



EMPLOYMENT TRIBUNALS

Claimant: Mr Oliver Hughes
Respondent: Stratford on Avon District Council

Heard at: Birmingham **On:** 7 February 2020
Before: Employment Judge Meichen

Representation

Claimant: In person
Respondent: Mr Sahota, solicitor

JUDGMENT

- (1) The Claimant's claim of constructive unfair dismissal was brought out of time. However, it was not reasonably practicable for the claim to have been brought in time and it was brought within a further reasonable period. The Tribunal therefore has jurisdiction to consider this claim.
- (2) There shall be a further preliminary hearing to identify the issues and make case management orders. The Respondent had complained in its ET3 response that the claim was not clearly particularised. There was no time left at the end of today's hearing to attempt to identify the issues and so I agreed it would be sensible to list a further hearing.
- (3) Shortly after the hearing the Respondent requested written reasons. I had delivered an ex tempore judgment at the end of the hearing. Therefore, what follows is largely the typed transcript of the judgment I delivered orally.
- (4) I have taken the opportunity to clarify a couple of points and added the quote from Lord Bingham which seemed to neatly encapsulate the concept I was attempting to explain and also a clearer summary of my interpretation of the correct application of the deeming provision at paragraph 32.

REASONS

Introduction and issues

1. The issues for this hearing were determined by Employment Judge Cookson when she listed this matter on the 26 September 2019 to determine the following:
 - a. Whether the (unfair dismissal) claim was presented in time.
 - b. If not, was it reasonably practicable for the time limit to be complied with by the Claimant.
2. We agreed at the outset of the hearing today that the issues for determination also included a further sub issue which was in the event that the Tribunal found that it was not reasonably practicable for the time limit to be complied with, whether the claim was brought within a further reasonable period.
3. The Respondent has been ably represented today by its Solicitor Mr Sahota and the Claimant has represented himself. I should note from the outset that the Claimant is a practising Solicitor. However he has told me, and I accept, that he has no expertise in employment law.
4. I also think it is appropriate to identify from the outset that in my judgment, the Claimant has been entirely honest in the evidence which he has given orally today and in the witness statement which he prepared for today's hearing. On the basis of everything I've seen and heard, I have reached the conclusion that I have no basis on which to disbelieve the Claimant on any relevant matter. In particular I have accepted the Claimant's evidence that he did not receive a copy of his ACAS certificate until 4 September 2019.

Background and findings of fact

5. The essential background to the issue which I have to determine today is as follows.
6. The effective date of the termination of the Claimant's employment was 29 March 2019. The Claimant submitted his resignation and his main claim is that he was constructively unfairly dismissed.
7. The Claimant contacted ACAS on 25 June 2019 and the period of early conciliation was subsequently extended. On 2 August 2019, ACAS contacted the Claimant by telephone to confirm that the Respondent did not wish to continue conciliating and they would therefore issue a certificate.
8. By that stage (2 August 2019) the Claimant had already conducted online research into time limits relating to Employment Tribunal claims. He was aware from that research, which he conducted himself, that he had a period of one month from receiving the early conciliation certificate to submit his claim.
9. The next significant matter in the timeline relates to an email which appeared on page 37 of the bundle which was before me today. That

email on its face is an email which was sent by a Conciliator at ACAS to the Claimant on Friday 2 August 2019 at 18:49.

10. The Claimant's case is that he did not receive that email. He says it never arrived in his email inbox and therefore he did not, on that date, receive the early conciliation certificate which appears to have been attached to the email which ACAS sent.
11. The Claimant has not been able to definitively explain why that email apparently was not received in his inbox. He has suggested that his email address may have been entered incorrectly, because in other emails which he received from ACAS, his email address is contained in the "to" line of the email, whereas in this particular email, it simply has his name and not his address. The Claimant also observes that the 2 August email was apparently sent from a different email address ("IDR emails") to the one from which he normally received emails from ACAS ("case@acas"). That might support the suggestion that a mistake may have been made as to the Claimant's email address.
12. I can only say on the basis of the evidence which is before me, that it is possible that a mistake was made as to the Claimant's email address, but I cannot put it any higher than that and I cannot make any findings even on the balance of probabilities, whether the email address was correctly entered or not.
13. It also strikes me as possible that ACAS sent the certificate to a different Oliver Hughes as this is not a particularly uncommon name. Other possibilities are that the email was sent to the Claimant but blocked by his email as it was sent from a different email address or simply that there was some fault with the Claimant's email system.
14. Taking into account all of the evidence and in particular the subsequent emails which I will come to explain in a moment, my finding is that, for whatever reason, the email apparently sent by ACAS on 2 August 2019 was not as a matter of fact received in the Claimant's inbox. The Claimant did not therefore in fact receive the early conciliation certificate on the 2 August 2019. I have taken into account the Claimant's written and oral evidence and the questions which were relevant to this aspect of the case which were put to him both by myself and during cross examination on behalf of the Respondent. I find that the Claimant's evidence on this point was consistent and credible.
15. In my judgment my finding that the certificate was not in fact received by the Claimant is supported by the subsequent emails which I mentioned earlier. I can see from the email chains in the bundle, that on the 3 September 2019, the Claimant sent an email to ACAS at 8:06pm chasing the certificate. That email read as follows:

"I received a telephone call from ACAS confirming that the Council did not wish to conciliate, but I cannot see that I have received the Conciliation Certificate from ACAS, please can you send it to me."

