EMPLOYMENT TRIBUNALS

Claimant: Ms E Wakelam

Respondent: Ravensworth Golf Club

Heard at: Newcastle Tribunal by CVP

On: 28 March 2022

Before: Employment Judge Murphy

Representation

Claimant: In person
Respondent: Mr D Bunting of counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(i) At a public Preliminary Hearing on 28 March 2023, the claimant withdrew her claim(s) of disability discrimination under the Equality Act 2010. This claim is dismissed pursuant to Rule 52 of the Employment Tribunal Rules of Procedure 2013.

(ii) The claimant's complaint of unfair dismissal is dismissed. The Tribunal, having determined that the claimant lodged her complaint out of time and not being satisfied that it was not reasonably practicable to lodge it in time, has no jurisdiction to hear the complaint.

REASONS

Introduction

1. The claimant presented a claim for unfair dismissal. The respondent resists the claim on the merits and also on the ground that it is time

barred. The claimant also identified in her originating claim a complaint of disability discrimination.

2. At a preliminary hearing on case management, a public preliminary hearing was fixed to determine the question of time bar in relation to the claimant's unfair dismissal claim. Following discussion about the claimant's discrimination complaint, Employment Judge Aspden also ordered the claimant to write to the Tribunal by 27 January 2023 to confirm whether she wished to continue to pursue that claim or whether she was withdrawing the claim. If she wished to pursue it, she was ordered to state the grounds on which it was said to be disability discrimination to evict her and / or dismiss her. EJ Aspden ordered that, if she wished to pursue the complaint, the Tribunal would also determine at the public preliminary hearing whether it was time barred and, if not, whether it ought to be struck out on the ground that it had no reasonable prospects of success.

3. The public PH proceeded on 28 March 2023 as EJ Aspden had confirmed during the previous PH that it would. It was conducted via CVP. The claimant advised during the public PH that she had not received EJ Aspden's written Case Management Order following the last hearing when it was sent to her by the Tribunal on 2 February 2023. The claimant confirmed, however, that she was aware that time bar would be considered in relation to both claims at the public PH, based on what EJ Aspden told her at the last hearing. She confirmed she was also told by EJ Aspden at that time that prospects of success would be considered in relation to the discrimination complaint if she confirmed she continued to pursue it. The claimant accepted that she had received the CMO as part of the bundle prepared by the respondent for the public PH. She confirmed this was sent to her on 21 March 2023, though she had not read it at that time because she was on holiday.

4. Regardless of whether she received the written CMO at the time it was sent, I was satisfied that, not only was the claimant aware of the purpose of the public PH, but that she had engaged in the preparation for it by supplying documents relating to the time bar issues to be included in the joint bundle prepared by the respondent.

5. The claimant had also written to the Tribunal on 27 January 2023 in accordance with EJ Aspden's order, advising at that time, that she wished to pursue her disability discrimination claim. She set out her explanation that she considered she had an indirect disability discrimination claim based on the respondent's decision to evict her from her tied accommodation and based upon her partner's disability. (At the Tribunal's request she re-sent a similar email on 8 February 2023, this time providing the case number to allow the Tribunal to link it to their records.)

6. During the public PH, the disability discrimination claim was discussed further. On further consideration, the claimant withdrew this complaint during the hearing. It was explained to her that the claim would be dismissed following her confirmation of the withdrawal.

7. The only outstanding issue for determination at the public PH was, therefore, the time limitation issue in relation to the unfair dismissal complaint, namely:

    a. Was the unfair dismissal complaint made within the time limit in section 111 of the Employment Rights Act 1996 ("ERA")? The Tribunal will decide:
        i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?
        ii. If not, was it reasonably practicable for the claim to be made to the Tribunal within that time limit?
        iii. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

8. It was undisputed that the effective date of termination of the claimant's employment was 3 July 2022. ACAS Early Conciliation was initiated on 8 August 2022 and the Early Conciliation Certificate was sent on 10 August 2022. The claimant presented the claim on 7 October 2022. The normal time limit, before any extension, would have expired on 2 October 2022. Taking account of the extension applied by operation of section 207B of ERA, the time limit expired on 5 October 2022.

9. The claimant had been ordered to prepare a written witness statement setting out her evidence relevant to the time limit issues by 28 February 2023. The claimant advised at the public PH that she had not understood the requirement for a written witness statement. She had prepared a document called a timeline which was a series of bullet points with key dates but it did not provide the evidence necessary to determine the relevant issues. I therefore heard supplementary oral evidence in chief from the claimant. The respondent led no witness evidence.

