

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105592/16

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Held in Glasgow on 1 March 2017

Employment Judge: Susan Walker (sitting alone)

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Ms A Fergusson

**Claimant
Represented by:
Mr Tinnion, of counsel,**

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Combat Stress

**Respondent
Represented by:
Mr Bayne, of counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim was presented out of time. However, the Tribunal is satisfied that it was not reasonably practicable for the claim to be presented in time and that it was then presented within a reasonable period.

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The claim can therefore proceed and a case management Hearing will be listed in due course as indicated by Judge Gall.

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REASONS

Introduction

40 1. This is a claim of constructive unfair dismissal and unlawful deduction from wages. This Preliminary Hearing is essentially concerned with the effect of

E.T. Z4 (WR)

early conciliation on time limits and specifically the interpretation of section 207B of the Employment Rights Act 1996 (“the ERA”). Depending on the interpretation, the claim is either in time or it is late.

5 2. At the start of the hearing, I provided counsel with two decisions of Employment Tribunals in England on the point and the hearing adjourned to give them time to consider them. The cases are *Chandler v Thanet District Council ET 2301782/14* held at Ashford on 20 January 2015 and *Myers and Wathey v Nottingham C.C ET 2601136/15* and *2601137/15* held on 11
10 January 2016.

3. It was also agreed that the Tribunal would consider first whether the claim had been presented outside the statutory time limit and only if that was the case, to hear evidence from Mr Argue, solicitor for the claimant at the
15 relevant time, as his evidence related only to the issue of reasonable practicability. I delivered judgment with oral reasons on the first issue and reserved my decision on the issue of reasonable practicability. This judgment contains the reasons for both matters.

20 4. The hearing focussed on the complaint of unfair dismissal. However the reasons apply equally to the complaint of unlawful deduction from wages.

Relevant law

25 5. Section 111(2) of the ERA provides that a Tribunal may 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
30 to be presented before the end of that period of three months. Section 23 of the ERA includes a provision to the same effect for a claim of unlawful deduction from wages although the three-month period in that case begins on the date of payment of the wages from which the deduction was made.

6. Subject to some exceptions, before a claim can be presented to the Employment Tribunal, the claimant must comply with the requirement for early conciliation as set out in Section 18A of the Employment Tribunals Act 1996 and in the Employment Tribunals (Early conciliation: Exemptions and Rules of Procedure) Regulations 2014. It is not in dispute that the claimant was required to comply with the requirement for early conciliation. That means that the claimant had to present an early conciliation from to ACAS and obtain an Early conciliation certificate before she could present a complaint to the Employment Tribunal. It is not in dispute that she complied with this requirement.

7. Both Section 111 and Section 23 of the ERA provide that Section 207B applies to them.

8. Section 207B provides for the extension of time limits where early conciliation applies. Specifically it provides in this section:-

“(2) -

(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 having 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.*

5 (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*

10 (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.”*

15 **The first issue – was the claim in time?**

9. The relevant facts are not in dispute. The significant dates are:-

ACAS received the early conciliation form (Day A)	14 July 2016
20 The effective date of termination	11 August 2016
Early conciliation certificate received (Day B)	14 August 2016
ET1 presented	18 November 2016

10. The essential question before me was how Section 207B is to be
25 interpreted when early conciliation starts before the primary time limit starts to run and when Day A is therefore before the effective date of termination.

11. Mr Tinnion urges me to adopt the reasoning of the two ET decisions in
30 England and Wales and find that the time spent in early conciliation is simply added to the primary time limit which is therefore extended by that number of days. The time limit in this case would then expire 30 days after 11 November 2016 and the claim, which was presented on 18 November 2016, would be in time.

