2022** for the proposition that "A person is who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so." (paragraph 53).

29. I drew the attention of the parties to the case of **Consignia PLC v Sealy 2002 ICR 1193, CA**, which provides that if a letter does not arrive at the time when it would normally be expected to arrive in the ordinary course of post and, as a result is presented late, then that delay may satisfy the "not reasonably practicable" test. In the 'ordinary course of post' a letter posted first-class is expected to arrive two days later excluding Sundays and various public holidays.

30. The respondent also relied on a first-instance decision, **Long v Wrigley Company [2018]**. That was also a case involving postal presentation and the Judgment in fact included a lengthy extract from the judgment of Brooke LJ the **Sealy** case. The **Long** case does not add anything, in itself, to the principles to be applied.

31. I have also considered the cases of **Software Box Ltd v Gannon 2016 ICR 148, EAT** and **Adams v British Telecommunications plc 2017 ICR 382**, although these were not referred to by the parties. The claimants in these cases initially presented claims 'in time' which were then rejected, and they presented subsequent claims 'out of time'. In such a case, the authorities confirm that the focus must be on the second claim and the fact that it was possible to present a first claim in time is not determinative. It is clear that each case must be considered on its own merits, taking into account all of the circumstances that led to the late presentation. The reasonableness of the mistake made by the claimant in the first place will be critical.

32. Looking beyond the question of whether it was reasonably practicable for the Mrs Barron to have presented her claim in time, I must also address the second question of whether it was presented within such further period as was reasonable. That is a less stringent test than the test of reasonable practicability. It is a question of fact, taking into account all of the circumstances.

Submissions

33. The respondent's primary submission was that it would have been reasonably practicable for Mrs Barron to submit her claim online. She could have done so using the computer at work, or she could have borrowed a computer (as she has done to attend the virtual hearing today). As she was able to complete the handwritten claim form by 18 January 2022 she could have made her claim online by the same date. That would have been in

time. It was therefore reasonably practicable for her to present the claim in time.

34. The respondent's secondary submission was that if the claimant wished to present her claim without making the claim online it was incumbent on the claimant to find out that the form had to be submitted by post and where it had to be submitted to. She had failed to do that and had brought her problems on herself by leaving submission to the last minute, when there was insufficient time to correct the error she made in thinking she could submit the claim to ACAS.

35. Mrs Barron's submissions repeated the evidence she had already given about the reason why the claim was presented late. She emphasised that it was difficult to get a 'straight answer' for example in relation to exactly when the deadline was. She also emphasised that she felt she had been hindered by her lack of access to technology and was entitled to "treat the deadline as the deadline" and not be expected to try to submit her claim weeks before. She stressed that the period between the conclusion of Early Conciliation and the presentation of her claim had fallen over Christmas and that that, along with her daughter's illness, was why she had ended up rushing to complete the form at the end of the period.

Discussion and conclusions

36. I reject the respondent's submission that the claimant should have submitted her claim using the online form. An online form will not be suitable for everyone, and the alternative of printing and posting the form remains a valid method of presentation, even if the wording of the form itself and the online guidance is intended to discourage this. The claimant had good reasons, in terms of her access to technology, for choosing to print and complete a form rather than use the online form.

37. The claimant acted in good time in printing off and completing the form, which she was able to do by 18 January. Whilst this was relatively late in the window, it did leave sufficient time for the form to be presented. I accept that the claimant had good reasons for not acting earlier in the window – she was not simply sitting on her hands or (as has been found in some cases) attempting to inconvenience the respondent.

38. The claimant's mistake was in thinking that she could present the form be emailing it to ACAS, rather than appreciating that she had to post it to the Tribunal Central Office. She was unaware of three key things: the exact deadline; the fact that the form could not be emailed (and therefore that time would have to be allowed to post it) and the fact that it had to be sent to the Tribunal, and not to ACAS. That ignorance was genuine. The question, in line with **Khan**, is whether it was reasonable.

39. I consider in the circumstances of the case that this was a reasonable mistake for Mrs Barron to make. As to the deadline, it has become much more complicated to establish the precise deadline for submission of a claim since the introduction of Early Conciliation (and the resultant extension) in 2013. Mrs Barron had established that there was a deadline, and approximately when it would fall. By working to the '19th or 20th' as she

suggested, Mrs Barron was actually giving herself more time than the actual deadline.

40. Whilst the advice on the gov.uk website is relatively clear to someone who knows what they are looking for, I must remember that Mrs Barron was accessing this website on a small phone screen, and it contains a lot of information in different sections. I find that it would have been easy for her to miss the section which gives the postal address for submitting the form. It is unhelpful that the address is not included in the form itself. I also find it was reasonable (although incorrect) for Mrs Barron to assume that it is possible to submit a claim by email.

41. Given that her dealings had all been with ACAS until that point, and there is no clear indication on the form itself as to how and where it must be presented, I find that her mistake in sending it to ACAS on the 18th was a reasonable mistake. Having done that, she understood that her claim was underway.

42. The facts of this case actually bear a similarly to the **Khan** case, notwithstanding that it concerns a regime which is now historical. In that case Mr Khan did not present his unfair dismissal claim as he believed, erroneously, that it was being dealt with as part of another claim. That error was clear in hindsight, but was reasonable at the time.

43. As I have said in my findings of fact, I consider that Mrs Barron acted diligently in 'chasing' receipt of her claim with ACAS. The outcome of this application would likely have been different had she not done so. Once she understood that there was a problem she acted very quickly to print and post the form on 21 January.

44. Given that the deadline was the 22 January, the **Sealy** regime is not enough to assist her in itself. The case does not deal with whether a claim is to be taken to be 'posted' on the following day if it is placed in a postbox after the last collection. The respondent suggested I should find that this claim was 'posted' on the Saturday, as more likely than not it would not have been collected until then. The **Sealy** approach is intended to introduce consistency and simplicity, and the approach argued for by the respondent would introduce more complexity. Ultimately, however, I don't consider it necessary to determine the point for the purposes of this application. Under **Sealy**, in the ordinary course of post the form would have been expected to be delivered on Monday 24 January (if posted on Friday) or Tuesday 25 January (if posted on Saturday), both of which would be outside the deadline, albeit by marginal amounts.

45. In the circumstances outlined above, I consider that it was not reasonably practicable for Mrs Barron to present her claim by 22 January given that she had made a reasonable mistake as to how and where she had to present the claim. Her diligent actions meant that the mistake was realised and rectified in a timely way, but, unfortunately, at a point where there was no time left to post the claim such that it would be received before the deadline.

46. Provided I am correct that it was "not reasonably practicable" for Mrs Barron to present her claim by the 22nd, I am satisfied that it was presented within

such further period as was reasonable. The further delay is very short, and in effect was out of Mrs Barron's hands as the form was in the post.

47. I said at the outset that this was a strict test, and I have hesitated to consider whether this might be too liberal an application. However, the fact that it will rarely be appropriate to extend time under the "not reasonably practicable" test does not mean that it will never be appropriate. There were various matters which conspired against Mrs Barron in this narrative, and, whilst this is a finely balanced decision, I am satisfied in the circumstances of this case that it was not reasonably practicable for her claim to be presented in time.

48. In view of that decision, the case will now proceed to a final hearing. I will write to the parties separate with case management orders for the preparation of the claim for that final hearing.

Employment Judge Dunlop
Date: 18 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
18 April 2023

FOR EMPLOYMENT TRIBUNALS