

Reserved Judgment
Preliminary hearing

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

BR

AND

NG

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 13 November 2018

EMPLOYMENT JUDGE: D A Pearl (Sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr T Kirk (Counsel)

JUDGMENT

The Judgment of the Tribunal is that:-

- i) There is no jurisdiction to entertain the claim of unfair dismissal which was received out of time.**

REASONS OF THE EMPLOYMENT TRIBUNAL

1 This was the preliminary hearing that was listed to determine whether the Tribunal has jurisdiction to hear the claim. It was held in private pursuant to a direction given under rule 50. The Claimant was dismissed on 2 February 2018. Her appeal against dismissal was rejected on 24 April 2018. She was represented at this hearing by a representative of the applicable trade union of which the Claimant was a member. After the appeal this representative sent an email to the Claimant saying that the ET1 form

had to be submitted “before you can do anything. Fill it and lodge it... It needs to be in by 2 May.”

2 The Claimant then wrote back and said to her representative that she had spent half an hour on hold but that she apparently needed some sort of certificate number from ACAS. She said she would get onto it tomorrow and may need some guidance; and would anybody be available for that purpose? The response about 41 minutes later was: “no you can click on the box unfair dismissal so you don’t need the early conciliation number.”

3 This advice was completely erroneous. The Claimant relied upon it and submitted the initial ET1 online on 25 April 2018. She did indeed, in box 2.3, say that she had no early conciliation certificate and the reason was the one to which the tick box related, namely that her claim only consisted of a complaint of unfair dismissal which contained an application for interim relief. There was no such application for interim relief and none had ever been intended. That initial claim was rejected by the Regional Employment Judge on 24 May 2018.

4 On the same day, 25 April, the Claimant did contact ACAS by telephone. She tells me, and it is not in dispute, that, notwithstanding the submission of the ET1, she wanted ACAS to try to conciliate a solution to her employment problem. In due course a certificate was granted that showed the date of application as 25 April and the date of issue was 25 May 2018. This meant that the Claimant had until 25 June to submit a valid claim but, of course, she did not realise that her original claim was invalid. It was only on 4 July that she received a letter from the tribunal rejecting that claim because there was no ACAS certificate. At this point the Claimant was nine days out of time, even though she acted immediately and submitted the current ET1 on that same day. The issue for me is solely whether or not there is jurisdiction to entertain the claim.

5 Section 111(2) provides that a tribunal shall not consider a complaint of unfair dismissal unless it is presented:

“(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”.

Conclusions

6 As I stated during the hearing, I have much sympathy for the Claimant in human terms. From the leading case of **Palmer & Saunders v Southend on Sea Borough Council** [1984] IRLR 119, we know that the Court of Appeal has said that the words “reasonably practicable” are equivalent to the words reasonably feasible; and that I should ask: “... Colloquially and untrammelled by too much legal logic – ‘was it reasonably feasible to present the complaint within the relevant 3 months’ ”.

7 **Dedman** [1974] ICR 53 gives rise to the principle that if skilled advisers are engaged and give mistaken advice, the remedy is against those advisers. Ignorance or a mistaken belief will not be reasonable if it arises from the fault of professional advisers:

Wall's Meat v Khan [1979] ICR 52. Mr Kirk relies upon Harvey at G [224]: the category of adviser for whose fault a claimant has been held to be responsible includes trade union officials, on the basis that they were skilled advisers and were engaged. In **Northamptonshire CC v Entwistle** [2010] IRLR 240 (EAT) the President reviewed these and later authorities. He said: "It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is itself reasonable ... So far so good, but the problem in the present case is that the Claimant's solicitor's error was negligent. The Council may have written a misleading letter, but Mr Lee should not have been misled by it. No doubt in human terms it is easy to see how the mistake arose, and as cases of negligence go it may not be at the most culpable end of the scale; but the Judge clearly believed that Mr Lee should have checked the Council's statement for himself and not simply taken it on trust ... must follow that it was reasonably practicable for the Claimant to have brought his claim in time. The burden of the **Dedman** principle is that in a case where a claimant has consulted skilled advisers the question of reasonable practicability is to be judged by what he could have done if he had been given 'such [advice] as they should reasonably in all the circumstances have given him': see the judgment of Brandon LJ in the **Walls** case quoted at para. 5 (3) above. It necessarily follows from the finding of negligence that Mr Lee did not give the Claimant the advice which he should reasonably, in all the circumstances, have given him."

8 While it is true that the Claimant might well have issued in time if the tribunal had written to her earlier, that does not meet the test. I have to ask whether it can be said that it was not reasonably feasible to present the claim within the (extended) time limit? It is clear to me that it cannot. If negligent advice had not been given, the Claimant would have been in no difficulty. The advice that she did not need a certificate was the effective and sole cause of the difficulty the Claimant now finds herself in. In these circumstances, I consider that the correct legal decision in dealing with these facts is to rule that it was reasonably practicable or feasible to present a claim within the limitation period. Regrettably, I find that there is no jurisdiction to entertain the claim for unfair dismissal.

RESERVED REASONS

London Central

Date and place of signing

13 Nov. 18

EMPLOYMENT JUDGE PEARL

RESERVED JUDGMENT & REASONS SENT
TO THE PARTIES ON 13 Nov. 18

FOR EMPLOYMENT TRIBUNALS