12. Mr Bayne urges me to come to a different conclusion and find that the days before the effective date of termination (and before the three month time limit starts to run) are simply not taken into account at all. The time limit would therefore expire on 14 November 2016 and on that analysis the claim is late.
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13. It is agreed that there is no appellate authority on the point. In most cases it makes no difference to the outcome.
- 10 14. With no disrespect to my judicial colleagues in England, I have come to a different conclusion to them. It agree with Mr Bayne that the wording of Section 207B is that of a “*stop the clock*” provision. It states that when working out when a time limit expires, the “*period beginning with the day after day A and ending with day B is not to be counted.*” That, in my view, means that those specific days that fall within the period are not counted. It does not mean that an equivalent number of days is added to the primary time limit. To put it simplistically, a clock cannot be “*stopped*” if it has not yet started.
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- 20 15. Mr Tinnion suggests that this means the start date of the limitation period is delayed and this is not permitted. I don’t see it that way. The limitation period still starts on the effective date of termination, 12 August 2016. However, in this case, as the claimant was still engaged in early conciliation, that day (12 August) is not counted as part of the limitation period.
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16. Mr Tinnion suggests that this interpretation is not in accordance with the intention of parliament. This is also suggested by Employment Judge Kurrein in the *Chandler* case. With respect to both, I do not agree. The purpose of Section 207B was to ensure that claimants were not disadvantaged by engaging in early conciliation. A claimant cannot present a claim without complying with the requirement for early conciliation. A claimant in the normal course who is making a claim for unfair dismissal will
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engage in early conciliation after the effective date of termination. This would result in the claimant being unable to present a claim but still having time running against her. This is why Section 207B provides that days spent on EC *“do not count”*.

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17. As Mr Tinnion says, most of the days in the present case that are covered by Section 207B would not have *“counted”* anyway towards the three month time limit. That is clearly correct but in my view, that is exactly why they don't count in this case – there is no disadvantage to the claimant in respect of those days because of the requirement for early conciliation. Mr Tinnion points out that on my analysis, where early conciliation is started and completed before the effective date of termination, the claimant would get no extension of time at all. That is clearly correct but it is not clear to me why a claimant, in those admittedly unusual circumstances, needs an extension of time at all? The clock, in terms of the limitation period, has not yet started running when early conciliation is competed. I do not consider that the purpose of section 207B is to extend the time limit every time a claimant engages in early conciliation. Rather it is to prevent the claimant being disadvantaged by the three month period being reduced by engaging in EC.

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18. Mr Tinnion submitted that the effect of this analysis would be to delay the start of the three month period which is impermissible because the statutory provision focuses on the expiry of the time limit and says nothing about delaying the start. In my view the correct analysis is not that the start date (the effective date of termination) is altered but that the first few days do not *“count”* towards the three month time period.

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19. Whether you say Section 207B delays the start date or extends the expiry date is not critical in my view. The key thing is whether the *“period”* is an actual calendar period of particular days or whether it is an equivalent number of days. In my view it is the former.

20. Employment Judge Kurrein and Mr Tinnion place emphasis on the HMCTS Guidance. I accept that the HMCTS guidance does not cover this specific point. It is not particularly helpful as it refers to “*stop the clock*” but also refers to “*adding days*” to the normal time limit. I think it is fair to say that most people working out the effect of early conciliation on time limits do it on the basis that they simply “*add*” the early conciliation days to the normal end date. This is the approach accepted by the Employment Judges in *Chandler* and *Myers*. I do not consider that this is correct and while the HMCTS Guidance is issued to assist parties, it does not have statutory force and should not impact on how legislation is interpreted. It could however, be relevant to reasonable practicability (see below).
21. The most convincing argument against my conclusion is one of simplicity and certainty. I appreciate that if I am correct, then it becomes more difficult to work out when a claim is in time or not. However, as Mr Bayne says, that is already the position where a claim includes an allegation of discrimination which may predate the dismissal. When time starts to run in such cases is not always clear. The effective date of termination, on the other hand, is usually clear and the early conciliation certificate sets out when the relevant dates. It should be straightforward to work it out. I appreciate that until we get appellate authority the position will remain unclear and that is clearly undesirable. However, I have to interpret the statutory provisions as I think is correct.
22. I should also mention the reference by Employment Judge Britton to the case of *Prison Service v Barua* which dealt with the extension of time under the old Dispute Resolution Regulations. In that case Mr Justice Underhill, suggested it would be unsatisfactory if an employee who lodged a grievance the day after time started to run should get 6 months to bring a claim whereas one who lodged it earlier had only 3 months and a day. That would penalise employees who acted promptly. Judge Britton considered that to accept the respondent’s interpretation of Section 207B would deter

employees from seeking ACAS conciliation sooner rather than later and that this was incompatible with the intention of the conciliation provisions.

