EMPLOYMENT TRIBUNALS

Claimant: **Mr K Mpiani**

Respondent: **T4 Trust**

Heard at: **East London Hearing Centre (by video)**

On: **4 May 2023**

Before: **Employment Judge P Klimov (sitting alone)**

Representation
For the Claimant: Michael Wainwright (Legal friend)
For the Respondent: Andrew Watson (Counsel)

CORRECTED JUDGMENT having been sent to the parties on 5 May 2023 and written reasons having been requested by the Claimant on 5 May 2023, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form dated 7 October 2022 the Claimant brought complaints of unfair dismissal, wrongful dismissal, unauthorised deduction from wages (holiday pay, arrears of pay and other payments), and race discrimination.

2. In completing his ET1 the Claimant indicated in box 2.6 that he did not have an Acas early conciliation certificate number and answer the question "*why don't you have this number*" by ticking the box "*My employer has already been in touch with Acas*". The Claimant also stated that he had a representative - Mr Wainwright of Wainwright Consultancy Limited. The particulars of claim were set out in the Particulars of Claim on behalf of the Claimant document prepared by Mr Wainwright. The Particulars contained detailed submissions on pertinent points of law with reference to the relevant statutory provisions and the case law.

3. The claim was accepted, but on 30 November 2022 the Tribunal wrote to the Claimant as follows:

> *"You have not provided an ACAS early conciliation number at section 2.3 of your ET1 and have ticked the box "My employer has already been in touch with ACAS" to indicate that you are exempt from initiating the early*

> *conciliation process yourself. Your claim has been accepted, but please note that you must be able to provide evidence that your employer has indeed been in touch with ACAS about your claim. If that proves not to be the case, the claim will then be rejected later on. If in doubt you should go to ACAS for your own certificate as soon as possible and issue a new claim."*

4. On 25 January 2023, the Respondent presented a response denying all the claims and contending that the Claimant's claims should be struck out pursuant to Rule 12.2 of the Rules set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "**ET Rules**") because of the absence of the Acas early conciliation certificate number. The Respondent also contended that the Claimant's claims had been presented outside the time limit and therefore the Tribunal did not have jurisdiction to consider them. Finally, the Respondent submitted that the Claimant's claims had no or little reasonable prospect of success, and if they were allowed to proceed it would be seeking to strike the claims out on that ground or, in the alternative, asking the Tribunal to make a deposit order.

5. On 11 March 2023, the Tribunal converted the previously listed case management preliminary hearing on 4 May 2023 to an open preliminary hearing to decide:

> *(1) Whether there has been an early conciliation number issued to confirm that early conciliation has taken.*
> *(2) If not, whether any early conciliation exemption applies.*
> *(3) In any event, whether the Tribunal has Jurisdiction to consider the Claimants complaints based on the application of statutory time limits for presenting complaints of unfair dismissal and race discrimination*.

6. On 14 April 2023, the Respondent sent to the Tribunal and the Claimant its strike out/deposit order application containing detailed submissions on the various grounds upon which the Respondent advanced the application.

7. On 2 May 2023, by the decision of Acting Regional Employment Judge Russell, the issue of whether the Claimant's claims should be struck out on the grounds that they are scandalous or vexatious or have no reasonable prospect of success, or a deposit order made was added to the list of issues for the hearing.

Evidence and Submissions

8. For the hearing the parties submitted a bundle of documents containing 69 pages. During the hearing I was referred to several documents in the bundle. The Claimant was represented by Mr Wainwright and the Respondent by Mr Watson. I am grateful to both representatives for their submission and assistance to the Tribunal. In advance of the hearing Mr Watson sent a recent Court of Appeal judgment in the case of ***Sainsbury's Supermarket Ltd v Maria Clark and Others*** CA-2022-001965, to which he referred me in his oral submissions.

9. The Claimant did not prepare a witness statement for the hearing. However, he attended the hearing and asked to be allowed to address the Tribunal personally, which I allowed. The Claimant told the Tribunal that his union representative had been advising him what to do and when and he followed his union representative's instructions. The union representative, however, told the Claimant that he would not be able to represent the Claimant in the tribunal's proceedings.

10. In the course of the hearing Mr Wainwright said that the Claimant wished to withdraw his complaint of race discrimination. I have dismissed that complaint upon withdrawal pursuant to Rule 52 of the ET Rules.

11. It was common ground that the Claimant's ET1 mistakenly stated that the Claimant did not have an Acas early conciliation certificate number. At the time of presenting the claim form on 7 October 2022 the Claimant was in possession of the relevant Acas EC certificate. A copy of the certificate was in the hearing bundle. The start date of Acas conciliation was recorded as 1 August 2022 and the end date – 22 August 2022.

12. However, Mr Watson for the Respondent argued that in light of the Court of Appeal decision in ***Sainsbury's Supermarket v Clarke*** the Claimant's claim ought to be struck out, unless the Claimant could persuade the Tribunal to waive under Rule 6 of the ET Rules the non-compliance with the Rules with respect to the presentation of a claim form, namely his failure to correctly state that he had an Acas EC certificate and give its number. Mr Watson submitted that since the Claimant had presented no evidence as to why his non-compliance should be waived his claim stood to be struck out.

