



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Benn

**Respondent:** Cheshire & Greater Manchester Community Rehabilitation

**HELD AT:** Liverpool **ON:** 25 March 2019

**BEFORE:** Employment Judge Shotter

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr N smith, counsel

## JUDGMENT

The judgment of the Tribunal is that the claimant's claim received on 19 November 2018 was not presented before the end of the period of 3 months beginning with 13 August 2018, the effective date of termination of employment. The tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint, which is dismissed.

## REASONS

1. This is a preliminary hearing to consider whether the claimant has filed his complaint form within the statutory time limit. The claimant claims unfair dismissal and in oral submissions he explained that he had been unfairly dismissed following an ill-health absence that had been caused by an incident involving an existing or past client of the respondent who had assaulted and stabbed him, and therefore he should not have been dismissed on 13 August 2018 by reason relating to his capability.
2. The Tribunal heard evidence from the claimant under oath, there is no reason to question his credibility and the Tribunal has sympathy with the claimant for the predicament he has found himself in as he is unable to continue with his claim, and was feeling "furious."

3. The Tribunal found the following facts and conclusion based on the contemporaneous evidence before it, oral submissions received from both parties, reference to the case law and the claimant's oral evidence:

Facts

4. The claimant was summarily dismissed with a payment in lieu of notice at a hearing held on 13 August 2018. The claimant was accompanied by his trade union official, PT of UNISON. The dismissal was confirmed in a letter dated 14 August 2018 which the claimant received on 16 August 2018. It confirmed the claimant's "last day of service will be 13 August, the date of our meeting and you will receive a payment in lieu of notice and any outstanding annual leave..."
5. The claimant appealed and the appeal hearing outcome letter dated 8 October 2018 dismissed the appeal and reference was made to the original dismissal on 13 August 2018. The claimant was accompanied by his trade union official PT.
6. On 12 November 2018 the claimant's Claim Form was filed by UNISON on behalf of the claimant without an Early Conciliation Certificate. The claimant left it in the hands of PT who came on record as the claimant's representative. In relation to paragraph 2.3 PT ticked the box confirming there was no ACAS early conciliation certificate number and incorrectly ticked the box that "ACAS doesn't have the power to conciliate on some or all of my claim." As the claimant's only claim was for unfair dismissal it is now accepted by the parties an Early Conciliation Certificate was necessary in order for the claimant's claim to be accepted by the Tribunal.
7. The claimant's claim was rejected by the Tribunal on 15 November 2018 and returned to the claimant confirming the claim appears to be "relevant proceedings" to which the early conciliation provisions apply, in accordance with sections 18 and 18A of the Employment Tribunal Act 1996, and it may not be brought until the claimant has gone through ACAS early conciliation". The claimant was made aware of the rejection beforehand.
8. ACAS Early conciliation took place on 14 November 2018 and on this date ACAS issued the certificate with the ACAS EC reference number.
9. The claim form was lodged with the Tribunal a second time and accepted on 19 November 2018. A letter was written and signed on behalf of the claimant by PT dated 16 November 2018 received 19 November 2018 that referred to the following: "I can now confirm that I made a mistake in competing the claim..."
10. The claimant was informed the second claim form had been accepted and by 10 December 2018 the relevant notice was sent to the respondent who raised the issue of time limits and jurisdiction in its Response.
11. On 12 December 2018 following a written request, PT came off record as acting on behalf of the claimant.

Law

12. Employees who have the right to claim unfair dismissal will generally lose that right if they fail to present their claim to a tribunal before the end of three months beginning with the effective date of termination — S.111(2)(a) ERA. Tribunals have a discretion to extend the time limit if the claimant can show that it was not reasonably practicable to put the claim in on time *and* that the claim has been submitted within a reasonable time of its becoming practicable to present the

complaint — S.111(2)(b). The time limit may also be extended to allow for early conciliation. As there was no early conciliation in Mr Benn's case there cannot be an extension of the statutory time limit.