23. With respect, I do not consider a true analogy can be drawn between the two situations. The issue in *Barua*, as I understand it, was whether the claimant was entitled to the three month extension that was available under the Regulations then in place, by virtue of having lodged a grievance before the start of the 3 month limitation period. The statutory provision provided that an extension of time was granted where the grievance was lodged in the normal time limit. It was argued that this was only available where the grievance was lodged during the three month period (between the start and end of the three month time limit) and that a grievance lodged earlier did not trigger the extension of time. Mr Justice Underhill was commenting that it would be unfortunate not to allow the extra period (which was to intended to encourage the resolution of disputes) just because a grievance was presented at an early stage. The key thing was when the grievance process was started.

24. What is being addressed in Section 207B is quite different and much more specific. The extra time to lodge the claim is given specifically to compensate for days spent complying with the requirement for early conciliation during which time the claimant is prevented from instituting proceedings. The claimant starts the process with the early conciliation form but it is issuing of the early conciliation certificate that starts the clock again. So it is not just when the claimant starts early conciliation that determines how many extra days there are but critically when the process concludes. The provision being considered *Barua* had a “cliff edge” effect. Either the claimant got an extra 3 months or he didn’t. That is not the case with Section 207B. The number of days will depend on how many days of the three-month period have been taken out for early conciliation.

25. I appreciate it is extremely unsatisfactory to have different decisions from different Tribunals and I have a great deal of sympathy for those wrestling

with the provisions. One judge, Judge Kurrain, has said the issue is finely balanced and finds for the claimant, Judge Britton consider it is not ambiguous and finds for the claimant and I am now finding for the respondent. However, employment tribunal decisions are not binding on other Tribunals.

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26. I consider, therefore, that in this case the days between 15 July 2016 (being the day after day A) and 14 August 2016 are not to be counted when calculating the time limit. The three month period would otherwise start on 12 August 2016 and conclude on 11 November. As the 12, 13, and 14 August are not counted, the three month time limit expires on 14 November 2016.

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27. The claim has therefore been presented late. I will now consider whether it was reasonably practicable to present the case in time.

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Second issue – was it reasonably practicable to bring the claim in time?

28. Having heard from Mr Argue, I consider the following facts to be established in addition to the agreed dates set out above:-

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(i) The claimant contacted ACAS herself to commence the early conciliation process.

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(ii) She instructed Thompsons solicitors about the effective date of termination

(iii) The procedure at Thompsons was that details of the case were input to a computer case management system by a member of administrative staff. Details would include the date of dismissal and would generate alerts that the time limit was approaching for presentation of the ET1. The alerts would be issued to the acting

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solicitor 28, 21 and 14 days before the final date for presentation. At 14 days, the acting solicitor would have to contact the partner in charge and explain why the claim had not been presented. The computer system did not take account of early conciliation.

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(iv) In the claimant's case, the usual alerts were generated. Mr Argue was the acting solicitor. When he got the 14 day alert, Mr Argue advised the partner that because of early conciliation the relevant date was in fact 10 December 2016, some 6 weeks away.

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(v) Mr Argue was going on holiday on 18 November 2016 and therefore submitted the claim that day as he was "*clearing his desk*" therefore submitted the claim on 18 November 2016. However at that stage he believed he had until the 10 December to do so.

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(vi) Thompsons solicitors had provided training to its solicitors, including Mr Argue on the effect of early conciliation. Mr Argue understood that he had to add the number of days spent on early conciliation to the three month time limit. He was not aware that there might be a different calculation if the early conciliation period started before the effective date of termination.

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Respondent's submissions

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29. The matter is a jurisdictional one. The onus is on the claimant to prove that it was not reasonably practicable for the claim to be presented in time and cannot realistically be discharged, given that she has been represented by solicitors (reference to *Dedman v British Building and Engineering Appliance Ltd [1974] 1 All ER 205*).

