Appeal No. UKEAT/0111/16/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 July 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR W PACZKOWSKI — APPELLANT

MRS M SIERADZKA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS KATE WOZNIAK (Representative) Euro Lex Partners Tower 42 25 Old Broad Street London EC2N 1HN
For the Respondent	MR MARCIN KOZIK (Representative) KL Law Ltd Censeo House 6 St Peters Street St Albans AL1 3LF

SUMMARY

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

Extension of time - reasonably practicable - section 111(2)(b) ***Employment Rights Act 1996***

The Claimant sought to pursue a complaint of automatic unfair dismissal under section 104 **ERA 1996** (alleging the reason for her dismissal was her assertion of a statutory right, namely the right to a statement of employment particulars) but had lodged her claim outside the three-month time limit. The ET found the Claimant had not known of her entitlement to claim unfair dismissal when she did not have two years' service and, although she promptly sought appropriate advice, had not been informed of this potential right but was told, by three separate sources (the CAB, ACAS and her local trade union adviser) she could not bring an unfair dismissal claim without two years' service. In the circumstances, the ET concluded it had not been reasonably practicable for the Claimant to lodge her claim in time and she had lodged it within a reasonable period of time once she learned of her right. The Respondent appealed.

Held: *Allowing the appeal and remitting the matter for rehearing by an ET*

The circumstances of this case were unusual, not least as the Claimant had made efforts to obtain appropriate advice from three separate sources, each of which failed to give her the correct advice. In this context, the question for the ET was whether (per Underhill P in **Northamptonshire County Council v Entwhistle** [2010] IRLR 740 EAT) the failure of the advisers to give the correct advice was itself reasonable.

The ET apparently saw a distinction between a CAB adviser and a skilled legal adviser such as a solicitor, relying on Lord Phillips' observation at paragraph 32 of **Marks & Spencer plc v Williams-Ryan** [2005] ICR 1293 CA. Whilst that was an entirely appropriate course, Lord Phillips had suggested that the relevance of the CAB advice might depend on "who it was that

gave the advice and in what circumstances". In the present case, the ET made no specific finding as to the status of the CAB advisor or as to the status of the advisers from ACAS or the Claimant's trade union.

The ET considered the extent of the obligation upon the adviser to make further enquiries of the Claimant was relevant to the question whether the failure to give the correct advice was itself reasonable but that required that it make findings as to the particular circumstances in which the advice was sought and why it was reasonable for the advisers to provide only the limited advice given. Allowing that the advice given to the Claimant might have been reasonable on the particular circumstances of the case and - at the same time - that the information provided by the Claimant and specific questions raised by her might also have been reasonable, the ET could only arrive at a final conclusion on that question once it had made findings as to the actual instructions given and questions asked as to the status of the advisers and advice received. The ET's reasoning failed to demonstrate that it had made the necessary findings; alternatively, failed to adequately explain the findings relevant to its conclusion.

Ultimately it was a matter for assessment as to whether this really was an exceptional case such as would satisfy the ET that it was not reasonably practicable for the claim to have been presented in time because of the particular factual matrix surrounding the advice sought by/given to the Claimant. More than one answer being possible, this matter would be remitted to the ET.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the hearing of the Respondent's appeal against a Judgment of the Leeds Employment Tribunal (Employment Judge Burton, sitting alone on 10 August 2015; "the ET"), sent out on 18 August 2015. By that Judgment the ET concluded that the Claimant's ET claim had been lodged out of time but that it had not been reasonably practicable for her to lodge it within time and the claim had been lodged within a reasonable period thereafter. The Respondent's appeal against that Judgment was initially considered by Singh J, on the papers, as having no reasonable prospect of success. Subsequently, after a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** before HHJ David Richardson on 8 April 2016, the appeal was permitted to proceed to a Full Hearing, albeit not on the broader basis on which it was initially formulated.

2. The specific grounds of appeal permitted to proceed can be summarised as follows: (1) whether the ET erred in failing to ask the correct questions as a matter of law, namely (a) were the Claimant's advisers skilled advisers and (b) was the failure to give the correct advice itself reasonable?; (2) whether any finding made by the ET relevant to these questions was made absent any proper evidential base; and/or (3) whether the ET's Reasons were adequate.

