EMPLOYMENT TRIBUNALS

Mr B Eurell		DL Insurance Services Limited
Claimant	v	**Respondent**

Heard at: Birmingham **On: 25 October 2017**

Before: Employment Judge Flood

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr Meichen (Counsel)**

PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is that the claimant's claim is dismissed as having been presented out of time.

REASONS

1. By a claim form submitted on 3 August 2017 the claimant brought a claim for breach of contract and unpaid wages in respect of his dismissal from the respondent on 7 April 2017. The case came before me today for full hearing but firstly it was necessary to determine the preliminary issue of whether the claim was presented in time; and if not whether time should be extended. The relevant test was whether it was reasonably practicable for the claim to have been presented in time and if not, whether it was presented within a reasonable time thereafter within the meaning of Regulation 7 (c) of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 ("**the 1994 Order**").
2. The claimant alleges that he was dismissed in breach of contract by the respondent at a disciplinary meeting held on 7 April 2016. He challenges the basis upon which the decision was made and alleges that he did not in fact commit any acts of gross misconduct entitling the respondent to dismiss him without notice. The respondent alleges that the claimant committed a repudiatory breach of contract entitling it to terminate the claimant's contract without notice. However before these matters could be determined, the first question was whether the Tribunal even has the jurisdiction to consider this complaint.

3. The first question I have to consider is whether as a matter of fact the complaint was brought in time. The claimant was dismissed on 4 April 2017 and this was confirmed to him in writing on 3 May 2017. He appealed against his dismissal on 24 April 2017 within the respondent's guidelines, and was notified that his appeal had been unsuccessful on 23 May 2017. The claimant commenced his claim on 3 August 2017. Prior to doing this he instigated a process of Early Conciliation via ACAS and his evidence today (which I have accepted) was that he first got in touch with ACAS via their telephone helpline to discuss his claim on 5 July 2017. He says he did this following a conversation with a friend on that same day where his friend had suggested he should contact ACAS. At the hearing today the claimant produced a copy of an e-mail he received from ACAS on 5 July 2017 confirming that he had made contact and sending him a link in order to complete the ACAS early conciliation form and instigate the conciliation process.

4. What happened next was in dispute. The Claimant alleged in his evidence today that he followed the link set out in that e-mail and completed the ACAS early conciliation form on the same day (i.e. 5 July 2017). He then alleges he received a further e-mail from ACAS on 7 July 2017 (2 days later) confirming that the ACAS early conciliation process had been instigated. He showed us a copy of this e-mail at the hearing today. There was also a suggestion from the claimant that there may have been a change of personnel dealing with his case within ACAS, which might explain the 2-day delay. This was the first time that the claimant had alleged that he submitted his formal ACAS early conciliation notification on 5 July 2017. If this is the case, it would also mean his claim would have been presented for conciliation within the required time limits. The respondent challenged this evidence and points out that the e mail we were shown today dated 7 July 2017 clearly shows that the form was received by ACAS on 7 July 2017 and it is an automatic response to an e mail generated when the information was submitted. The respondent points out that the claimant had previously acknowledged in correspondence (page 19 of the Bundle) that the claim was "*entered into early conciliation one day late*" and has produced no further substantive evidence to back up his claims that he submitted his ACAS early conciliation form on 5 July, or which would explain the delay in receiving the required notification back from ACAS.

5. My finding on this issue is that the claim was as a matter of fact entered into early conciliation on 7 July 2017 when the latest date he was required to do so was 6 July 2017 and accordingly was not in time. I find that the claimant was mistaken as to the date he clicked through to the link to complete the required form and this happened on 7 July 2017, not 5 July 2017. This is evidenced by the clear system generated automatic e-mail acknowledgement sent to the claimant at 12.51 on 7 July 2017. This was subsequently confirmed in correspondence by ACAS when they issued the EC certificate, which is also dated 7 July 2017. The claimant did not take issue with any of these dates, to challenge the correctness of it, even when he was alerted by the Tribunal to the issue of his claim being potentially out of time by letter of 8 August 2017 (shown at page 14 & 15 of the Bundle). His explanation that he thought by this stage that his claim had been accepted and that was the end of it does not stand up to scrutiny. Therefore as the claimant's employment terminated on 7 April, he was required to have triggered ACAS early conciliation by 6 July 2017 and this was not (as I have found above) done until 7 April 2017.

6. Further it is then necessary for me to consider whether I can admit the claim because it was not reasonably practicable to have presented it within time; and subject to the answer to that question; whether it was presented within a reasonable time period thereafter.

7. The claimant gave evidence today on the course of events leading up to his decision to issue proceedings. It is clear that he had formed the view that his dismissal was wrongful as soon as he had been dismissed. He exercised his right to appeal against his dismissal and once that appeal process was exhausted, he wrote to the respondents to notify the that it was his intention to bring a claim for damages. My attention was drawn to an e mail written by the claimant headed "Letter before Action" at page 85 of the Bundle. The date this e-mail was written was in dispute but I have concluded that it must have been written before 16 June 2017 (as this was the date the e mail was forwarded within the respondent).

8. The claimant accepts that at this stage, he "*knew he was in the right*" but states that he was not aware of any deadlines regarding bringing proceedings and also he explains that he had received a clear letter from the respondent at page 81-84 of the Bundle which informed him that he was not allowed to go any further. I have looked at the content of this letter and it is worth setting out what is said at page 84:

   "*I should remind you that my decision is final and no further appeals are permitted*"

9. The claimant suggests he was not aware of any time limits for bringing proceedings and when questioned by Mr Meichen he confirmed he did not check this at any time (although he suggests checking would assume some prior knowledge).

