



EMPLOYMENT TRIBUNALS

Claimant: Mr Lorne Maynard

Respondent: Openreach Ltd

Heard at: Watford Employment Tribunal **On:** 2 May 2024

Before: Employment Judge Young

Representation

Claimant: Litigant in Person

Respondent: Ms Amy Jervis (solicitor)

JUDGMENT of Employment Judge Young having been sent to the parties on 14 June 2024 and written reasons having been requested on 20 June 2024 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed by the Respondent as a telephone engineer. The Respondent runs the digital communication network for the benefit of its customers. It installs and maintains the copper wires and fibre cables that connect homes and businesses to phone and broadband. The Claimant was employed from 12 September 1983 until his dismissal on 21 April 2023. The Claimant contacted ACAS on 17 May 2023 (day A). The ACAS Early Conciliation Certificate was issued on 28 June 2023 (day B). The Claimant presented claims for ordinary unfair dismissal, race discrimination and age discrimination on 3 September 2023. However, the Claimant withdrew his race and age discrimination claims at the preliminary hearing on 8 March 2023. By judgments of 18 March 2024, the race and age discrimination complaints were dismissed by EJ Postle on 26 March 2024.

The Claims and Issues

2. The Employment Tribunal must determine whether the Claimant's remaining unfair dismissal claim is in time.

The Hearing and Evidence

3. The hearing was via CVP and listed for 3 hours. I was provided with a 46 page bundle. During the hearing the Claimant referred to other emails that explained the conversations that the Claimant had with his representative. The Claimant forwarded those emails to the Employment Tribunal and the Respondent's representative Ms Jervis. Those emails were added to the bundle. The Claimant gave oral evidence and was cross examined by Ms Jervis.

Findings of fact

4. The following findings of fact are made on the basis of a balance of probabilities. I have had careful regard to all the evidence that I have heard and read. All references in square brackets are a reference to the bundle page numbers.
5. On contacting ACAS on 17th May 2023, the Claimant was told by his union CWU to provide ACAS with their contact details which he did. The Claimant's union representative Mr Winston Richards was sent an email on 28th June 2023 stating that the ACAS email did not contain the certificate but did contain the full certificate number. The email said, "*Use the full certificate number R177940/23/95 when you're asked for it.*" [48]. Mr Richards requested the certificate from ACAS and was sent the certificate on 23 August 2023 [47-48].
6. The Claimant received the ACAS email dated 28th June 2023 as he was copied into the email having provided his email to ACAS, but it went into his junk mail. The Claimant admitted he saw the email on 30th June 2023; however, the Claimant did not scroll down the email to see the full certificate number. I do not accept the Claimant's evidence on this point. The Claimant did not state that the ACAS certificate was not attached to the 28th June 2023 he received. Furthermore, the sentence *use the full certificate number is at the top of the email*, the Claimant would have seen it when he saw the email.
7. The Claimant said that he enquired about the receipt of the certificate by his union representative on 18th August 2023 not whether he as the Claimant had received the ACAS Early Conciliation Certificate, which I find he had. There was correspondence between ACAS and Mr Richards regarding the actual certificate, and on the 29th August 2023, Mr Richards was sent the certificate by ACAS which he forwarded to the Claimant the same day.
8. The Claimant said that he tried to submit the ET1 on 30th and 31st August 2023 but he was prevented from doing so because he was missing two digits from the ACAS EC certificate number. I do not accept the Claimant's evidence on this point, there is nothing in the form to suggest that the failure to provide a full ACAS EC certificate number prevents a claim form from being accepted by the Employment Tribunal. The Claimant did not call the Employment Tribunal on 30th or 31st August 2023 but did call the Employment Tribunal 1st September 2023. The Claimant said he considered the reason why he was unable to submit his claim form was due to his lack of technological expertise. I find there was nothing preventing the Claimant calling the Employment Tribunal on 30th or 31st August 2023 to assist him with the ACAS EC certificate number or indeed seek assistance from the CWU.

9. The Claimant was not ready to submit his form until 3rd September as he had been advised just to complete a chronology of dates of events and he did not finalise that until 3rd September 2023. The Claimant admitted that he always knew about the 3 month time limit requirement in respect of unfair dismissal claims, but on this occasion, he was not sure specifically what date the expiry of the time limit would fall. The Claimant admitted that he did nothing to inquire what date the expiry of the time limit would fall on. The ACAS early conciliation certificate states "*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.*" [1] I find on 29th August 2023 the Claimant had ACAS EC certificate number and knew from the email dated 28 June that he had until 1 month (until 28th July 2023) to make his claim on time, according to the email; it also warned him to make the Claim as soon as possible [48].
10. I find that the reason for the Claimant's lateness in submitting his claim form was a failure to inquire as to the exact date for submission. The Claimant was advised by his CWU representative throughout and had access to his representative to obtain the exact date.

