EMPLOYMENT TRIBUNALS

Claimant: **Mr C C Eze**

Respondent: **ISS Facility Services Limited**

On: **4 June 2024**

Before: **Employment Judge McAvoy Newns**

Heard at: **London South Employment Tribunal (via CVP)**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr Lawrence, Counsel**

WRITTEN REASONS

Background

1. Oral judgment was given at the hearing on 4 June 2024 and, on the following day, the Claimant requested written reasons. These written reasons have been prepared and promulgated as soon as practicable following receipt of this request.

Approach to the hearing

2. This case was listed for two days to determine the Claimant's claims. However, the Tribunal was aware that the claims were out of time and therefore it would be necessary to address that jurisdictional issue before making any determinations regarding the substantive merits of the claims. It was unclear from the Tribunal's previous orders whether I was required to deal with the time limits issue as a preliminary issue at the beginning of the hearing or whether I was required to hear all of the evidence regarding the claims and then deal with the time limits issue as part of my overall decision. After discussing this with the parties, I decided that it would be more compliant with the overriding objective for me to adopt the former approach. Neither party objected. As the

case was completed in one rather than two days, this was undoubtedly more proportionate and would have likely saved the parties time and cost.

Identity of the Respondent

3. As both parties agreed that the correct legal entity for the Respondent was ISS Facility Services Limited, rather than ISS UK Limited, and it was compliant with the overriding objective for me to do so, the name of the Respondent was amended. The Respondent did not raise any issues regarding the description of the employer on the ACAS certificate not being ISS Facility Services Limited.

Evidence

4. I was provided with a hearing bundle comprising of 255 pages and three witness statements (two for the Respondent and one for the Claimant). The Claimant provided an additional bundle of documents comprising 69 pages but confirmed that all of these document were contained within the main bundle. I heard evidence from the Claimant which was cross examined by the Respondent's representative. I also heard some evidence from one of the Respondent's witnesses and the Claimant cross examined that evidence to the extent it concerned the time limit points.

5. I have also seen some correspondence between the parties relevant to their respective preparations for this hearing. These concerned the Claimant's failure to provide documents or a witness statement in accordance with the Tribunal's orders. In this regard the Claimant said that he would not be providing any further documents or exchanging a witness statement. I was told however, at the beginning of the hearing, that the Claimant had provided a witness statement after the date of these email exchanges and the Respondent was not objecting to me treating the same as his evidence.

Findings of facts

6. The parties agreed that the Claimant's claims had been submitted out of time. As the Claimant's employment was terminated on 12 May 2023, for the purposes of the unfair dismissal claim, he ought to have started the ACAS process by 11 August 2023. As the last deduction from his wages was made on 28 May 2023, for the unauthorised deductions from wages claim, he ought to have started the ACAS process by 27 August 2023. However, he did not do so until 18 September 2023.

7. The reasons provided by the Claimant, which are considered in greater detail below, for submitting his claim late, were:

    1. The Respondent's delay in dealing with his appeal against his dismissal;

    2. The advice which the Claimant says he received from ACAS. In this regard, the Claimant's position was that he had been misled by ACAS;

3. The ill health of the Claimant's father; and

4. The Claimant's homelessness following his eviction.

8. In respect of the appeal process, the Respondent accepted that there was a delay which they say arose for multiple reasons. The appeal was submitted on 18 May 2023, the appeal hearing took place on 3 August 2023 and the outcome was delivered on 15 September 2023. It was accepted that the Claimant had been in contact with the Respondent, chasing the progression of the appeal process, during the period between May and August 2023. He had done so whilst he was in Nigeria with his ill father (considered below). He had suggested that the appeal meeting take place via video, to avoid delays arising from the fact he was in Nigeria.

