



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Birch

Respondent: HSBC Bank Plc

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 10 December 2020

Before: Employment Judge Moor

Representation

Claimant: In person

Respondent: Miss D Masters, counsel

JUDGMENT

The complaint of unfair dismissal is dismissed, because it was not brought within the relevant time limit when it was reasonably practicable to do so.

REASONS

1. Mrs Birch brings a complaint of unfair constructive dismissal.

Preliminary Issue

2. The Claimant resigned on 3 October 2019, giving notice. The effective date of termination was 1 November 2019. The Claimant began Early Conciliation on 21 January 2020. She received the Early Conciliation certificate on 21 February 2020.
3. The parties agree that sections 111 and 207B of the Employment Rights Act 1996 ('ERA') mean that here the time limit for the presentation of a complaint to the Tribunal expired on 21 March 2020. The Claimant presented her complaint to the Tribunal on 9 April 2020.

4. The preliminary issues for me are therefore:
 - 4.1. whether I am satisfied that it was not reasonably practicable for the complaint to be presented on or before 21 March 2020; and
 - 4.2. if so, what further period was reasonable for the presentation of the complaint.

Early Conciliation Provisions and Time Limits

5. A little legislative history might help put the facts I find in context. Before the introduction of section 207B of the ERA (by the Enterprise and Regulatory Reform Act 2013), the time limit for bringing an unfair dismissal claim was 3 months minus 1 day from the effective date of termination.
6. The 2013 Act amended the Employment Tribunals Act 1996 ('ETA'), by requiring a compulsory first step before complaints to the Tribunal would be accepted: the prospective claimant must contact ACAS with certain information. ACAS then offers the prospective parties conciliation i.e. the opportunity to negotiate. This is known as Early Conciliation ('EC'). In order that time was allowed for EC, the time limits for complaints to be presented to the Tribunal were extended.
7. Section 18A of the ETA set a 'prescribed period' for EC at the end of which, if a settlement had not been reached, ACAS would issue a certificate to the potential claimant, see section 18A(4). At the time, the prescribed period was one month. (The provisions also allowed the conciliation officer to continue to try to promote settlement after the expiry of that period, see section 18A(5) of the ETA.)
8. The issuing of the ACAS certificate has two important effects:
 - 8.1. first, it is needed in order to bring a Tribunal claim; and
 - 8.2. second, upon its issue, the time limit clock starts ticking again, see section 207B ERA.
9. The extension of the time limit to accommodate EC is not the same in every case: it depends upon when EC began and when would have been the expiry of the original time limit.
10. In this case the parties agree that section 207B(4) of the ERA applied because the original time limit would have expired during the period of EC. In such a case, the time limit is extended by one month from the receipt of the certificate. Therefore, the final time limit was 21 March 2020, one month after the issue of the ACAS certificate on 21 February 2020.

Findings of Fact

11. Having heard the evidence of the Claimant and having read the documents referred to me, I make the following findings of fact.
12. The Claimant worked for the Respondent bank for 22 years. She alleges that in the few years of her employment she was treated so badly that

she was entitled to treat herself as dismissed. She resigned on 3 October 2019.

13. The Claimant understood the concept of constructive dismissal. And, while her evidence varied on this point, I find it most likely that she thought about the possibility of bringing an unfair dismissal claim at the time of her resignation. She also had hopes of settling her differences with her ex-employer via the grievance she commenced after her resignation or by negotiation. I find, however, as a last resort, she knew she could bring an unfair dismissal claim in the Employment Tribunal. The Claimant also knew or found out enough about the Tribunal process to start EC with ACAS on 21 January 2020.
14. The grievance was unsuccessful initially and Mrs Birch appealed. When she began EC with ACAS, that appeal was ongoing.
15. The Claimant also knew that there was a time limit to bring an unfair dismissal claim. Shortly after she began EC, she spoke to a conciliator named Alan. He told her that during EC the time limit clock had been paused. I accept that *at this point* this is what she understood. (She was also provided with a pdf document 'conciliation explained', which I have not seen.)
16. Not very much happened by way of negotiation during EC. On 28 January 2020, the Claimant proposed that she receive a redundancy payment based on 23 years' service. On 6 February ACAS told her that the Respondent had talked about her withdrawing the grievance. The Claimant told ACAS she would consider this '*but the settlement would need to be substantial*'. She did not hear anything else back from the Respondent via ACAS. I do not accept the Claimant's description of the negotiation as being near to a settlement: the Claimant had not heard any proposed figure from the Respondent and she had suggested that it be substantial. Discussions were tentative, at best.
17. The Claimant received the ACAS Certificate on 21 February 2020. It came under cover of an email from Alan the conciliator as follows:

Here is your Certificate which is evidence that you notified Acas before making a tribunal application... Acas cannot advise you about when a tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time.
18. I do not accept the Claimant's evidence that she saw this as a 'system' generated email. This is because it was from Alan, her conciliator. I do not find it plausible that she read it as somehow automatically generated when it came in the name of the particular individual handling her negotiation.
19. After this the Claimant says, and I accept, that she tried to telephone her conciliator on a number of occasions but did not get through. She wanted to find out more information about the whole situation. She left a few voicemails but Alan did not return them. The Claimant was very frustrated by this lack of contact, so after a few weeks, she read through the ACAS website to make sure she had not missed anything.

20. The Claimant read the ACAS website which referred to time limits (99-100). It informed her that *'when we receive your early conciliation notification, the limitation date gets extended so that there's enough time for early conciliation to take place'*. It went on to explain what an early conciliation certificate was: *'If early conciliation ends without an agreement An early conciliation certificate is issued. A claimant will have a minimum of 1 calendar month from the date of receipt of the certificate to make a claim to the employment tribunal. In some cases, a claimant might have longer than 1 month to make a claim... Working out the exact time limit can be complicated. You might want to get legal advice. ... It is the Claimant's responsibility to make sure their claim is made to the tribunal in time. ... The conciliator cannot decide or advise on this point.'* At the end of the information the reader is referred to the Citizens Advice website and gov.uk.
21. The Claimant also identified a further ACAS webpage she had read. It explained *'If a respondent declines early conciliation We'll give you a certificate...'* (108). It also explained *'Talks up to and during the tribunal' 'you and your employer can still talk through ACAS up to and during the tribunal... This is known as 'conciliation' (rather than 'early conciliation'). Normally you'll get the same conciliator...'* (110).
22. The exact date the Claimant read the ACAS web pages is not clear from her evidence. She said she had become frustrated with the lack of contact from ACAS after a few weeks.
23. Finally, the Claimant emailed Alan at ACAS on 8 April 2020 referring to the initial negotiation, stating she had not heard back *'apart from an automated email including an ACAS certificate. I'd really like to talk to you as I am not sure what has gone wrong and would like to understand your follow up with the bank'*.
24. The Claimant found out that her grievance appeal had been rejected on 7 April 2020.
25. On 8 April the Claimant got through to the Duty Cover Team at ACAS. They explained they had heard nothing further from the Respondent. She spoke again to ACAS on 9 April and ACAS reminded her that there were time limits. They could not advise her whether her claim was late but suggested *'she might not want to delay any further'* in presenting her claim. She presented her complaint to the Tribunal on the same day.
26. It was only after she presented her claim that the Claimant sought advice from Citizens Advice.
27. In her evidence, the Claimant referred, on a number of occasions, to the fact that ACAS moved offices in the week before 21 March 2020.
28. The Claimant initially stated in her oral evidence that she did not think she could negotiate and pursue a settlement in parallel with a tribunal claim, but she later clarified this by stating that she had read somewhere that you could not bring a claim if you had settled.

29. In her email to the Tribunal of 12 November 2020, the Claimant explained why she did not consider it reasonably practicable to present the claim earlier. She stated:

I firmly believe that I was awaiting not only the outcome of the grievance process and truly believed that a positive resolution would be given if the 'key' witness had been interviewed as well as, HSBC Legal asking me to enter into a settlement discussion. This is why it wasn't reasonably practicable for me to present the claim any earlier than I did.

30. It was clear from the Claimant's oral evidence that she did not think she was obliged to await the outcome of her grievance before she could bring a claim.