13. A claimant will not normally be allowed to bring a claim in an employment tribunal unless he has informed ACAS of the complaint giving ACAS the opportunity to try to resolve the case by 'early conciliation.'
14. The EC scheme is set out in Ss.18A and 18B of the Employment Tribunals Act 1996 (ETA), and in the Early Conciliation Rules of Procedure ('the EC Rules') contained in the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254 ('the EC Regulations'). Proceedings in respect of which early conciliation applies includes unfair dismissal. The ACAS conciliator issues an EC certificate as evidence that S.18A(1) ETA has been complied with — S.18A(4) ETA/rule 7 EC Rules. This certificate is vital where the claimant wishes to proceed with his claim as he cannot start proceedings without it in any case to which the EC requirement applies — S.18A(8). The certificate also bears a unique reference number — rule 8(d). This number must be marked on the claimant's claim form when completed to avoid the claim being rejected under rule 10 of the Tribunal Rules.

Conclusion: applying the facts to the law

15. The claimant has lost the right to claim unfair dismissal having failed to present his claim to a Tribunal before the end of three months beginning with the effective date of termination as required by S.111(2)(a) ERA. The primary time limit has not been extended by ACAS early conciliation as this did not take place until after the limitation period had expired and the first claim form lodged with the Tribunal rejected. The primary time limit expired on 12 November 2018, the date when the first claim form was lodged and thereafter rejected.
16. The claimant took the advice of a UNISON representative throughout, who was present when the claimant was summarily dismissed on 13 August 2018, at the appeal hearing, who advised the claimant and who lodged the first ET1 on 12 November 2018 on the claimant's behalf. The Tribunal accepted the claimant's evidence that the claim form was drafted by PT on whose advice he relied. He described how he had "just left it in PT's hands, he is being the case manager." It was only after the first ET1 had been filed the claimant became aware that a mistake had been made by PT and he was out of time.
17. The Tribunal is required to consider whether any substantial fault on the part of the claimant's adviser that has led to the late submission of his claim may be a relevant factor when determining whether it was reasonably practicable under the test set out in S.111(2)(b) ERA for the claimant to present the claim within the prescribed time limit. It is notable following a number of cases, including Times Newspapers Ltd v O'Regan 1977 IRLR 101, EAT, Alliance and Leicester plc v Kidd EAT 0078/07 and London Borough of Islington v Brown EAT 0155/08 an adviser's incorrect advice about the time limits, or other fault leading to the late submission of a claim, will bind the claimant and a Tribunal will be unlikely to find that it was not reasonably practicable to have presented the claim in time. Trade union representatives are 'advisers' and, if they are helping a claimant with his or her case, they are generally assumed to know about ACAS Early conciliation, the need for a ECC, the relevant time limits and to appreciate the necessity of presenting claims in time following early conciliation.

18. In respect of Mr Benn, the Tribunal found he relied completely on the advice given by his trade union representative who had supported him throughout the disciplinary process, was aware the claimant had been summarily dismissed on the 13 August 2018 and at that point should have appreciated the need for early conciliation with ACAS as a precursor of filing the claim form. It is clear from the ET1 that was filed on 14 November 2018 and rejected, the union official advised incorrectly and as conceded in the letter dated 16 November 2018 a “mistake” had been made. As set out in case law, this mistake is attributed to the claimant even though it was that of the union official, and therefore the claimant (who is not personally to blame) cannot claim that it was not reasonably practicable to have presented the claim in time. The Tribunal is bound by legal authority to find the claimant could not rely on the union official’s mistake to excuse late submission of his claim. Clearly, on the facts set out above, had the mistake not been made the claim would have been received in time, and it was reasonably practicable to have presented the claim in time.
19. In conclusion, the claimant’s claim received on 19 November 2018 was not presented before the end of the period of 3 months beginning with 13 August 2018, the effective date of termination of employment. The tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint, which is dismissed.

Employment Judge Shotter 25.3.19

Date \_\_\_\_\_

JUDGMENT & REASONS SENT TO THE  
PARTIES ON

29 March 2019

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