16. The Claimant also told me, and I accept, that he spoke to ACAS on the 3 September for the same reason; that is to chase up the certificate which he had not received.
17. The Claimant got a response to his email and his chasing on the 4 September 2019. That was an email which was sent by ACAS at 14:08 which said as follows:
- “Please find attached a further copy of the Certificate as originally sent on the 2 August.”*
18. The Claimant later on the same afternoon responded to that email and he said this:
- “I have no record of having received the email below before today, I cannot see my email address in it, only Oliver Hughes.”*
19. It can fairly be observed then that the Claimant chased ACAS directly (rather than submitting his claim) on the basis that he had not received his certificate and when the certificate was sent to him he immediately said that he had not received it previously. In addition, the claimant wrote in his claim form (which he drafted on 4 September):
- “I only received my ACAS certificate today”*
20. I considered that these actions were consistent with the Claimant genuinely not having in fact received his certificate on 2 August 2019.
21. The Claimant also tells me in his witness statement, and I accept, that he searched his email inbox, both on his mobile phone and his laptop, but could find no record of having received the certificate at any stage prior to the 4 September.
22. Once the Claimant actually had the certificate in his possession, which I accept was for the first time on the 4 September, he on any view acted promptly to submit his claim. He prepared his claim form in the evening of 4 September and it was recorded as received by the Tribunal on 5 September. His claim (or at least his main claim) was for constructive unfair dismissal.

The law

23. The time limits for submitting a complaint of unfair dismissal are set by s.111 Employment Right Act 1996 (“ERA”). That section relevantly provides as follows:
- (2) Subject to the following provisions of this section, an employment 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.

(2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).

24. Section 207B ERA, referred to in s.111(2A) deals with the extension of time limits in cases where early conciliation applies. I shall set it out in full:

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(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.

25. As to the circumstances in which a Claimant is treated as receiving an early conciliation certificate for the purpose of calculating Day B (see s. 207B(2)(b)) the relevant regulations are the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. The Schedule to those Regulations sets out the relevant rules of procedure and in particular rule 9 provides as follows:

An early conciliation certificate will be deemed received—

(a) if sent by email, on the day it is sent.

26. Whenever the law provides an event is to be “treated as” something or “deemed” to be something, it is because otherwise the event is not, or may not, be that something. This concept was pithily explained in a different context by Lord Bingham in Celtec v Astley [2006] UKHL 29 when he said:

“In legal parlance, a matter is only deemed to be the case when it is not, or may not, in fact be so, or would not or might not be thought to be so if not deemed to be so.”

27. Therefore in the case of an early conciliation certificate sent by email, it is deemed as having been received on the day it is sent, regardless of whether it is in fact received by a claimant in their inbox (“the deeming provision”). Accordingly, the deeming provision is a legal fiction which may not necessarily reflect actual reality.

Conclusions

28. There was no dispute that this was a case to which early conciliation applied and the Claimant complied with the requirement to contact ACAS before starting proceedings. Day A was the day on which the Claimant contacted ACAS which was 25 June 2019. The first controversial question I had to determine was what Day B was.
29. In my judgment, I can only conclude that the email of 2 August 2019 which appears to have been sent by ACAS, is genuine and that it was sent on the date which the email shows, ie: 2 August 2019. In my judgment, there is no proper evidential basis on which I could find that that email had not been sent by ACAS. Applying the law as I have set it out that means that the ACAS certificate was deemed to have been received by the Claimant on the day it was sent – 2 August 2019. Day B was therefore 2 August 2019.
30. That means that the time limit in this case expired one month after 2 August, that is 2 September 2019. As I have already mentioned, it was not in fact brought until 5 September 2019. The claim was therefore brought out of time.
31. However, I must go on to consider whether it was reasonably practicable for the claim to have been brought in time. In my judgment, my answer to that question must be no. The reason why I so find, is because I have found as a matter of fact that the Claimant did not have the early conciliation certificate until 4 September 2019. The Claimant needed the early conciliation certificate in order to lodge his claim; this claim not being one to which one of the early conciliation exemptions applies. The Claimant would not have been able to bring his claim within the time limit as if he had attempted to do so without having an early conciliation certificate it would have been rejected.