The Relevant Background Facts and the ET's Decision and Reasoning

3. The Claimant is a Polish national; English is not her first language. She brought a claim against the Respondent of unfair dismissal under section 104 of the **Employment Rights Act 1996** ("ERA"), namely that she was dismissed for asserting a statutory right, the right to have a written statement of her particulars of employment.

4. It is the Claimant's case that she was employed by the Respondent for some two months; she says she was dismissed on 28 June 2014. At that stage, as the ET found, her principal concern was that she believed she was owed wages by the Respondent. She therefore contacted the Citizens Advice Bureau ("CAB") with a view to finding out how she might recover those wages, but was unable to obtain an appointment until 29 August 2014. When she did get to meet with a CAB adviser, the Claimant explained she believed she was owed wages and that she had no written contract of employment. She was advised (1) that she would be better off pursuing her wages claim in the County Court and (2) that she was unable to bring a complaint of unfair dismissal in the ET as she did not have the requisite two years' service. That latter advice would normally be correct but not if the alleged basis of the dismissal falls within section 104 **ERA**. The ET noted it could not be certain the CAB adviser had been given all the information she would have needed to alert her to the possibility of such a claim. In any event, the CAB adviser also suggested the Claimant make contact with ACAS by telephone.

5. As English is not her first language, the Claimant asked her partner, Mr Thompson, to telephone ACAS, which he did within a couple of days of the CAB appointment. The ACAS adviser reiterated the advice already given.

6. At that time the Claimant and her partner were members of the GMB and they also decided to take advantage of their membership by seeking advice from their trade union. Doing so, they were given the same advice as obtained from the CAB.

7. On 15 September 2014, the Claimant lodged a claim for wages in the County Court. Having been served with that claim, the Respondent lodged its defence and also counterclaimed some £4,800 from the Claimant.

8. Concerned by the counterclaim, the Claimant then decided to seek professional legal advice and, on 22 October 2015, met with her current representative, who operates as a consultant and who represented her before the ET as he does now.

9. The ET considered that in all probability the Claimant's current representative asked her for more information about the circumstances surrounding her dismissal than had previously been requested and it was then that she explained that she believed she had been dismissed because she had asked for a written contract of employment. She was then advised for the first time that she could bring a complaint of unfair dismissal even though she had not been employed for two years. On 29 October 2014 the Claimant contacted ACAS to pursue early conciliation, and subsequently the ACAS early conciliation certificate was issued on 6 November 2014, the Claimant lodging her ET claim the same day.

10. The question whether the Claimant's claim was time-barred was listed for hearing before the ET on 10 August 2015. Both the Claimant and her partner gave evidence, and the ET found the relevant facts to be as I have summarised above. The ET referred to section 111(2) **ERA**, which allows that a claim of unfair dismissal might be brought outside the primary three-month time limit if it was not reasonably practicable for it to have been presented within that time, and also referenced the leading cases of **Dedman v British Building & Engineering Appliances Ltd** [1973] IRLR 379 CA, **Wall's Meat Co Ltd v Khan** [1978] IRLR 499 CA, **Marks & Spencer plc v Williams-Ryan** [2005] ICR 1293 CA and **Northamptonshire County Council v Entwhistle** [2010] IRLR 740 EAT.

11. The ET accepted that the Claimant would not have known there was a particular entitlement to pursue a complaint of unfair dismissal asserting a statutory right even when

employed for less than two years. That said, it equally accepted that someone in the Claimant's position who did not take reasonable steps to obtain advice as to their rights would not be able to complain if it subsequently transpired they might have pursued a claim but were then out of time to do so. In the Claimant's case, however, the ET was satisfied that she had made prompt efforts to obtain appropriate advice from the CAB and had listened to and accepted that advice. The ET was further satisfied that the CAB had not advised the Claimant of the possibility of pursuing a claim under section 104 **ERA**, observing:

> **"16. … A skilled legal advisor, such as a Solicitor, may perhaps be expected to find out a little bit more as to the circumstances leading up to the dismissal in order to satisfy him/ herself that those circumstances did not give rise to a possible exception to the usual rules as to qualifying periods of employment but in accordance with *Marks and Spencer* I find that such a duty of care may not exist in relation to a CAB advisor particularly when it is clear that the Claimants [sic] emphasis was more upon her desire to recover the wages that she believed to be owed to her."**

12. The ET equally accepted that the Claimant also promptly obtained advice from ACAS and her trade union, but the advisers from those organisations also failed to inform her of the possibility of such a claim. The first time this was brought to her attention was 22 October 2014, and the seven-day period that then followed was, the ET considered, reasonable for that advice to be confirmed and for the necessary procedural steps to be taken for a retainer agreement to be established between the Claimant and her adviser. In the circumstances, the Claimant's ignorance of her right to bring a complaint of unfair dismissal under section 104 was reasonable, given not only that very few people would know of the right but because she had sought appropriate advice and had not been told that such a claim could be brought. When she was given that information, the Claimant then lodged her claim within a reasonable period, and time should thus be extended.

Submissions

The Respondent's Case

13. On behalf of the Respondent it is contended that the ET failed to establish whether the Claimant was or was not aware of her rights or could reasonably have been so as it did not have the evidence as to what information and instructions the Claimant gave to her advisers and as to what advice was given by them in response. The Respondent observes that the test that the ET had to apply was an objective one (see paragraph 17, **Royal Bank of Scotland plc v Theobald** UKEAT/0444/06/RN) and it was the Claimant who bore the burden of proving it was not reasonably practicable to present her claim in time. If there were any gaps in her evidence, they should have been adequately cured and the case proved accordingly. The Respondent had raised the issue of the identity of the CAB adviser and the precise advice given with the Claimant in advance of the hearing, although it had not proactively sought an order for that information or for a witness order for the adviser. This had also been an issue canvassed in the Respondent's submissions before the ET. If the Claimant failed to adduce the required evidence to enable the ET to determine reasonable practicability given the advice sought and received by her, the ET would have erred in allowing time to be extended.

14. In the present case, there was no evidence as to what advice was given or as to what advice ought to have been given in the light of the Claimant's instructions. The ET was simply not in a position to conclude whether there was any fault on the part of the adviser or the Claimant herself. Moreover, the ET had allowed that a CAB adviser might not be a skilled adviser (see paragraph 16) but did not make a precise finding on that point, although it had earlier found that the Claimant had had to wait for an adviser who knew about employment law. It had also failed to make findings in respect of the advice given by ACAS and the Claimant's trade union employment law adviser. Those were all factual matters that needed to be

A determined before the ET could reach any conclusion as to whether this was in fact a case where the **Dedman** principle applied or, if not, what the precise circumstances were such as to enable the ET to reach a conclusion on reasonable practicability.

B

The Claimant's Case

15. On behalf of the Claimant, it was submitted that the question of the CAB adviser's status was not a point raised expressly by the Respondent below and should not be permitted at this stage. The Respondent's case before the ET was put on the basis that the CAB in fact provided skilled advice; it had only raised the issue of the status of the CAB adviser in closing submissions. Accepting, however, that the point was one of legal principle that the ET had to deal with in any event, the Claimant contended that the ET reached a permissible conclusion on the particular facts before it. This was not a case where the ET was dealing primarily with bad advice. As the ET had found, the Claimant's first concern had been about recovering her wages. She had no reason to know that she had a right to claim automatic unfair dismissal for asserting a statutory right. She would not have known the importance of specifying the particular nature of her claim such as to trigger in the adviser's mind the relevant advice.