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30. Mr Bayne invites me to find that the claimant's solicitors were negligent. He submits that the wording is clear and a reasonably competent solicitor should have come to the same conclusion that I have. At the least, they

should have been aware that there was a potential problem and taken steps to ensure that claims were submitted at the earlier date. It is not necessary for the Tribunal to find that Mr Argue was negligent. The question is whether Thompsons solicitors were negligent. That is who the claimant instructed. They are a large firm with a complicated system to ensure that claims are presented in time. There is a heavy burden on solicitors to make sure case are presented in time.

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31. He submitted that if the solicitor is negligent, then it cannot be “*not reasonably practicable*” for the claim to be submitted in time. However even if the solicitor is not negligent, he submits there is a question of fact for the employment tribunal as to whether the actions of the solicitor in giving wrong advice or missing a time limit were reasonable.

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32. Mr Bayne submitted that I should have regard for the case of *Northampton County Council v Entwistle* [2010] IRLR 741 and not the other cases relied on by the claimant which were not in point. While it is theoretically possible for a solicitor to miss the time limit and not be negligent, that would involve the sort of situation envisaged in *Entwistle* where an employer misleads the solicitor. If the solicitor knows, or ought to know, when the expiry date is, that is the end of the matter.

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33. Mr Bayne further submitted that even if Thompsons thought the later date was correct, if they recognise there is an argument then they should present the claim before the earlier date. Not to do so would be negligent. The question is whether Thompsons ought to have recognised the problem? Mr Bayne submits that they should. Section 207B is complicated and they should have recognised it could be interpreted in more than one way.

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Claimant's submissions

- 5 34. Mr Timmion submits either there is negligence (in which case he agrees that the claimant cannot benefit from the extension of time) or there isn't. If there isn't negligence, he submits that she must benefit from the extension.
- 10 35. He submits that the circumstances of the present case cannot amount to negligence. The solicitors were not aware there was an issue. It is not established that "*no competent solicitor*" would have acted in the same way. Two Employment Judges have come to the same view as Thompsons solicitors did on the meaning of Section 207B.
- 15 36. Mr Tinnion submits that the respondent has not provided the Tribunal with expert evidence on what a reasonable solicitor would have known.
- 20 37. Mr Tinnion invites me to consider Mr Justice Underhill's comments in *Entwistle* when he says at para 14: "*It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is reasonable...The paradigm case though not the only example of such circumstances would be where both the claimant and the adviser had been misled by the employer as to some material factual matter*". He also asked the Tribunal to note that in *Entwistle* it was accepted that there had been negligence. That is not the case here.
- 25 38. Mr Tinnion also referred me to *Ebay (UK) Ltd v Buzzeo UKEAT/0159/13* where HHJ Richardson relied on that passage to derive the following proposition of law "*An adviser's failure to give the correct advice may itself be reasonable and if so, will not in itself be a bar to a finding that it was not reasonably practicable to bring the claim in time*". He also referred to *Balfour Beatty Engineering Services v Allen 2011 UKEAT/0236/11* where
- 30 HHJ Richardson again said:-

5 *“It follows in my judgment from what Underhill P collected from the authorities with which analysis I agree that it may not be such an overarching principle that the Claimant must accept as his responsibility an error on the part of skilled advisors. If there is no negligence, then it will not be reasonably practicable for the employee to put his claim in time.”*

39. In the present case, Mr Tinnion submits that the claimant entrusted her case to Mr Argue a skilled lawyer. It was reasonable for her to do so. Mr Argue had had training and did everything that he was meant to do. He would have remembered if the point had been covered in training. It is important that the Tribunal is not making a judgment about today but the reasonableness of conduct in 2016.

15 40. Whatever the correct construction is of Section 207B it is not a clear, straightforward matter. The claimant’s situation was unusual in that her early conciliation notification took place before her effective date of termination.

20 41. In November 2016 there was, and still is not, any appellate authority on the point. The issue is a novel point of law. In the absence of any binding or persuasive authority it was not negligent of Mr Argue to consider and act upon the basis that the deadline for presenting the claimant’s claim was within 30 days of 11 November 2016. Even if the Tribunal disagrees, there is an arguable case. Mr Bayne says that if the solicitor gets the law wrong then it must be negligent. That cannot be right.

42. The HMCTS Guidance suggests you just add the days to the expiry date.

30 43. If the Tribunal is satisfied that it was not reasonably practicable to present the claim in time, it was only presented 4 days late which must be a reasonable period.