10. A bundle running to 42 pages was lodged by the respondent and was referred to in the course of the claimant's evidence.

Facts

11. Having heard the evidence, I make the following findings of fact, and any others that appear in this judgment, on the balance of probabilities.

12. The claimant was employed by the respondent from 1 August 2018 until she was dismissed on 3 July 2022 with immediate effect. She was employed as a bar person and also had certain duties as a keyholder. Until in or about February 2022, she lived in accommodation provided by the respondent onsite. She and her partner moved from that accommodation at the respondent's request at that time. At the time of the claimant's dismissal, she was off sick. She received notice of her dismissal by email. She read it on 3 July 2022.

13. On 5 July 2022, the claimant got in touch with the Citizens Advice Bureau. She was unable to get an appointment for a consultation that day. On 8 July, CAB Adviser, Fiona Luckhurst-Matthews ("FLM"), sent the claimant an email recommending the claimant appeal against her dismissal. She did not comment upon and was not asked about Tribunal time limits for a claim.

14. The claimant's belief at this time was that there was a three-month time limit for bringing a claim in the Employment Tribunal. She believed the three months began to run from the date she was notified her appeal was unsuccessful. She was not informed of this by the CAB but this was her belief.

15. The claimant took no steps to research the time limit position online or to confirm with the CAB that her understanding was correct.

16. Following her dismissal, she was given 7 days within which to appeal against the decision. On Friday 8 July 2022 she sent a letter of appeal to the respondent.

17. In around the middle of July 2022, FLM told the claimant that she was no longer working on her case because she had a heavy caseload at that time in relation to helping tenants with housing issues. She told the claimant that the claimant could still come to her for advice.

18. The claimant did not wish a face-to-face meeting with the respondent so sent a written submission on 21 July 2022 in connection with her appeal.

19. On 24 July 2022, she received a letter from the respondent advising that the appeal process was complete and that her appeal had not been successful; she remained dismissed.

20. On 26 July 2022, the claimant called the ACAS helpline and further to this contact, ACAS sent the claimant a link to an online Early Conciliation Notification form the same day.

21. On 8 August 2022, the claimant used the link ACAS had sent to complete the EC notification form. The claimant intimated in the form to ACAS that FLM of the CAB was her representative. FLM had not agreed to be her representative in the matter. The claimant did not make FLM aware that she had been recorded as her representative for the purposes of the ACAS Early Conciliation process.

22. On 10 August 2022, ACAS sent to FLM the Early Conciliation Certificate. FLM did not pass this on to the claimant.

23. The claimant did not contact either ACAS or FLM to enquire about progress until the end of August 2022. At that time, the claimant walked into the CAB office without an appointment in the hope of discussing her case with someone. She did not speak to FLM, who was unavailable, but another female CAB adviser met with her. The adviser explained that they were too busy to handle her case and suggested that she contact the North East Law Centre. The claimant did not discuss time limits with the adviser. The adviser did not inform the claimant that an EC Certificate had been issued in her case on 10 August 2022.

24. Following that discussion, on or about 5 September 2022, the claimant made contact with Nort East Law Centre. She sent an email requesting advice. North East Law Centre called the claimant following that contact on 11 or 12 September 2022. At the time of the call, the claimant was away from home on a trip. She was sitting on a bus when she took the call.

25. During that call, the claimant explained what had happened. She told them when she was dismissed. The adviser informed her the correct approach to calculating time limits. The claimant, did not have a pencil or paper about her person to take note of what she was told. The claimant either misunderstood or misremembered the advice. She continued to believe that the time limit ran from the date she was notified of her unsuccessful appeal. She was not told this by North East Law Centre.

26. The adviser from North East law centre asked the claimant for a copy of her ACAS Early Conciliation Certificate. When she returned from her trip, the claimant contacted ACAS on 16 September 2022. She asked ACAS for a certificate number. She received no reply.

27. The claimant messaged ACAS again on 4 October 2022, as follows:

> *"Hi*
>
> *Was just wondering if you have got a certificate number as I'm close to my deadline.*
>
> *Many thanks*
>
> *…"*

28. Notwithstanding the terms of that email, the claimant believed the deadline expired on 26 October 2022, which according to her erroneous calculations, was three months from the date of receipt of her appeal outcome. (As it happens she received the appeal outcome on 24 July).