9. In respect of the discussions with ACAS, in evidence, the Claimant said that he contacted ACAS two days after being dismissed. He said he spoke with a lady but could not recall her name. He said that she advised him to wait until the appeal process had been completed before starting the Tribunal process. He said the phone call lasted four or five minutes and there was no correspondence or notes of the call. He said that the ACAS officer did not mention any time limits for lodging the claim but accepted that he did not ask the ACAS officer about this specifically. His position was that the ACAS officer ought to have proactively given him this information, rather than wait for him to ask for it. In his witness statement, the Claimant stated: "I was advised by ACAS to follow the company appeal process first and wait until the outcome of the appeal. I highlighted this in my emails to the team dealing with my appeal, I told them that the delay with dealing with case is also delaying any further action I need to take". However, in cross examination, the Claimant accepted that he did not refer to any advice he received from ACAS in his emails with the Respondent. It appeared that the Claimant was referring to an email that he had sent to the Respondent on 5 September 2023 which stated, "I have been waiting for a response from you as you promised the last time we spoke. It's been four months since I appealed my unfair dismissal and still waiting for the decision on the appeal hearing. I have been evicted from my house and I am now living on the street. I'm beginning to think that this is a tactical and constructive attempt trying to frustrate me to give up my legal rights to a fair process". However, this was sent on 5 September 2023, after the deadline for the Claimant to lodge his claim had expired. Additionally, contrary to what the Claimant had said at the outset of the hearing, he said in evidence that he did not consider ACAS to have misled him. I have considered this further in the conclusions section below as the Claimant changed his position regarding this again during submissions. The Claimant was asked whether he had done any of his own research to which the Claimant confirmed he had not and said, "I wasn't in a good situation – I was in a very bad state". The Claimant also accepted that he did not refer to the fact that ACAS had misled him when he lodged his claim.

10. In respect to the ill-health of the Claimant's father, the Claimant said that he had travelled to Nigeria in order to visit him. He said that he left on 24 May 2023 and returned to the UK on 5 July 2023. The Respondent's representative

suggested to the Claimant that he could have undertaken research into the Tribunal processes on his return to the UK. The Claimant disagreed and said, "Have you been through depression before?" I asked the Claimant whether he had disclosed any medical evidence of his depression for me to consider as part of these proceedings. He told me that he had not. I asked whether he had any such evidence. He said that he did not because he couldn't go to the GP because he didn't have a fixed address before October 2023.

11. In respect to the fact that the Claimant had said he was homeless, in evidence the Claimant said that he was sleeping in different people's houses from when he returned to the UK in July 2023 until October 2023.

The Law

Unfair dismissal

12. Section 111(2) of the ERA states that in respect of a complaint for unfair dismissal, the 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".

13. The test in (b) above is the same for claims for unauthorised deductions from wages.

Early conciliation

14. Section 207B of the ERA states:

(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.

Not reasonably practicable test

15. Following *Porter v Bandbridge 1978 ICR 943*, the Claimant has to satisfy the Tribunal not only that he did not know of his rights throughout the period preceding the complaint and there was no reason why he should know, but also that there was no reason why he should make enquiries. In this regard, the burden of proof is on the Claimant.

16. Following *Palmer v Southend-on-Sea Borough Council 1984 ICR 372,* the term 'reasonably practicable' means something like 'reasonably feasible'.

17. As Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* explained: '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'.

18. In *Bodha v Hampshire Area Health Authority 1982 ICR 200*, it was held that awaiting the outcome of a company's internal appeal procedure was no excuse for failing to make a complaint to an industrial tribunal within three months of dismissal. In this case, the claimant's union branch advised him to utilise the internal disciplinary procedure before, if necessary, going to an industrial tribunal. As a result, when his internal appeal was dismissed, his complaint to the industrial tribunal occurred more than three months after his dismissal. It was held that the test of what was reasonably practicable was a strict test of practicability, namely, whether the act of presenting the complaint in time was reasonably capable of being done, not whether it was reasonable for the claimant to present his claim for unfair dismissal before the internal appeal procedure had been completed.

19. The Court of Appeal decision in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372* approved the decision in *Bodha*. It held that although prior pursuit of an employer's domestic appeals procedure is a relevant circumstance, it is not by itself enough to make it "not reasonably practicable" for an employee's complaint for unfair dismissal to be prosecuted within the prescribed period.

