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## THE EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr K Miah**

**v London Underground Limited**

**Heard at:** London Central

**On:** 9 November 2017

**Before:** Employment Judge Walker

**Representation:**

**Claimant:** In Person

**Respondent:** Ms J Shepherd, Counsel

### JUDGMENT

The Judgment of the Tribunal is that all the Claimant's claims in both sets of proceedings are struck out on the grounds that the Tribunal has no jurisdiction to consider them as they were brought out of time.

### REASONS

1. This Preliminary hearing was listed to consider whether the Claimant's claims should be struck out on the basis that the Tribunal had no jurisdiction to consider them since they were out of time.
2. The Claimant Mr Miah brought a claim against London Underground for unfair dismissal and arrears of pay. He filed a claim on 29 April 2017. The effective date of termination was 1 February 2017.

3. The Claim Form did not set out an Early Conciliation Certificate number and was rejected. Mr Miah obtained an Early Conciliation Certificate on 14 June and filed again. He also sent in a letter which referred to the rejection and also included the number.
4. The second claim was received with that letter and the effect was that both claims were treated by the Tribunal as validly received on 6 July 2017. However, a letter was sent out by the Tribunal referring to the matter and making it clear that in accepting the claims, the Tribunal did not adjudicate on any question of jurisdiction and in particular time limits.
5. The receipt of the two claims on 6 July was more than 3 months after the effective date of termination and additionally the Early Conciliation Certificate was obtained after the 3 month period and did not extend time. The result of that was that the Respondent made an application to strike out and the Tribunal listed the hearing before me today.

**The Issues**

6. The notice of Preliminary Hearing makes it clear that the issues I have to determine are the following:
  - (a) whether the claims were presented out of time and if so, whether it was reasonable practicable to present them in time and if not, whether they were presented within such further period as was reasonable.
  - (b) whether the claims should be struck out as having no reasonable prospects of success.
  - (c) whether an order for a deposit to be paid as a condition to continuing the claims should be made on the basis that the claims have little reasonable prospects of success.

7. If the claims were not presented in time, and it was reasonably practicable to do so, or if it is not appropriate to extend time, then the claims will fail and be struck out as having no reasonable prospect of success.
8. If the claims were either presented in time, or were not in time, but they were presented within such further period as was reasonable, the Respondent has made it clear it wishes to apply for a Deposit Order. Until I determine the issue of time, it is not necessary to consider the question of a Deposit Order. Therefore the first matter I have focused on is the question of the jurisdiction based on time.
9. The effect of that is that the issues I have to consider are
  - (i) whether the claims were presented out of time.
  - (ii) if they were, was it reasonably practicable to present them in time, and
  - (iii) if not, were they presented within such further time as was reasonable.
10. The issues are the same for both the complaint for unfair dismissal which the Claimant has made and also his complaint for arrears of pay. The sections in the Employment Rights Act 1996, which provide the Tribunal with jurisdiction both include the same wording in relation to time limits.

### **Evidence**

11. The evidence I heard today was from the Claimant himself, I also heard from a friend of his and former colleague Mr Adrian Bulley.

### **Facts**

12. The facts I found were these. The Claimant enjoyed his job. He had been promoted to Train Driver. Certain events had lead to a Disciplinary Hearing and on 1<sup>st</sup> February 2017 the Claimant was dismissed. He appealed.
13. The appeal process was lengthy. I do not have an exact date for the outcome but the Claimant says that he got the outcome around 3 months after his dismissal. The Claimant had Trade Union support but never felt

confident that he was being supported and says the Union did not tell him he had limited time to apply to the Employment Tribunal after the date of his dismissal. He also made it clear he knew very little about the Employment Tribunal or the process, and furthermore he expected he would be successful in his appeal, but he thought it most likely he would be demoted back to his previous role.

14. Additionally, I know the Claimant was extremely worried about the shame of his dismissal and embarrassed, so he did not tell his friends or family for some time. The situation caused him financial problems and he became depressed and anxious. The Claimant did not tell the Tribunal of any research he made into his legal position or efforts to get legal advice and I believe he did none of this. He says that a family friend with some knowledge of employment law, who we believe was an employment lawyer himself, learned of his situation from the Claimant's brother. His brother only learned after some while when the Claimant eventually told a friend who in turn told members of his family. His brother contacted the employment lawyer/family friend who then contacted the Claimant. This friend told him he had 90 days to bring a claim to the Tribunal and that period was very close to being up.
  