32. This conclusion means that I have found that the deeming provision contained in s.207B(2)(b) ERA applies for the purpose of determining the time limit set out in s.111(2)(a) ERA but not for the purpose of considering an extension of the time limit in accordance with s. 111(2)(b) ERA. I think this finding is supported by the following:
- (i) Section 207B(1) makes it clear that that section applies where the ERA provides for it to apply.
 - (ii) Section 111(2A) stipulates that s. 207B applies for the purpose of subsection (2)(a) of s.111. It does not say that s. 207B applies to subsection (2)(b) of s.111.
 - (iii) Therefore, the ERA does not make any provision for the deeming provision contained in s.207B to apply for the purpose of considering an extension of the time limit in accordance with s. 111(2)(b) ERA
33. I also think it would be illogical and unjust if I was required to find that it was reasonably practicable for the Claimant to bring his claim in time when I have found as a matter of fact that he did not at the relevant time have the early conciliation certificate which was a necessary prerequisite to him bringing a claim.
34. As part of my decision making I have considered carefully the evidence which I've heard surrounding the fact that the Claimant waited from 2 August 2019 when he knew early conciliation had been brought to an end until 3 September 2019 which was the first time that he chased ACAS for the certificate which he had not as a matter of fact received by then. As observed by the Respondent that is a period of approximately one month. The Claimant has given me evidence, which I accept, that that particular time period was especially challenging for him. The key issues were as follows.
35. The Claimant had been diagnosed with stress earlier in 2019, and he had been signed off from January until the 1 April. Although the Claimant made it clear that he was not, as far as he is concerned, suffering from any particular medical condition as of August and September, it is plain from everything he said that he was in some respects still experiencing some difficult aftereffects of that stress illness.
36. Moreover, after leaving the Respondent the Claimant had for the first time started his own business which I accept would have been a big change in life and work after a period of being employed by a Local Authority and I accept that would bring its own challenges.
37. Further to that, the most significant factor was that the Claimant's six-year-old son was displaying some very challenging behaviours (which the Claimant gave me some examples of) and he was in the process of being assessed for autism. I accept that that factor in particular meant that this was a particularly challenging and difficult time for the Claimant.

38. I accept that these factors all combined together to make this a difficult time for the Claimant. I accept that evidence and I find it is relevant. However, it does not in fact seem to me to be the crucial factor. The crucial factor seems to me to be that as the Claimant frankly explained when he gave his oral evidence today he had in his mind that he had a month from when ACAS sent him the certificate to lodge his claim. He had had the conversation with ACAS on 2 August when they told him that conciliation was ending, and they would be sending him the certificate. He was therefore waiting for that certificate before he took the next step of submitting his claim.
39. It might be said that from the Claimant's perspective his understanding was that the ball was in ACAS' court and he didn't need to do anything until the certificate was sent to him. He therefore in his words put it to the back of his mind as he was waiting for the certificate.
40. In my judgment, I can't really see anything wrong with the Claimant adopting that state of mind. The information which he had gleaned from his online research was that he had a month from being sent the certificate and that was accurate. He had various other things going on in his life as I have outlined and, in those circumstances, it seems to me that the Claimant acted reasonably throughout.
41. I asked the Claimant in evidence why it was that he contacted ACAS to chase them on the 3 September. He explained that that was when his son had undergone the assessment for autism at Birmingham Children's Hospital and therefore, he at that point turned his mind back to obtaining the certificate in order to progress his claim. Again, I cannot see anything which is unreasonable about that.
42. I bear in mind that although the Claimant is a solicitor, he has no expertise in employment law and so I accept his point that he should not be held to some higher standard. An employment lawyer would probably have chased ACAS sooner, but the Claimant did not have the benefit of advice from an employment lawyer. The Claimant knew he had a month from the date of the ACAS Certificate, and he was entitled as he saw it, and as I find was reasonable, to wait for ACAS to send it to him.
43. It was only when the Claimant was alerted by ACAS to the fact that they said they had sent the certificate earlier that he realised there may be an issue with time limits and that was on 4 September. As soon as the Claimant got the certificate on 4 September, it is plain that he acted as quickly as he possibly could to prepare and submit his claim so that it was recorded as received by the Tribunal on the 5 September. In my judgment this is further evidence of the Claimant acting reasonably in the circumstances.
44. For those reasons, my judgment is that it was not reasonably practicable for this claim to have been brought in time and it has been brought within a further reasonable period. Therefore, my decision is

that the Tribunal does have jurisdiction to hear the Claimant's claim of unfair dismissal.

Employment Judge Meichen
19 February 2020