20. However, this was not applied by the EAT in *John Lewis Partnership v Charman EAT 0079/11.* In this case, it was held that where a lay person had not sought the advice of a skilled adviser or otherwise been put on notice of the time limit, it was reasonable for him to defer investigating the possibility of making an unfair dismissal claim until the determination of his internal appeal, and until then, it would not be reasonably practicable for him to present his claim. The Tribunal had held that the Claimant's ignorance of the time limit

made it not reasonably practicable for him to present his claim before the determination of his internal appeal. The employer's appeal against this decision, arguing that the Tribunal had failed to apply *Bodha* and *Palmer*, was unsuccessful. The EAT decided that, applying ordinary principles, it could not be considered reasonably practicable for an employee to comply with the time limits if he was reasonably ignorant of them. The authorities relied on by the employer were not ignorance cases in that unlike Charman, the claimants were being advised by trade unions. The issue in those cases was whether the pursuit of an internal appeal in itself made it not reasonably practicable to present an employment tribunal claim, and not, as in the instant case, whether it was reasonable for the claimant not to be aware of the time limits. They did not demand a different conclusion to that reached on the application of ordinary principles.

21. In *Marks & Spencer v Williams-Ryan [2005] ICR 1293* the Court of Appeal observed that W-R had contacted a citizens advice bureau, which advised her to exhaust the internal appeals procedure but did not tell her of her right to make a complaint to an employment tribunal. It also observed that M had sent a letter confirming her dismissal and set out the internal appeal procedure. It also referred to her separate right to make a complaint to a tribunal but it did not refer to the three-month time limit. W-R exhausted the internal appeal procedure during which time the time limit to make a claim to the tribunal had expired and she lost her appeal. W-R then made a claim for unfair dismissal to the tribunal, sending a covering letter explaining why it was outside the time limit. The tribunal found that W-R thought she had to wait for the decision of the internal appeal procedure before bringing a claim. The Court of Appeal held that whilst the tribunal's decision was generous to W-R it was not outside the ambit of conclusions available to it. They held that section 111(2) of the Act should be interpreted liberally in favour of employees and the tribunal was entitled to find, inter alia, that advice given by M was misleading and insufficient. They held that no doubt the letter from M setting out the internal appeal procedure was intended to be helpful but it was capable of bearing the misleading suggestion that a claim to the tribunal was something that should be left until the internal appeal procedure had reached its conclusion.

22. In the same case, at paragraph 21, it was stated: *"it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an Employment Tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and the time limit for making such a complaint...It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances."*

23. Also, at paragraph 24, it was stated: *"… if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the employment tribunal in due time. The fault on the part of the adviser is attributed to the employee"* and *"If a man engages skilled advisers to act for him − and they*

mistake the time limit and present it too late − he is out. His remedy is against them."

24. In *Cygnet Behavioural Health Ltd v Britton 2022 EAT 108*, the EAT disagreed with the employment tribunal's conclusion that it was not reasonably practicable for B to have presented his unfair dismissal claim in time because of depression and dyslexia, combined with ignorance of the time limit. He had limited mental and physical energy and his primary focus during the relevant time was on a regulatory investigation into his fitness to practise as a physiotherapist. The EAT observed that, notwithstanding B's conditions, he had been able to do a great deal during the period between his dismissal and the expiry of the time limit, including appealing against his dismissal, contacting Acas about his potential claims, working as a locum and then in a temporary post, moving house and engaging in great detail with the regulatory investigation. While he had been very busy, the EAT considered that it would be 'the work of a moment' to ask somebody about unfair dismissal time limits or to type a short sentence into a search engine. There was no rational explanation or justification in the tribunal's judgment as to why B's conditions prevented him from finding out about the time limit.

Submissions

25. Both parties gave oral submissions. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

26. As the Respondent had not addressed me specifically about the ***Charman*** decision, I allowed an adjournment for the Respondent's representative to consider this and revert with further representations. He accepted that ***Charman*** qualifies ***Bodia*** and ***Palmer***. He said that if the Claimant had been found to be reasonably ignorant of the time limits, the existence of the internal appeal and the time it took would be an important factor for me to take into account. Therefore, he submitted that this turns on whether the Claimant's ignorance of the time limits was reasonable and he contended that it was not.

Conclusions

27. The Claimant accepts that his claims were submitted out of time and, therefore, the sole issue in determining this jurisdictional matter is whether I ought to exercise my discretion to extend time.