15. The Claimant then rushed to bring the claim. He was not told by his family friend about the early conciliation process. The Claimant went online and he found the ET1 application form. He applied for remission for the fees because he was on benefits and this was granted. The web pages immediately prior to being able to download the form refer to the need for an Early Conciliation Certificate number. The Claimant says that he did read the guidance which accompanies the online form. This also refers to the early conciliation process. Despite the government web site prominently flagging up of the need for the certificate number and the need to contact ACAS before bringing a claim, the Claimant says he did not understand that he had to get an Early Conciliation Certificate. He also failed to understand that if he had applied for it, that process would have extended his time.

16. When the Claimant came to completing the ET1 form, he was required to tick the box that to indicate if he did or did not have the Early Conciliation Certificate. The form says “do you have an Early Conciliation Certificate Number, and he has ticked no. Next to that box, there is some wording in italics in a pale colour, but nevertheless there which says “Nearly everyone should have this number before they fill in a claim form. You can find it on your Acas certificate. For help and advice call Acas” and it provides the telephone number and also a website address for ACAS.
17. The form then goes on to provide the box for putting in the number and then says “If No, why don’t you have this number?” and there are four options. The second of those options is “Acas doesn’t have the power to conciliate on some, or all of my claim” and that box was ticked by the Claimant. In short, the Claimant ticked that he did not need the form and that he had a reason for this which was that ACAS were not empowered to conciliate on his claim. That was simply incorrect. In consequence the claim was rejected.
18. The Claimant, when he was told by the family friend about the opportunity to bring a claim realised he was very close to the time limit. He had no particular explanation for not having got the early conciliation certificate or ticking the boxes as he did. His words were “I felt it was not important enough. I had no knowledge. I filed the claim just to get on within the 90 days, to get my foot in the door, I had no choice.
19. Because of the lack of an early conciliation certificate number, the claim was rejected, as it must be by law. The Claimant learned of the rejection by letter from the Tribunal which was dated 7 June 2017. That letter pointed out that “the grounds of exemption from providing a certificate cited that part of the claim falls outside Acas responsibility is not made out. The claims of unfair dismissal and wages are claims ACAS have responsibility to conciliate.” This letter was accompanied by an explanatory memo headed Claim rejection – your questions answered

(requirement to contact ACAS before instituting proceedings). This sets out first a general explanation for why there had been a rejection in relation to there being no Early Conciliation number and then provides information about the options for reconsideration, some information about time limits and also appeals. The date of this letter was as I have noted 7 June, which was a Wednesday. Assuming the letter was not necessarily sent the same day, they often miss the immediate post and assuming it was posted by second class post I would imagine the Claimant got it on or around Monday 12 June. Certainly the Claimant knew of the position by 13 June when he applied to ACAS and on 14 June he was given a certificate by ACAS.

20. On 15 June, the Claimant began writing a letter. We have the letter which he eventually sent to the Tribunal which includes the Certificate number and he wrote it citing the references on the rejection letter so it was linked to the first file. He did not however send it immediately. Indeed it seems that he only sent it on or about the 5<sup>th</sup> July which was around 2 weeks later and at that time he sent it he also sent in a new Claim Form. In consequence, the Tribunal had the original Claim Form together with a letter which included the Early Conciliation Certificate number and a second Claim Form. At that stage both claims were accepted, the mechanics being that one was treated as accepted on reconsideration and the other was presented at that time. The effective date for both being accepted by the Tribunal was the date when they were both received complete with an early conciliation number and that was 6 July.
21. The Claimant's explanation for his situation in the period between 15<sup>th</sup> June and 5<sup>th</sup> July is that he was feeling very low at this time. The Claimant told the Tribunal that at this time he was deeply stressed and was having difficulty sleeping. He had got a doctor's appointment but did not go as it was mid morning and he had only got to sleep a few hours beforehand. The Claimant's friend, Mr Bulley, says that he could not contact the Claimant at this time. He said that he had found out about the Claimant's difficulty in being dismissed some time after it happened and

he understood the Claimant found it extremely difficult to talk about it, but when it came to this particular period, the Claimant did not answer his phone or texts and he explained to the Tribunal he recognised the feelings of stress, isolation, loneliness and the anxiety which this dismissal would have engendered from his own previous experience of having a period of unemployment.