13. It was also not in dispute that the Claimant had presented his claim late, with the limitation period expiring on 22 September 2022.

14. Mr Wainwright argued that the delay was only 15 days, and as such was not excessive or unreasonable. He also argued that the Claimant had a strong claim, and it would be just and equitable and in accordance with the overriding objective for the Tribunal to allow the Claimant's claim to proceed to be decided on its merits.

15. Mr Watson submitted that the Claimant presented no good evidence as to why it was not reasonably practicable for him to present his claim in time. The fact that he relied on advice of his union representative did not help the Claimant, because union representatives are generally regarded as skilled advisers and therefore a default by them is to be attributed to the Claimant. Mr Watson referred me to several EAT's decisions in support of that argument.

The Law

Strike Out

16. Rule 37 of the ET Rules provides:

37. Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

[..]

(c) for non-compliance with any of these Rules or with an order of the Tribunal;
……..

17. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal must have regard to the overriding objective set out in Rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:

    a. the magnitude of the non-compliance,
    b. whether the default was the responsibility of the party or his or her representative,
    c. what disruption, unfairness or prejudice has been caused,
    d. whether a fair hearing would still be possible, and
    e. whether striking out or some lesser remedy would be an appropriate response to the disobedience — see ***Weir Valves and Controls (UK) Ltd v Armitage*** 2004 ICR 371, EAT.

18. In ***Emuemukoro v Croma Vigilant (Scotland) Ltd*** [2022] ICR 335, Choudhury P (as he then was) reminded the tribunals, when considering a strike-out application, to consider all the factors relevant to a fair trial, including "*the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective*" at [19].

19. In ***Sainsbury's Supermarket v Clark*** LJ Bean said at [42] and [51] (*my emphasis*):

    "42. If the tribunal staff reject a claim under Rule 10 or an employment judge rejects it under Rule 12, the claimant may seek reconsideration on the basis that either the decision to reject was wrong or the notified defect can be rectified: see Rule 13(1). But if no such rejection occurs it is not in my view open to a respondent to argue at a later stage that the claim should have been rejected. The respondent's remedy is to raise any points about non-compliance with the Rules in their form ET3, or in appropriate cases at a later stage, and to seek dismissal of the claim under Rule 27 or apply for it to be struck out under Rule 37.

    51. I return to Mr Milford's submissions about giving effect to the legislative purpose. The legislative purpose of s 18A of the 1996 Act was to require claimants to go to ACAS and to have an EC certificate from ACAS

(unless exempt from doing so) before presenting a claim to an ET in order to be able to prove, if the issue arises, that they have done so. I do not accept that it is part of the legislative purpose to require that the existence of the certificate should be checked before proceedings can be issued, still less to lay down that if the certificate number was incorrectly entered or omitted the claim is doomed from the start. If the claim is rejected in its earliest stages under Rule 10 or 12 then the claimant may seek rectification or reconsideration. If it is not, then the time for rejection of the claim has passed. The respondent may instead apply to have the claim dismissed under rule 27 or struck out under rule 37, with the tribunal having the power to waive errors such as the one relied on in the present case under Rule 6."

20. Rule 6 of the ET Rules states:

6. Irregularities and non-compliance

A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—

(a) waiving or varying the requirement;

(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c) barring or restricting a party's participation in the proceedings;

(d) awarding costs in accordance with rules 74 to 84.

Time Limit

21. Section 111 of the Employment Rights Act 1996 ("**ERA**") states:

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.

22. The same time limit provisions apply to unauthorised deduction from wages claims (s.23(2) ERA) and to claims for breach of contract/notice pay (Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("**the Order**")).

23. The following key rules can be derived from the authorities:

    a. s.111(2)(b) ERA should be given a '*liberal construction in favour of the employee*' — ***Dedman v British Building and Engineering Appliances Ltd*** 1974 ICR 53, CA.

    b. If a claimant retains a solicitor as his or her representative in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. "*If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them*." – per Lord Denning in ***Dedman v British Building and Engineering Appliances Ltd***. This rule is known as the "Dedman principle".

    c. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. Lord Justice Shaw said in ***Wall's Meat Co Ltd v Khan*** 1979 ICR 52, CA: "*The test is empirical and involves no legal concept. Practical common sense is the keynote….*".

    d. the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "*That imposes a duty upon him to show precisely why it was that he did not present his complaint*" — ***Porter v Bandridge Ltd*** 1978 ICR 943, CA.

    e. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented "*within such further period as the tribunal considers reasonable*".

Meaning of 'reasonably practicable'

24. Lady Smith in ***Asda Stores Ltd v Kauser*** EAT 0165/07 explained it in the following words:

> "*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*".