28. As the law states, in order to do so, I have to be satisfied that it was not reasonably practicable for the complaint to be presented by the deadline and that the claim was brought within such further period as I consider to be reasonable. In this regard, the burden of proof is on the Claimant. Whether something is reasonably practicable ought to be interpreted as whether something is 'feasible'. A liberal interpretation, in favour of the Claimant, ought to be given.

29. The core reasons given by the Claimant for the delay in lodging his claim concerned the Respondent's delay in dealing with the internal appeal proceedings and the advice the Claimant says he received from ACAS.

30. In the ***Bodha*** case, the EAT held that the existence of an impending internal appeal was not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit, and this view was expressly approved by the Court of Appeal in ***Palmer.***

31. However, in ***Charman***, the EAT upheld an employment tribunal's decision to accept an out-of-time unfair dismissal claim where the claimant waited for the outcome of an internal appeal against his dismissal before deciding how to act. It was held that the case could be distinguished from Bodha and Palmer.

32. I considered these cases in conjunction with the evidence heard and representations given by the parties and agreed with the Respondent's representative that central to the EAT's decision in ***Charman*** was that the Claimant was reasonably ignorant of the Tribunal time limits. Relevant to this, the Tribunal found that the claimant, who was 20 years old, was young, inexperienced and dependent on his parents' advice.

33. Therefore, the first issue for me to consider was whether the Claimant was reasonably ignorant of his rights. In this regard, the case law makes it clear that that not only does the Claimant need to satisfy me that he did not know of the correct deadline, but that he ought not to have known it. This involves consideration of the enquiries that the Claimant did or could have undertaken to learn about the deadline. 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.

34. The Claimant said that ACAS informed him that he needed to wait until the appeal process had concluded before lodging his claim in the Tribunal. He said he spoke to a lady from ACAS but could not remember her name. He says the conversation took place two days after his dismissal, therefore on 14 May 2023, and lasted about 4 or 5 minutes. He accepted that he did not ask the ACAS officer directly about time limits during this conversation; instead, he expected ACAS to proactively tell him about this if the same was relevant to his situation.

35. I had to determine, on a balance of probabilities, whether this conversation took place and, if so, whether this advice was given. If it was, I then had to determine whether the Claimant had been misled by ACAS.

36. The Claimant accepted that there was no evidence before me, except his oral evidence, of this conversation having taken place. He mentioned today that he might be able to get hold off a copy of the recording of the phone call but appreciated that this might not arrive today and therefore the hearing would need to be postponed in order for me to consider it. I did not consider it appropriate for the hearing to be postponed whilst he obtained this evidence. Firstly, there was no certainty that this evidence still existed as the recording

may have been deleted. Secondly, the Claimant had had ample time to provided this evidence, if it did exist. As explained earlier, the Respondent had had to chase him for his disclosure documents and, having done so, was told that the Claimant had nothing else to disclose.

37. I noted that, in his appeal dated 18 May 2023, the Claimant stated he had "sought legal Counsel". This could be a reference to the call he had with ACAS a few days before. However, he does not say in his appeal that he had been advised that he The Claimant chased the progression of his appeal on numerous occasions. In none of these chasers did he state that he had been advised that the appeal needed to be concluded before he could lodge his claim in the Tribunal. He did not refer to ACAS' advice when submitting his claim despite, at this point, being aware that the claim was out of time.

38. On 5 September 2023, the Claimant did say, "I'm beginning to think that this is a tactical and constructive attempt trying to frustrate me to give up my legal rights to a fair process". In evidence, the Claimant told me that his legal rights to a fair process were his legal rights to pursue the matter in the Employment Tribunal.

39. This suggested to me that, by 5 September 2023, the Claimant had become aware that there was a deadline for lodging his claim in the Tribunal. However, given that the deadline was 11 August 2023, he may not have been aware that the time limits were as short as three months.

40. The Claimant's evidence and representations on whether he was misled by ACAS were inconsistent. At the start of the hearing, after clarifying the issues, he told me that he felt misled by ACAS' advice. However, in evidence, he said that ACAS had not misled him. In submissions his position reverted to my original understanding. I queried with the Respondent's representative whether the Claimant was confused when answering the question and whether an accurate assessment of his position was that he did believe that ACAS had misled him. Although I agree with the Respondent's representative that his questions in cross examination were clear, I am also conscious that this question was answered shortly after I had interjected and asked the Claimant to avoid interrupting and answer the specific questions that he was being asked. Attending a Tribunal hearing will no doubt be difficult for many litigants in person. I expect that the Claimant was confused, perhaps flustered, when answering this question and accept he believed that ACAS did mislead him, even though this is different to the account that he gave in evidence.