Relevant Law

11. Section 111 of the Employment Rights Act 1996 ('ERA') sets out the remit of the Employment Tribunal's jurisdiction regarding the presentation of unfair dismissal claims as: -

"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 subsection (3), 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."*

12. However, Employment Rights Act 1996 also includes section 207B, which states that:

"207B extension of time limits to facilitate conciliation before institution of proceedings.

- (1) *This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").[...]*

(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*
- (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.*
- (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) *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.”*

13. Statutory instrument 2014/254 Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) 2014, paragraph 9 states:

“(1) Where ACAS issues an early conciliation certificate, it must send a copy to the prospective claimant and, if ACAS has had contact with the prospective respondent during the period for early conciliation, to the prospective respondent.

(2) If the prospective claimant or prospective respondent has provided an email address to ACAS, ACAS must send the early conciliation certificate by email and in any other case must send the early conciliation certificate by post.

(3) An early conciliation certificate will be deemed received—

- (a) *if sent by email, on the day it is sent; or*
- (b) *if sent by post, on the day on which it would be delivered in the ordinary course of the post.”*

14. In order to determine how the normal time limit will be extended by early conciliation, it is necessary to identify day A and day B and then apply the extensions in section 207B (3) and 207B(4) ERA. Day A and day B are defined in section 270B(2) ERA. Day A is the day on which the prospective

claimant initiates the early conciliation process and Day B is the date of the early conciliation certificate issued when the process is concluded.

15. The extension under section 207B(3) ERA applies in every case. It operates to "stop the clock" during the period in which the parties participate in EC as it provides that in working out when a time limit expires, the period beginning with the day after day A and ending with day B is not to be counted. The additional extension under section 207B(4) ERA only applies in certain circumstances, where the limitation date, as calculated by subsection 207B(3), falls in the period between day A and one month after day B.
16. In Paragraph 18 of Ellenborgen QC's judgment in the EAT decision of Luton Borough Council v Haque [2018] ICR 1388, she sets out how section 207B(3) and section 207B(4) ERA are to be applied, she explains that "*Sub-section 207B(3) applies in every case: as its wording makes clear, it establishes the method by which to work out when it is that a time limit set by a relevant provision expires. By contrast, sub-section 207B (4) expressly applies only in the circumstances to which it refers. Those circumstances are “where 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”. If, determined in accordance with sub-section 207B (3), the expiry date would fall within the period specified in sub-section 207B(4), that latter sub-section operates to extend the time limit in the manner provided. As a matter of construction, the two sub-sections are, on their face, to be applied sequentially*".
17. In Tanveer v East London Bus and Coach Co Ltd UKEAT/0022/16 (8 February 2016, unreported), the EAT held that, in calculating the period ending 'one month after Day B', the correct approach is to adopt the 'corresponding date' rule, as approved by the House of Lords in Dodds v Walker [1981] 1 WLR 1027 at 1029, per Lord Diplock. The exception to this is when the start date is a 31 day month and the following month a 30 day month.
18. Section 18A Employment Tribunal Act 1996 "*(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. This is subject to subsection (7).*"
19. The Court of Appeal decision of Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119 establishes that the tribunal must consider the following questions when considering section 111 Employment Rights Act 1996:
20. Firstly, whether it was reasonably practicable for the Claimant to present his claim within the 3 month time limit, if it was not, secondly should the tribunal exercise its discretion to extend the time period ? If so, by what time period?
21. In the same case, May LJ sets out how the tribunal is to have regard to the surrounding circumstances of each case in answering these questions and the following are named as examples of relevant circumstances at p125 paragraph 34-35. This list is by no means exhaustive:

- What was the substantial cause of the Claimant's failure to comply with the statutory time limit?
- Whether the Claimant has been physically prevented from complying with the limitation period
- Whether at the time of dismissal and if not when thereafter did the Claimant know he had the right to complain he had been unfairly dismissed?
- Whether there has been any misrepresentation about any relevant matter to the Claimant
- Whether the Claimant was being advised at the relevant time and if so by whom
- The extent of the advisor's knowledge of the facts of the Claimant's case and the nature of the advice then given to him.

22. May LJ in **Palmer and Saunders v Southend-on-Sea Borough Council** defines "reasonably practicable" as "reasonably feasible". Denning LJ also provides further guidance in the case of **Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53 (CA)** at page 60, paragraph F-H in providing examples of what prevents it being reasonably practicable for a Claimant to present their claim in time i.e. through sickness or failure of the postal service. Essentially, a Claimant needs to be physically prevented from presenting their claim for it not to be reasonably practicable for them to present their claim in time.

Submissions

23. The Claimant's submissions in summary were that it was clear from the emails, that he was trying to locate the certificate. He was CC in to the 28/6/23 email from ACAS with the certificate. ACAS told him to check his junk mail, the Claimant said that was why he got the email so late. ACAS knew there was something wrong and that is why ACAS say look in junk mail. The Claimant admitted that he had made mistake.