10. The claimant entered into a conciliation process with ACAS and this was not successful, the claimant says, because the respondent refused to engage with the conciliation process. The claimant was issued with an EC certificate on 24 July 2017 confirming his unique ACAS Early Conciliation reference number. The claimant then took a further week and a half before he submitted his claim to the Employment Tribunal on 3 August 2017. The claimant explains that the reason for this delay was that he was struggling to get the required information from the respondent to supplement his claims and had sent numerous e-mails to which the respondent did not apply. He states that it was only once the ET1 had been issued that the respondent started to reply to him.

11. The claimant did not seek legal advice at any time and other than his friend advising him to contact ACAS did not have any further information or advice about bringing his claims. When the claimant was asked by the Tribunal by letter dated 8 August to explain why early conciliation was entered into a day late, he replied stating that this was caused by delays of correspondence and lack of information from the respondent. The claimant was unable to explain why he did not refer then to his contentions about a mix up of dates at ACAS, other than to say that the date was 9 August and he had spoken to ACAS in July and assumed that everything was OK.

12. The claimant effectively has the burden of proof in showing that it was not reasonably practicable for his claim to have been presented in time. His main submission rests on the fact that he was not aware that ACAS was available to

assist in resolving the claims until his friend notified him of this on 5 July. He points out that he was not notified of this by the respondents at any stage and was given clear information by them that there was no further right of appeal to take his complaints further. He thought that he had complied with the ACAS requirements when he spoke to them on the 5 July and also had assumed that his case had been accepted once he received the paperwork from the Employment Tribunal. He states that if he is allowed to go ahead, that it will be clear in black and white that he is in the right.

13. The respondent submits that there is simply no evidence to show that it was not reasonably practicable for the claimant to have presented his claim on time, and further, no evidence that it was then presented within a reasonable time period. The respondent states that the claimant knew as soon as he was dismissed that he could bring a claim. This is evidenced, they say, by the fact that he wrote a letter before action to the respondent on or before 16 June 2017 setting out the legal basis for his claim and telling the respondent that he was contemplating bringing it. The respondent contends that the claimant did not bother to check whether there were any relevant timescales and suggests that this was negligence on his part. The respondent contends that the claimant's argument that he was misled by the respondent into believing that he was not able to pursue this further does not assist him, as the wording is very clear that this is the end of an internal process. Indeed, they state, there is no obligation on a respondent prior to proceedings having been issued to inform a potential claimant of further legal redress available. The respondent questions why the issues raised today about timing of the ACAS notification were only raised at this late stage. The respondent further suggests that the claimant did not act in a timely manner in submitting his claim once the EC certificate had been issued.

14. I have considered carefully all that the claimant has said and I have sympathy with his predicament but I prefer the submissions of the respondent. I have concluded that this Tribunal does not have jurisdiction to hear his complaints.

15. The relevant legal provisions I have considered are set out at regulation 7c of the 1994 Order and states that time can only be extended:

"where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable [and] within such further period as the tribunal considers reasonable"

16. The authorities on this provision are clear that the power to disapply the statutory time limit is very restricted. This is not a just and equitable jurisdiction where there may be further leeway to look at the surrounding circumstances including the fact that the claim is just one day late. The statutory test is one of practicability. It is not satisfied just because it was reasonable not to do what could be done as per **Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200.**

17. There has to be some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time as stated by the Court of Appeal in the case of **Walls Meat v Khan 1979 ICR 52**. If this impediment claimed amounts to just not knowing or having a mistaken belief as to rights of time limits, it will not be reasonable if it arises from the fault of the complainant for not making enquiries as he should reasonably have done. The claimant appears to be relying on the respondents to provide him with the information

regarding how his claim should be pursued and as pointed out by the respondent, they are under no obligation to do this.

18. It is not just necessary for me to consider what the claimant actually knew and did, but what he should have known and did had he acted reasonably. The claimant is an articulate and capable individual who has conducted himself exceptionally well at the tribunal today. Indeed he was able to articulate clearly the basis of his claim for wrongful dismissal at an early stage in the proceedings long before the time limit was due to expire. On this basis, I would have expected this claimant to have enquired as to whether there was any time limit to issue his proceedings and have realised the importance of these once he became aware of them. Therefore I am not convinced that it was not reasonably practicable for the claimant to commenced early conciliation in time.

19. I do not therefore need to consider the second arm of the test as to whether the claim was presented within such further time period as was reasonable. However on that point, given all that I have said above, I would have expected the claimant to have been in a position to present his claim earlier than he did in fact present it. He was aware of the basis of his claim from early on and although I understand that he was waiting for answers from the respondent and they may not have behaved entirely without fault, he had sufficient information to present his complaint in a timelier manner.

20. Therefore I decline to extend time and the claimant's claim for breach of contract is dismissed.

21. This may seem to the claimant to be an exceptionally harsh decision on the basis that he was just one day late. However I can only stress that the jurisdiction of the Employment Tribunal is strictly defined by legislation and the Tribunal itself is a creature of legislation. It can only hear claims that satisfy all the legal tests for such claims to be brought including time limits. Claims such as breach of contract and unfair dismissal do have a strict time limit with limited room for manoeuvre. There are good public policy reasons why such time limits are imposed so that the parties may have certainty and so that a case can be progressed expeditiously. Had I been considering a claim brought within a different jurisdiction where the test was different, it could be that a different outcome may have been reached.

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Employment Judge Flood

25 October 2017