29. On 5 October 2022, ACAS sent the claimant an email attaching the Early Conciliation certificate. They advised the certificate had been sent to her representative on 10 August 2022. The email stated that the next steps, should she wish to lodge her claim with the employment tribunal was to submit the ET1 form. The message attached a link to the form. In large bold font the message stated:

> *"It is your responsibility to ensure that any tribunal claim is submitted on time*"

30. At the time of receipt of the email from ACAS, the claimant was working long night shifts. She waited until her days off in her shift pattern to present her ET1. She did so on 7 October 2022.

Relevant Law

31. The law relating to time limits in respect of unfair dismissal is set out in the Employment Rights Act 1996 ("ERA"). Section 111, so far as relevant, provides 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.*
>
> *(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.*

32. S.207B of ERA provides for an extension to the three-month time limit in certain circumstances. In effect, s.207B(3) of ERA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'day A' and 'Day B' as defined in the legislation. This 'stop the clock' provision only has effect if the early conciliation process is commenced before the expiry of the statutory time limit.

33. Where a claim has been lodged outwith the three-month time limit, the Tribunal must determine whether it was not reasonably practicable for the claimant to present the claim in time. The burden of proof lies with the claimant. If the claimant succeeds in showing that it was not reasonably practicable, then the Tribunal must determine whether the further period within which the claim was brought was reasonable.

34. In **Lowri Beck Services Ltd v Brophy** 2019 EWCA Civ 2490, the Court of Appeal summarised the approach along the following lines.

    1. The test should be given a "liberal interpretation in favour of the employee".

    2. The statutory language is not to be taken only as referring to physical impracticability and might be paraphrased as to whether it was "reasonably feasible" for that reason.

    3. If an employee misses the time limit because he or she is ignorant about the existence of the time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time. Importantly, in assessing whether ignorance or mistake are reasonable, it is necessary to take into account enquiries which the claimant or their adviser should have made.

    4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (**Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53).

    5. The test of reasonable practicability is one of fact and not of law (**Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119).

35. With respect to the effect of the retention of a skilled adviser *per* **Dedman**, it has been held by tribunals of first instance in **Syed v Ford Motor Co Ltd** [1979] IRLR 35 and other cases that trade union officials fall to be categorized as 'skilled advisers', such that their wrong advice was visited on the claimant.

36. The **Dedman** principle applies however careful the selection of adviser and however reasonable it was for the employee to rely on the advice. The adviser must be a professional or skilled adviser (not necessarily a lawyer, but advice from friends or colleagues will not count); the adviser must themselves have been at fault in the advice they gave, and the wrong advice must have been the substantial cause of the missed deadline.

37. In **Riley v Tesco Stores Limited & Anr** [1980] ICR 323, the Court of Appeal applied **Dedman** in a case where the claimant had consulted the CAB and then submitted an unfair dismissal complaint out of time. The employee's appeal was dismissed. The skill of the adviser or whether the adviser was "engaged" does not seem to be material to the question of reasonable practicability. A third party only comes to be considered as a possible excuse for an employee's delay if he gives advice or is authorized to act in time and fails to act or advise acting in time (pp 330D-F, 336A-B, 337D).

38. With respect to ignorance of the time limit, in **Wall's Meat Ltd v Khan** [1978] IRLR 499, Brandon LJ held that ignorance or mistake will 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." In **Dedman**, Scarman LJ explained that relevant questions for the Tribunal would be:

> *"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of his rights, would it be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."*

39. Unless there are additional circumstances, the mere fact of invoking an internal appeal procedure is not regarded as sufficient to justify a finding that it was not reasonably practicable to present the claim in time (**Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119). In **Bhoda (Vishnudut) v Hampshire Area Health Authority** [1982] ICR 200 (approved by the CA in **Palmer**), it was held that:

> "there may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not reasonably practicable to complain to the … tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the …tribunal."

40. A list of possible "additional" considerations was set out in **Palmer** to include the question of the claimant's state of knowledge of his or her right to claim for unfair dismissal and of the time limit, and whether the employer had misrepresented any relevant matter to the employee.

Discussion and decision

41. Mr Bunting gave an oral submission. He observed the test of reasonable practicability is a high threshold. He advised that the respondent did not accept the claimant had a representative in place or that they gave faulty advice, but argued that, if they did, it would fall within the **Dedman** principle. He cited the Court of Appeal decision in **Riley** as authority for the proposition that this principle extends to CAB Advisers. However, Mr Bunting explained that the respondent's primary submission was that this was not a case where the fault lay with advisers but with the claimant herself. He invited me to find that the North East Law Centre had not given incorrect advice as the claimant asserted during her evidence. He suggested the claimant had misremembered any advice she was given on time limits. It was reasonably practicable, in Mr Bunting's submission, for her to have ascertained the correct position and to have entered the claim within the normal time limit.