Respondent in reply

44. Mr Bayne responded to the issue of expert evidence saying that this had only been raised the night before. If the Tribunal was to consider it needed expert evidence, then the correct course would be to adjourn to allow that to be provided. However, Mr Bayne's position was that it was not necessary to find negligence (although that would dispose of the matter). It then became a question of fact whether the solicitor was "*reasonably ignorant*" of the time limit.

45. Mr Tinnion repeated his submission that if there was negligence, then the claimant loses but if there is not, then, relying on *Balfour Beatty*, the claimant must win.

Decision

46. The *Dedman* principle, as confirmed by the Court of Appeal in *Marks and Spencer plc v Williams Ryan [2005] ICR 1293*, is that where a claimant has retained a solicitor to act for her and fails to meet the time limit because of the solicitor's negligence, this will defeat any attempt to argue that it was not reasonably practicable to present the claim in time. Parties in this case are agreed that if I find that the solicitor in this case was negligent, then the claimant will fail.

47. In *Entwhistle*, Mr Justice Underhill said that, subject to that principle, "reasonable practicability" is a question of fact for the Tribunal and that, in principle, there could be cases where a solicitor is involved and a time limit is missed and the extension granted. The question is whether the solicitor's failure was itself reasonable.

48. Mr Tinnion invites me to take from the case of *Balfour Beatty* a proposition that if the solicitor is not negligent, then it will not be reasonably practicable for the claimant to put in his claim in time. I agree that that is what was said

but it was an obiter remark and is said to follow from what Mr Justice Underhill had said in *Entwhistle*. I am not convinced that the matter is as bilateral as that. I agree with Mr Bayne that the correct approach is firstly to consider whether the claimant's solicitor was negligent. If that is not established, I must then consider whether the solicitor's misunderstanding (as I have found it to be) about the effect of Section 207B was reasonable. If so, it will not be reasonably practicable for the claimant to have presented her claim in time. The consideration in each question is very similar but could, at least in theory, provide different results.

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49. I agree also with Mr Bayne that the question is not whether the solicitors should have agreed with my interpretation of Section 207B but whether they should have been aware there was a risk and guarded against it.

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50. Turning first to the consider whether Mr Argue and/or Thompsons solicitors were negligent, the question is whether he or they exercised the degree of skill and care which is ordinarily exercised by reasonably competent members of the profession. I do not have expert evidence but I consider that my judicial knowledge in this area is relevant. This is the first time that the issue has been raised in Scotland to my knowledge. I was unaware of the issue. I was unaware of the two decisions in Employment Tribunals in England and Wales, before preparing for this hearing, and clearly so were the two experienced counsel appearing in this case. I would not categorise the solicitor's lack of awareness of the issue as negligent. While in an, ideal world, solicitors would be aware of any potential ambiguity in legislation and guard against it, the rate of change in employment law is fast and the effect of early conciliation is still being tested in the appellate courts. There is no appellate decision on this point. I do not consider the solicitors in this case to be negligent.

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51. For very similar reasons, I consider that it was reasonable for the solicitors to interpret Section 207B in the way that they did. Even though I disagree, the point is not an easy one. I may be wrong and two other Employment

Judges agreed with their interpretation. Had they researched the point, the most they would have found would be two first instance decisions that supported their interpretation.

5 52. The Guidance provided by HMCTS does not cover the point and it would be reasonable for someone looking to that for directions to understand that all that was required was to “*add the days*”.

10 53. In these circumstances, I am satisfied that the solicitor’s mistake was reasonable and that in these circumstances, it was not reasonably practicable for the claim to be presented in time.

15 54. I then have to consider whether it was presented within a reasonable period. The claim was only 4 days late and I do not understand the respondent to be arguing that this was not a further reasonable period. In any event, I consider that this short delay was a reasonable period and so the claim can proceed.

20 55. I will now give instructions for a case management hearing to be listed as directed by Judge Gall at the earlier preliminary hearing.

56. I am grateful to counsel for their thoughtful submissions.

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30 Employment Judge: Susan Walker
Date of Judgment: 03 March 2017
Entered in register: 06 March 2017
and copied to parties

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