16. There were, moreover, other complicating factors - the lack of a written contract and an issue about employment status - that might have muddied the waters for the advisers. Also, these were not advisers with a retained relationship with the Claimant; she was seeking help at a specific stage and then taking matters on herself. As noted in **Entwhistle** (see paragraph 9 of that judgment), there can be circumstances where the adviser's failure to give the correct advice is itself reasonable and where, therefore, it would not be reasonably practicable for the Claimant to bring the claim in time. Here, there were three separate advisers who had told the Claimant the same thing. The ET had considered the relevant questions and had made sufficient findings

to mean it was permissible to conclude that the Claimant's ignorance of the basis of her claim was reasonable because this was a case where the failure to give correct advice was reasonable. Given that the ET was entitled to take the view that it did, it was not obliged to make further findings; its reasons were adequate to the task.

The Respondent in Reply

17. It could not be said that the ET had not needed to make a finding as to the particular status of the CAB adviser; see **Marks & Spencer**, where it was observed that the question of reasonable practicability may well depend on who it was that gave the advice and in what circumstances (see paragraph 32 of that judgment). The same point also arose in respect of the ACAS and trade union advice in this case.

The Relevant Legal Principles

18. By section 111 **ERA 1996** it is, relevantly, provided that:

> **"111. *Complaints to employment tribunal***
>
> **(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.**
>
> **(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."**

19. A body of case law has developed in respect of the test of reasonable practicability laid down by section 111(2)(b) (and the earlier provisions to like effect), the most relevant of which were referenced by the ET in its reasoning. The principles that may be extracted from the authorities were considered and helpfully summarised by the then President of the Employment

A Appeal Tribunal, Underhill J (as he then was) in **Entwhistle**. Extracting that which is relevant to the present appeal from that summary, I note as follows:

> **"5. …**
>
> **(1) Section 111 (2) (b) should be given "a liberal construction in favour of the employee". This was first established in *Dedman*. There have been some changes to the legislation since but this principle has remained: see, most recently, paragraph 20 in the judgment of Lord Phillips MR in *Williams-Ryan*, at page 1300.**
>
> **(2) In accordance with that approach it has consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit. This was first clearly established in the decision of the Court of Appeal in the *Walls* case, but see most recently paragraph 21 of Lord Phillips' judgment in *Williams-Ryan* and, in particular, the passage from the judgment of Brandon LJ in *Walls* there quoted, at pages 1300 to 1301.**
>
> **(3) In *Dedman* the Court of Appeal appeared to hold categorically that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a skilled adviser, even if that adviser had failed to advise him correctly. Lord Denning MR said this at page 61 E-G:**
>
> > **"But what is the position if he goes to skilled advisers and they make a mistake? The English court has taken the view that the man must abide by their mistake. There was a case where a man was dismissed and went to his trade association for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was 'practicable' for it to have been posted in time. He was not entitled to the benefit of the escape clause: see *Hammond v Haigh Castle & Co Ltd* [1973] ICR 148. I think that was right. If a man engages skilled advisers to act for him, and they mistake the time limit and present it too late, he is out. His remedy is against them. Summing up, I would suggest that in every case the Tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the four weeks to pass by without presenting the complaint. If he was not at fault, nor his advisers, so that he had just cause or excuse for not presenting his complaint [within] the four weeks then it was not practicable for him to present it within that time. A court has then a discretion to allow it to be presented out of time if it thinks it right to do so, but if he was at fault, or his advisers were at fault in allowing the four weeks to slip by, he must take the consequences. By exercising reasonable diligence the complaint could and should have been presented in time."**
>
> **…**
>
> **(5) However, in *Williams-Ryan* Lord Phillips reviewed the relevant authorities in some detail with a view to identifying whether it was a correct proposition of law that, as he put it at paragraph 24 (page 1301):**
>
> > **"… if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the Employment Tribunal in due time. The fault on the part of the adviser is attributed to the employee."**
>
> **He concluded squarely at paragraph 31 (page 1303):**
>
> > **"What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in *Dedman* was part of the ratio. There the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal."**
>
> **The passage from *Dedman* there referred to is part of the passage which I have set out at (3) above. I think it is clear that Lord Phillips was intending to confirm that what he elsewhere called "the principle in *Dedman*" is a proposition of law …**

> **(6) Subject to the *Dedman* point, the trend of the authorities is to emphasise that the question of reasonable practicability is one of fact for the Tribunal and falls to be decided by close attention to the particular circumstances of the particular case …"**