22. I have noted that the Claimant started writing to the Tribunal on 15 June saying he understood he had to explain why the circumstances were exceptional and he was trying to find acceptable reasons. He explained that although the letter was dated 15<sup>th</sup> June, that was when he started work on it and he did not send it till later. He said he sent it by first class post so we assume it went on 5 July as it arrived on 6 July when the two claims were accepted.
23. The Tribunal wrote several letters dated 4 August, one of which was sent to explain the status of that acceptance and that letter made it clear that although the two claims had been accepted, the acceptance did not involve a consideration or determination of any time points either way. It said "both claims have been presented on 6 July 2017 and any issues as to whether they have been presented out of time remain to be considered and adjudicated". The result was that the question of time limits remained an issue.

### **Submissions**

24. I heard submissions from the Claimant and the Respondent. I am going to summarise them in brief. They are as follows.
25. The Claimant asked me to recognise the commitment he had for his job and the importance he placed on being able to have this particular opportunity to get it back. He referred to his emotional state and to his need for medication which he said he got it over the internet so he had no prescription he could show me. He says he knew nothing about the

Tribunal process and in fact this was his first time of being unemployed and he had no support. He was not told of the position by the Trade Union and only learned of it from a friend who gave him very limited information at a very late stage. He says he did what he could when he found out and he feels extremely worried about this whole position.

26. The Respondent reminds me of the legal requirements and the test and says that the burden of proof is on the Claimant, that the Claimant has not discharged it. The Respondent says that we know the Claimant had Trade Union support and also spoke to a friend who we believe was an employment lawyer and certainly had some legal knowledge about employment rights. The Respondent says that all that means the Claimant should have known the position. The Respondent also says the Claimant had a computer and access to the internet and could have checked the point online. The Respondent points out that the Claimant was able to submit the ET1 in time on the first occasion albeit without the certificate number. I was reminded of the wording on the ET1 form which I have recited above and the fact that the Claimant would have read that question and clearly decided to tick the box indicating that the form was not necessary in his circumstances.
  
27. The Respondent points out that had the Claimant simply contacted ACAS on the number given on the ET1 form, they would have told him about the extension of time and indeed would have supported him in terms of giving him the information about the time limits that then applied. ACAS would have helped him with a certificate number. It was reasonably practicable for him to file in time.

### **Law**

28. The words “reasonably practicable” have been considered and have not been particularly clearly defined but in one particular case *Palmer and Another v Southend on Sea Borough Council 1984 ICR 372* Court of Appeal, the Court of Appeal conducted a general review of the authorities



and concluded that the words reasonably practicable do not mean reasonable, which would be too favourable to employees and do not mean physically impossible, which would be too favourable to employers but means something like reasonably feasible. Lady Smith in *ASDA Stores v Cowser EAT 016507*, 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.

29. It is also the case that there are various classifications for the sorts of matters which generally arise in this situation and this case law which applies in those situations. I have considered the case law applicable to the various types of explanation given by the Claimant.
30. I have considered the submissions including the written submissions and the oral submissions made by the parties, and I have considered the law carefully and these are my conclusions.

### **Conclusions**

31. First of all I have to consider if it was not reasonably practicable to submit the claim in time. I recognise the Claimant is distressed and very worried about his position. I also recognise that he had not been in this position before and he had no knowledge of the Employment Tribunal from personal experience. I conclude from the Claimant’s arguments that he is raising a series of points which generally fall within the following classifications.
32. First the Claimant is saying he was ignorant of his rights and of the legal requirements. Secondly, the Claimant says that his advisors were at fault in that he had Trade Union representation who did not tell him what his position was and therefore they left him in the dark about it. Thirdly, he says he was ill with the stress of it and that put him in a very difficult

position. A raft of cases has been before the Tribunal of those types and there is a settled legal position as to how to approach each of them.