42. The claimant declined to give any submission.

43. In general, I found the claimant to be a credible witness. I accept she intended to give her evidence in an honest and straightforward fashion. However, I did not find her evidence to always be particularly reliable. On a few occasions, she couldn't recall dates of events, or mis-recalled them, when giving evidence. On the whole, however, she willingly corrected her evidence when inconsistencies were pointed out to her.

44. The most material dispute, having regard to the issues for determination, related to the advice given by North East Law Centre on or about 11 September 2022 which the claimant said (at least initially) she received on a bus on the phone. The claimant's evidence about that advice changed. She originally said that, with regard to time limits, she was told by the Law Centre adviser that she had three months to present her claim and that time ran from the date she spoke to ACAS. When I asked her if she was sure this is what they had said, she said yes. Later in her evidence she said the Law Centre Adviser told her that the three months ran from the date she was told her appeal outcome. When she was asked about this inconsistency during cross-examination, she said it was the latter advice that she received. At another point during her evidence on the advice from the Law Centre, the claimant said she wasn't sure whether the advice on time limits was received on the phone or whether the Law Centre had sent an email. She said she couldn't find an email from them.

45. I found, on the balance of probabilities, that the Law Centre did not give the claimant the incorrect advice she said they did regarding time limits. I had regard to the inconsistencies in the claimant's account of the matter. I also noted the claimant's evidence was that, as early as July 2022, the claimant's (incorrect) belief had been that time ran from the receipt of the appeal outcome. I accept that the claimant held this erroneous belief at that time, and that she continued to do so throughout, notwithstanding the advice she received around 11 September 2022 from the Law Centre. I find that the claimant either misunderstood that advice, or perhaps more likely, that she 'heard' what she expected to hear from them, based on her own already formed belief. Either way, I am satisfied that she did not take on board the true information that was supplied about calculating time limits.

46. Had I found otherwise, it would have mades little difference to the outcome. If the claimant had received incorrect advice from the Law Centre, any unreasonable ignorance or mistake on their part would, in any event, have been attributed to her (**Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53).

47. Those were not the facts of this case, however. The claimant knew that she had recorded FLM as her representative in her notification to ACAS without having received confirmation from FLM that she was content to be named as such. She knew at the time that FLM had a heavy workload such that she would not be taking her case forward for her. She did not try to contact either ACAS or the CAB between 8th August and the end of August 2022 to enquire as to progress or next steps. The reason was that

she was under the misapprehension that she had 3 months from the date of receipt of the appeal. That incorrect belief did not arise from advice received from ACAS or the CAB or from North East Law Centre. Nor was the belief informed by any incorrect information given to the claimant by the respondent.

48. In **Wall's Meat Ltd**, Brandon LJ held that ignorance or mistake will 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." The claimant took no steps to acquaint herself with the correct position regarding the time limit. She made no enquiries of CAB when she was in touch with them and nor did she conduct any online or other research to help her understand the position. She did not raise the question with North East Law Centre and, I have made a factual finding that, when the Law Centre adviser raised it and provided the correct advice, the claimant failed to register that advice.

49. The reason for the late presentation for the claim was not because there was an outstanding appeal or because of incorrect advice. Nor was it because the claimant did not obtain her EC Certificate in time. It is true that she did not obtain her EC Certificate until the last date for lodging the claim, but this was because she did not raise the matter with ACAS or the CAB until a relatively late stage (in mid-September 2022) after she herself, not the CAB, had initiated the EC process well over a month before. The reason the claimant did not chase the Certificate more promptly was that she was mistaken as to the time limit and believed she had around three weeks longer than she in fact had to present the claim. For the same reason, she failed to present the claim immediately upon receipt of the EC Certificate on 5 October 2022. The claimant's mistaken belief that the time limit ran from the date of exhaustion of the internal appeal process was the determinative cause of the lateness of her claim.

50. I do not find that her ignorance or mistake in this regard was reasonable in all the circumstances of the case. I find, on balance, that it was reasonably practicable for the claimant to ascertain the correct approach to calculating time limits before the time limit expired. It was, therefore, reasonably practicable for her to have presented the claim within the normal time limit which expired on 5 October 2022. The Tribunal, therefore, lacks the jurisdiction to hear the claimant's complaint of unfair dismissal which is dismissed.

L Murphy

Employment Judge Murphy (Scotland), acting as an Employment Judge (England and Wales)

Date 3 April 2023

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