Submissions

31. The Claimant's case was that she had relied on the ACAS conciliator's advice that the time limit clock was paused during conciliation. She contended that she still understood she was negotiating with the Respondent and was waiting to hear back from them via ACAS until 8 April and therefore thought the clock was still paused. She contended the ACAS certificate did not change this: she thought it was an automated event. She blamed ACAS for not returning her voicemails after the certificate: if someone had spoken to her earlier, as had done on 8 and 9 April, she would have obtained the correct information. In submissions she suggested that, even if she had sought advice from Citizens Advice earlier, her local office and helpline was closed for a week or so because of the Covid 19 restrictions.
32. Miss Master made three essential points:
- 32.1. The fact that there had been early, tentative settlement discussions did not make it not reasonably practicable to bring a claim prior to 21 March. Any misunderstanding as to the effect of EC on time limits was not a reasonable one here. The email to the Claimant and her own research on the ACAS webpages ought reasonably to have alerted her to having to seek more information as to when the time limit expired. It made clear this was her obligation and she should not rely on what ACAS had said.
- 32.2. Relying on Inchcape, a mistaken belief that the grievance appeal outcome should be awaited before presenting the claim was not enough 'of itself'.
- 32.3. The Claimant had taken her eye off the ball in waiting/hoping for a favourable grievance or settlement outcome. That she had done so did not somehow make it not reasonably practicable to bring a claim.

Legal Principles

33. The power to extend time is limited by section 111 of the ERA to cases in which the Tribunal is satisfied that it was not reasonably practicable to bring the claim in time.
34. 'Practicable' is a word we do not often use in ordinary speech. According to the OED, it means '*Able to be done or put into practice successfully; feasible; ...*'. I must look at what the Claimant could reasonably have done in practice.
35. Miss Masters referred me to the observations of Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 that the exercise of the discretion to extend time is the exception to the rule and that the standard is a high one for the Claimant to discharge. I have not found those observations to be helpful. I agree with the observations of Sedley LJ in Chief Constable of Lincolnshire v Caston [2010] IRLR 327 CA that the matter is a question of fact and judgment. I must apply the words of the statute to the facts I find. The notion of what is a high standard or what is an exception can mean different things to different judges and is an unhelpful gloss on the statutory wording. I acknowledge that the Claimant has the burden of proof, but it is a rare case where the burden of proof decides the issue: the facts usually point in one direction or another.
36. Where ignorance of the right is claimed, the question is what it was reasonable practicable to do. The well-known case of Walls Meat Company v Khan gives useful guidance:

*Looking at the matter first without reference to the authorities, I should have thought that the meaning of the expression concerned, in the context in which it is used, was fairly clear. The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. **Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him. (my emphasis)***

37. Where a party knows of their right to claim unfair dismissal they can generally be expected to seek information about the enforcement of that right. I must look at the Claimant's capacity to do that. Was it reasonably practicable, in the Claimant's circumstances, to search for the relevant

information as to time limits? Was her misunderstanding about them reasonable; what were her opportunities for finding out her rights; did she take them; and/or had she been misled?

38. In Inchcape Retail Limited v Shelton UKEAT/0142/19/JOJ, helpfully cited by Miss Masters, the Claimant misunderstood that he had to exhaust an internal appeal procedure before bringing his claim. The Employment Judge found therefore that it was not reasonably practicable for him to bring his claim. But the EAT decided that whether it was reasonably practicable depended upon whether it was reasonable to expect the Claimant to take steps to find out about the enforcement of his rights, what steps and when. The judge had failed to ask these questions and had therefore erred in law.

Application of Facts and Legal Principles to Issue

39. The Claimant's main argument is that she relied on the advice of the ACAS Conciliator at the start of Early Conciliation that the time limit clock was paused during conciliation. While this was probably a reasonable understanding to have at the outset, I do not consider that it was reasonable, for a person in the Claimant's circumstances and with her capacity, however, to continue to rely on this advice after she had received the ACAS Certificate and email on 21 February 2020. This is because the ACAS email made it clear that it was her responsibility to find out the time limit **and** that ACAS could not advise about that. If she had been acting reasonably, the Claimant would have read that email, taken note of it and done more to find out the time limit in her case.
40. It was not reasonable for the Claimant to decide that the certificate was less important because it appeared to be automatically generated. In any event, I do not consider that this is what someone in the Claimant's circumstances acting reasonably would have concluded about the ACAS conciliator's covering email because it was sent to her by the individual conciliator. In my judgment, the Claimant ought reasonably to have read this email carefully, and, if she had done so, she would have seen that it was up to her to investigate when the time limit would expire in her case after receiving the certificate.
41. It was not reasonable for this Claimant, with her level of understanding and ability, *without more* to rely on her earlier understanding of what the conciliator had told her (that the clock stopped during conciliation, rather than only during EC). By *without more* I mean, without checking because this is what the email from ACAS made it clear it was her responsibility to do and because the email from ACAS told her specifically it could not give her advice about time limits. Both of these elements of the email would have alerted a Claimant acting reasonably to further investigate.
42. After that point the Claimant had a whole month in which to search for information about the time limit. Unfortunately, the Claimant used most of this period to try to contact her conciliator. In my judgment, it was not reasonable for the Claimant to revert to the ACAS conciliator for time limit information after his email of 21 February, because he had made it plain in that email that he would not give advice about when the time limit expired in her case. The fact, therefore, that the Claimant left him