24. The Respondent's submissions in summary were the Claimant had enough knowledge to know the time limit of 3 months and he knew had 1 month to submit after the receipt of email with the certificate. The authority of **Reed in partnership v Frame** establishes that ignorance of time limits is not reasonable.

25. If it was not reasonably practicable for the Claimant to present his claim, then the Employment Tribunal had to consider a further period reasonable. It is wholly implausible that the Claimant could not submit his claim form on the basis of 2 missing digits. The 29th -31st August 2023 were working days. If the Employment Tribunal did reject the claim form, it was reasonable for the Claimant to contact his union and the Employment Tribunal. On 2nd September 2023 the Claimant was still finalising his ET1, so it was unlikely

he was ready to submit his claim by the 31st August 2023, so it is so unlikely he would have submitted it.

26. The Claimant responded that when he referred to reasonably late, he was abbreviating the sentence.

Analysis/ Conclusions

27. The Claimant was dismissed on 21st April 2023 so that the primary 3 month time limit would, but for section 207B ERA, have expired on 20th July 2023.

28. However, pursuant to section 207B(3) ERA, for the purposes of calculating the expiry of the time limit the period beginning with the day after 17th May 2023 (day A) the date that the Claimant contacted ACAS and ending on 28th June 2023 (day B) the date the ACAS certificate is deemed to have been received is not to be counted. Even though Mr Richards said that he did not receive the certificate. The Claimant provided his email to which the email with the certificate was sent and so applying paragraph 9(3) (b) of SI 2014/254, the certificate is deemed to have been received on 28th June 2023 regardless of whether the Claimant checked his junk mail on 28th June 2023 or not.

29. This means that the time to be calculated to apply section 207B(3) ERA is between 18th May- 28th June 2023 inclusive, which is a period of 42 days. Adding 42 days to 20th July 2023, means the time limit expired on 31st August 2023.

30. I now consider whether section 207B(4) ERA applies. section 207B(4) ERA only applies if the primary time limit is due to expire during the period beginning with the day A and one month after the day B, the time limit expires instead at the end of that period. This effectively gives the Claimant one month from when he receives the certificate to present the claim. However, I consider that this section does not apply here because applying Hague the Claimant went to ACAS on 17th May 2023 which is day A the ACAS Early Conciliation Certificate was issued on 28 June 2023 which is day b and this is added to original time limit was due to expire on 20th July 2023, which puts the date as 31st August. This is not a date that expires during the period beginning with the day after 17th May and ending one month after day b which is 28th July 2023, the 31st August 2023 is obviously later than 28th July 2023. Thus section 207(4) ERA does not apply to the facts of this matter. The Claimant presented his claim on 3rd September 2023 and the time limit expired on 31st August 2023. I therefore conclude that the Claimant is 3 days out of time.

31. I then move on to consider that as the Claimant's claim was presented outside the time limit, whether it was reasonably practicable for the Claimant to present within time in accordance with s111(2)(a) ERA. It is only if it was not reasonably practicable for the Claimant to present his claim in time that I consider whether the claimant presented his claim within such further time as was reasonable in accordance with s111(2)(b) ERA.

32. I consider that it was reasonably practicable for the Claimant to present his claim in time. I found the reason for the Claimant's failure to present his claim

in time was his failure to enquire into the time limits not the lateness of the receipt of the certificate. The certificate was deemed to be received on 28th June 2024 as the Claimant received the email with the certificate in his junk email box. The Claimant accepted that he saw this email on 30th June 2023 and so the Claimant clearly received the certificate in good time. Even if the Claimant did not see the certificate on 30th June 2023, I found he would have seen the ACAS EC certificate number.

33. Even if I am wrong about that, on any reading, the Claimant certainly received the ACAS EC certificate number on 29th August 2023 which was within the limitation period. The 29th August 2023 was a working day and the Claimant had two full days on which to submit his claim. I did not accept that that the Claimant could not have submitted his ET1 on these days as I did not believe that the Employment Tribunal would have rejected the claim form because of the lack of a full ACAS Early Conciliation Certificate number. There was nothing preventing the Claimant from submitting his claim in time. The Claimant was well aware of the time limits and had warning of presenting his claim with urgency from the wording of Acas Early Conciliation Certificate. I therefore conclude that it was reasonably practicable for the Claimant to have submitted his claim in time.
34. Having concluded that it was reasonably practicable for the Claimant to have submitted his claim in time, I do not need to consider s11(2)(b) ERA, but if I had found it was not reasonably practicable for the Claimant to have submitted his claim in time, I would have concluded that the time period of two days was not reasonable as there was nothing preventing the Claimant from contacting his union or the Employment Tribunal to gain assistance to be able to submit his ET1 in time.
35. The Employment Tribunal do not have jurisdiction to consider the Claimant's unfair dismissal claim and the claim is dismissed.

Employment Judge Young

Dated 1 July 2024

REASONS SENT TO THE PARTIES ON
2 July 2024

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