33. I have taken each of those arguments in turn. In relation to the question of ignorance of rights, the case law makes it clear that this alone is not enough. I have to find out what were the Claimant's opportunities for finding out that he had rights. I have to ask myself, did he take them? If I conclude he did not, I have to ask out why not. In this case the Claimant could have asked the Union about claims. He could have looked online. He was in fact given a guidance of some sort by a family friend who we believe was an employment lawyer. He had the opportunity and indeed said he read the written guidance which accompanies the Employment Tribunal online form. In all the circumstances, given the amount of information which was available to the Claimant, this is not a justification for me concluding it was not reasonably practicable for him to bring the claim in time.
34. In terms of the submission that the Claimant's advisors were at fault, the Claimant says that his trade union representative (which count as advisors for this situation, and are assumed to know the time limits and the steps that need to be taken to comply with them), did not tell him his rights or what he needed to do. It is generally the position that in such situations the remedy lies with a claim against the Trade Union. They have a duty to the Claimant in tort. Therefore if in fact the Trade Union actually failed to tell the Claimant important information about the time limits and the process; this does not excuse the Claimant himself but rather leaves him with an issue to raise with his Trade Union.
35. The third position is the Claimant's illness. This can be a valid reason but it usually requires some supporting medical evidence and the case law makes that clear. Moreover, it is further clear that there is a difference between stress and a mental illness which is sufficiently severe to mean somebody is incapable of filling out the necessary forms or indeed taking the steps to find out what to do. I know that the Claimant felt very

stressed and extremely worried. I have no evidence that his condition actually amounted to a mental illness.

36. Importantly, the facts show that the Claimant was capable of filing his claim in time despite his stress. The Claimant actually managed to file the claim form within the time limit. This proves he was able to do so. His mental condition, however poor, did not stop him from going on line and finding the relevant form and the accompanying guidance. He did that.
37. The key point is that the Claimant was so worried about the time limit that he rushed to file the claim when he heard about it and in doing so choose not to read the points in the guidance and in the form and elsewhere which repeatedly state the need for the ACAS certificate. The fact is that this is not a case about a claimant who has failed to file at all, but a case about a claimant who did file but simply did not follow the requirement to get an ACAS Early Conciliation certificate. Despite several clear statements on line that an Early Conciliation Certificate was required, he did not take the step of calling ACAS to get that Certificate.
38. In my view, the fact that the Claimant was able to file the claim (albeit without the certificate) is demonstrable evidence that it was reasonably practicable for him to do so with a certificate number included. That is an end to the matter.
39. However, for the sake of completeness, I have also considered what it would mean if the Claimant's mental situation had been sufficiently serious that he was not able to file the ET1. So far as I am concerned, the forms and the guidance makes the position clear, but if in fact the Claimant had been unable to do that, we do know he got the Early Conciliation Certificate on 14 June and he began a letter to the Tribunal on 15 June. If I had concluded that it was not reasonably practicable for the Claimant to file the form in time, (which I have not) I then have to ask myself whether he did so within such further time as was reasonable. There is an expectation that any further period would be relatively short

but obviously the time taken depends on the circumstances. Nevertheless, it is expected the Claimant will act promptly when he knows of the true position and he will demonstrate that he is acting with due speed and proper attention at that point in time.

40. The Claimant received with his early Conciliation Certificate on 14 June, began the letter on the 15<sup>th</sup> June and was clearly in a position to do that. I have been given insufficient evidence to prove the Claimant acted promptly thereafter. The Claimant's explanation was that he was trying to find enough to explain his exceptional circumstances. He took a little over 2 weeks to actually submit the new ET1 form and the letter. I do not consider the information I have about that period demonstrates that the Claimant acted within such further period as was reasonable.
41. In the circumstances, my primary view is that I am satisfied that it was reasonably practicable for the Claimant to file his ET1 in time. Although it is not necessary, given that finding to take it any further, I have considered the position and I also conclude that the Claimant failed to file within such further time as was reasonable.
42. I have to conclude the Tribunal has no jurisdiction.

Employment Judge Walker  
15 November 2017