25. In ***Wall's Meat Co Ltd v Khan*** Brandon LJ explained 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 prevents, or interferes with, or inhibits, such performance. The impediment*

> *may be physical … or the impediment may be mental, namely, the state of mind of the complainant 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*." (Pages 60F-61A)

26. In ***Wall's Meat Co Ltd v Khan***, LJ Brandon clarified the Dedman principle, explaining that ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the complainant or from the fault of his/her solicitors or other professional advisers in not giving him/her such information as they should reasonably in all the circumstances have given. Trade union representatives are regarded as "skilled/professional advisers" in this context. Therefore, if they take on helping a claimant with a claim, they are generally expected to know the relevant time limits and to appreciate the necessity of presenting the claim in time – see ***Times Newspapers Ltd v O'Regan*** 1977 IRLR 101, EAT.

Analysis and conclusions

Should the Claimant claim be struck out under Rule 37?

27. I do not accept Mr Watson's submissions that the effect of the ***Sainsbury's Supermarket v Clark*** CoA judgment is that if a claimant's claim form contains a defect, which makes the claim liable to be rejected under Rule 12 of the ET Rules, but the claim is accepted by the tribunal, the claimant must persuade the tribunal to exercise its powers under Rule 6 of the ET Rules and waive the non-compliance, failing which his claim is stand to be struck out.

28. I do not read LJ Bean's judgement as containing any such proposition. On the contrary, I read his judgment at [42] and [51] as confirming that it is for the respondent to persuade the Tribunal that the claimant's claim ought to be struck out for non-compliance with the ET Rules.

29. Furthermore, Rule 6 states that a non-compliance with the Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. It states that the Tribunal *may* take such action as it considers just, which *may* include waiving or varying the requirement. It does not say that the party in default must apply to the Tribunal to obtain a waiver for non-compliance, lest that failing to do so will render the claim or response liable to be struck out.

30. Also, I see nothing in the ***Sainsbury's*** judgment to suggest that the factors set out in ***Weir Valves and Controls (UK) Ltd v Armitage*** (see paragraph 17 above) should not apply in such circumstances, or that the Respondent's strike out application should be decided on a different set of principles.

31. In the present case, I see no proper basis for striking out the Claimant's claim for this error in the claim form. The Claimant had gone through the Acas early conciliation process, as the law required him to do. He had the requisite certificate number before the issuance of the claim form. It appears that he or Mr Wainwright when completing the ET1 form has simply made a mistake by clicking a wrong box. I heard no evidence as to what caused them to make that mistake, but I do not consider the absence of such evidence to be dispositive of the issue.

32. More importantly, I see no real prejudice that the mistake has caused or may cause the Respondent. The proceedings are at an early stage. The claim has not yet been listed for a final hearing, and no case management directions have been given to the parties. The possibility of holding a fair trial is not affected in any way.

33. Furthermore, considering that the early conciliation ran from 1 to 22 August 2022 the Respondent, in all likelihood, will have been contacted by Acas about the Claimant's complaints, and as such will have been well aware that the Claimant was intending to issue a claim. Therefore, in the circumstances, it cannot be said that the Claimant's mistake has caused the Respondent to lose an opportunity to resolve the dispute outside the tribunal proceedings.

34. If, however, I am wrong in this analysis, I still find that considering the above factors it will be just and proper for me to exercise my powers under Rule 6 and waive the non-compliance with the Rules by reason of the mistake contained in the claim form presented by the Claimant.

35. For these reasons, I find that the Respondent's application to strike out the Claimant's claim must fail.

Does the Tribunal have jurisdiction to consider the Claimant's remaining complaints?

36. As noted above, the Claimant withdrew his race discrimination complaint, and it was dismissed under Rule 52 of the ET Rules upon withdrawal. The fact that the Claimant presented his claim form 15 days late was not in dispute.

37. Therefore, the issues I needed to decide were: (i) whether it was reasonably practicable for the Claimant to present his claim before the expiry of the three months' limitation period, and (ii) if not, whether the claim was presented within a reasonable period after that.

38. Neither the Claimant in addressing the Tribunal, nor Mr Wainwright in his submissions argued that it was not reasonably practicable for the Claimant to present his claim in time. The Claimant said that he was guided by his union representative and followed what the union representative was telling him he should do. Mr Wainwright argued that the Claimant had a strong case, that the delay of 15 days was not excessive or unreasonable, and it would be just and equitable and in accordance with the overriding objective to allow it to proceed.

39. However, none of these arguments gives me any ground upon which I can sensibly conclude that it was not reasonably practicable for the Claimant to present his claim in time. As explained in paragraphs 23.d and 26 above the law says that the onus is on the Claimant to explain why he could not present the claim in time, and the fact that he might have been wrongly advised by his union representative or that his union representative might have neglected to tell the Claimant by when he had to submit his claim is not sufficient to prove that, to borrow the words of Brandon LJ in ***Wall's Meat Co Ltd v Khan,*** there were "*impediments making it not reasonably practicable to present a complaint within the period of three months*".

40. Therefore, I have no choice but to find that the Claimant has failed to prove that it was not reasonably practicable for him to present his claim within the limitation period of three months. He presented the claim outside that period. Accordingly, under sections 27(2) and 111 ERA and Article 7 of the Order the Tribunal shall not consider his remaining complaints in the proceedings, which complaints stand to be struck out for that reason.

Employment Judge Klimov
Date: 8 May 2023