voicemails and did not receive a response, did not therefore create a further reasonable obstacle to a timely presentation of her claim. Had she not waited several weeks for his response, she would have had more time to search for the information elsewhere. It was reasonable to speak to him about ongoing conciliation, but that was a separate issue and the Claimant was not labouring under the mistaken belief that she could not bring a claim during settlement negotiations (see below).

43. There was time, for example, to look at the ACAS website. The pages there gave a good indication to anyone reading them with the Claimant's capacity, that the certificate was an important document so far as time limits were concerned: it said there was a minimum of a month to put in the claim after the certificate, possibly more. It suggested the Claimant seek legal advice to work out the time limit, which could be complicated. Had she taken reasonable notice of that information, it would have become apparent to the Claimant that the time limit clock had started on the certificate's issue and she needed to find out more. There was plenty of time to do this in the month from receipt of the certificate before 21 March 2020.
44. I conclude from the evidence she gave that the impact of the pandemic restrictions did not have an effect on the practicability of the Claimant's search for more information. The Claimant's evidence was that ACAS had moved a week before 21 March: but, as I have found, it was not reasonable for her to refer back to ACAS on time limits and, of course, their website was still available. In submissions the Claimant made a hypothetical point about the closure of her local Citizens Advice office, but because she did not seek advice from Citizens Advice at the time she reasonably ought to have done, from 21 February 2020, I cannot find that this actually created any practical difficulty to her on the facts of her case. In any event the advisory lockdown started on 16 March and the compulsory one on 23 March: I have no evidence of when local advice services available to the Claimant ended. What is clear is that there was time from 21 February 2020 to seek advice.
45. Nor do I consider, on the facts I have found, that the Claimant was operating upon the assumption that she could not start her claim while negotiations were continuing as a matter of general principle. This is because she clarified in her evidence that she thought this was the case if settlement had been reached. She knew settlement had not been reached in her case. In addition, the ACAS web pages she identified she had read, make it clear that negotiation can continue *after* a claim is presented.
46. Although the Claimant asserted in her evidence that she was not waiting for the appeal to conclude, her explanation to the Tribunal in her email of 12 November and the coincidence in timing of the outcome on 7 April and presentation of the claim on 9 April, lead me to conclude that waiting for the grievance appeal outcome was one factor in the Claimant's delay. But what is clear from her oral evidence was that she was not operating under the mistaken belief that she could not bring a claim before the appeal outcome. And, in any event, if she had she acted reasonably and

sought information about time limits, she would have learned that the progress of an internal appeal did not pause the time limit clock.

47. The statutory provisions relating to how time limits are extended by Early Conciliation are by no means straightforward. But, in my judgment, the Claimant did not do enough reasonably to look for information about them prior to their expiry, bearing in mind that she was advised that it was her responsibility to bring her claim in time when she received the ACAS certificate. Further, the Claimant relied on what the ACAS conciliator had said at the start of early conciliation, but it was unreasonable to carry on relying on this once he had made it clear ACAS could not give advice about time limits. The failure of the conciliator to return her calls did not create a practical impediment, because he had already told her he could not advise her about when the time limit expired. The Claimant had the capacity and technology to look up information about time limits via the Internet. If she had read the ACAS website within the time as she ought reasonably to have done, it would have told her about the significance of the certificate and provided links to further information about time limits. There was nothing, as a matter of fact, in this case about the pandemic restrictions that created an obstacle for the Claimant in seeking this further information in time before 21 March: she unreasonably failed to do so.
48. For all of these reasons, I am satisfied that it was reasonably practicable for the Claimant to present her complaint to the Tribunal on or before 21 March 2020.
49. The Tribunal therefore has no jurisdiction to hear the complaint of unfair dismissal and it is dismissed.

**Employment Judge Moor
Date: 15 December 2020**