41. I'm also conscious that the appeal outcome was communicated on 15 September 2023 and the ACAS process was started on 18 September 2023, just three days later. This is consistent with what the Claimant says ACAS told him, given that he started the process very soon after the appeal decision was given.

42. Therefore, on balance, I accepted the Claimant's evidence that he did seek advice from ACAS and that, during his conversation with ACAS, ACAS may

have informed him that he needed to go through the appeal process before lodging his claim.

43. However, this does not mean that the Claimant was misled by ACAS. The Claimant was seeking reinstatement during the appeal process and I expect therefore the focus of his conversation with ACAS was on getting his job back. I can understand therefore why this was the focus of ACAS' advice during this short 4/5 minute call. There is no written record of the advice actually provided by ACAS. However, crucially, the Claimant accepts that he did not ask ACAS about whether there were deadlines for lodging his claim. He did not ask whether he could go through the Tribunal process and the internal appeal processes at the same time. Therefore, he was not misled. Instead, it appears that he was simply not sufficiently engaged in the conversation to seek all the advice that he needed from ACAS to determine his next steps.

44. I also concluded that the Claimant's ignorance of the time limits was unreasonable. The Claimant had not sought to re-engage with ACAS or any other adviser after the above mentioned brief phone call. He also accepted that had not undertaken his own independent research, despite having access to the internet. A simple google search concerning Tribunal time limits would have yielded the information he needed. It seems that the Claimant had a closed mind to obtaining any further information or advice, relying solely on the earlier mentioned brief call with ACAS.

45. I recognise that it may have been more difficult for the Claimant to engage in these matters whilst he was in Nigeria, with his extremely unwell father. I agree also that further challenges awaited him when he returned to the UK as he had been evicted and was moving between different people's houses between then and October 2023. However, the Claimant was liaising with the Respondent regarding his appeal during this time. He was only in Nigeria between 24 May 2023 and 5 July 2023. He was able to attend an appeal meeting on 3 August 2023. He was also able to start the ACAS process, request his certificate and lodge is claim on 18 September 2023. When he lodged his claim he had become aware of the fact that his claim was being lodged late. He was living in different people's houses at this point in time too.

46. I am also conscious that if the Claimant was suffering from depression during this time, this would be relevant to my considerations. However, no medical evidence of the Claimant's depression has been provided. He says that this was because he had no postal address but there is no evidence of him obtaining such medical evidence in October 2023, when he had found a new job and secured new accommodation.

47. Therefore, in particular, during the period between 5 July 2023 and 11 August 2023, I concluded that the Claimant could have sought and obtained further advice from ACAS, the CAB or another adviser. He could have used the many online resources to learn about the Tribunal's deadlines. His ignorance of the time limits during this time was not, therefore, reasonable.

48. Going back to the Bodha case, the EAT held that impending internal appeal was not "in itself" sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit. Clearly, it was not just the delayed appeal which the Claimant relies upon to justify this finding. He also relies upon the advice from ACAS, his father's ill health, his consequent trip to Nigeria and his eviction. However, for the reasons I have given above, and the fact that the Claimant had ample opportunity to engage in these processes in particular between 5 July 2023 an 11 August 2023, these additional reasons for the delay do not justify this finding.

49. Consequently, his claim was out of time in circumstances where it was reasonably practicable to present it in time. It was therefore dismissed during the hearing.

50. For completeness, had I found that it was not reasonably practicable for the Claimant to present his claim until 15 September 2023, when the appeal outcome was delivered, I would have concluded that it was presented within a reasonable period of time thereafter. Three days in this regard is a reasonable period of time bearing in mind the need to digest the decision, deal with the ACAS process and prepare and lodge a claim in the Tribunal.

Employment Judge McAvoy Newns

23 August 2024

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Sent to Parties.
19 September 2024