20. In **Entwhistle** the ET had taken the view that it would be an error to read Lord Phillips' endorsement of **Dedman** too literally. On hearing the appeal against the ET's Judgment in **Entwhistle** Underhill J did not disagree with that statement of principle, holding:

> **"9. In my judgment the Judge was right not to read Lord Phillips' endorsement of the *Dedman* principle in *Williams-Ryan* as meaning that in no case where a claimant has consulted a skilled adviser and received wrong advice about the time limit can he claim that it was not reasonably practicable for him to present his claim in time. It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is itself 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 (for example something bearing on the date of dismissal, which is not always straightforward). …"**

21. Moreover, when the adviser is from an organisation such as a Citizens Advice Bureau, in **Marks & Spencer** Lord Phillips indicated that it might be relevant to know something of the status of the advice and the adviser.

22. Ultimately, however, the language of the statute must prevail; the question of reasonable practicability is - as section 111(2)(b) provides - largely one of fact for the ET and will fall to be determined on the particular circumstances of the case. An ET's decision in this regard will therefore only rarely be susceptible to challenge on appeal, although the case law certainly provides examples where successful challenges have occurred.

Discussion and Conclusions

23. The starting point in the ET's reasoning cannot be faulted: the fact that the Claimant did not know of her rights under section 104 **ERA** did not mean it was not reasonably practicable for her to lodge her claim in time; she was aware of the relevant facts - this was not a case of

concealment or representation by the employer - and could be expected to take reasonable steps to obtain advice.

24. The ET found that the Claimant did, indeed, make prompt efforts to obtain advice, initially from the CAB but also from ACAS and from her trade union. It is right to acknowledge that this case is somewhat unusual in that the Claimant made efforts to obtain advice from three appropriate sources, all of whom advised her that she did not have sufficient continuity of employment to bring a claim of unfair dismissal. Given that the Claimant's complaint was that she was dismissed for asserting her statutory right to written terms and conditions, that advice was incorrect. The question for the ET was whether - *per* Underhill J in **Entwhistle** - the failure of the advisers to give the correct advice was itself reasonable.

25. The ET apparently saw a distinction between a CAB adviser and a skilled legal adviser such as a solicitor. At paragraph 16, it allowed that the latter might be expected to make greater enquiry as to the circumstances leading up to a dismissal such as to give rise to a possible exception to the usual rules as to qualifying periods of employment, but considered that such a duty may not exist in relation to a CAB adviser. In drawing that distinction, the ET was relying on Lord Phillips' observation at paragraph 32 of **Marks & Spencer**. That was an entirely appropriate course, but Lord Phillips had suggested that the relevance of the CAB advice might depend on "*who it was who gave the advice and in what circumstances*". In the present case, the ET made no specific finding as to the status of the CAB adviser, although it had earlier found that delays might arise in obtaining an appointment with a CAB adviser with knowledge of employment law. That was quite possibly because the Claimant herself did not know (see her witness statement at paragraph 74, where she volunteered she was not aware whether the adviser she saw was a qualified lawyer or not). It equally made no finding as to the status of

the advisers from ACAS (albeit that would seem to have been simply advice from the helpline) or the Claimant's trade union (the Claimant had volunteered that she had seen the GMB "local employment law adviser", see paragraph 84 of her statement).

26. What the ET did appear to consider material was the extent of the obligation upon the adviser to make further enquiries of the Claimant. I infer it saw that as relevant to the question of whether the failure to give the correct advice was itself reasonable. The ET had found that the Claimant's principal concern when she approached the CAB was as to how she might recover the sums that she believed were due to her as wages. To the extent that it made findings as to her instructions to the CAB adviser, the ET records simply that the Claimant explained that she believed that she was owed money and that she had no written contract of employment (see paragraph 3 of the ET's Reasons).

27. If that was all the Claimant indicated to those from whom she sought advice, I can see why the ET might conclude that the failure to advise of a potential right to pursue a claim of automatic unfair dismissal for asserting a statutory right was not of itself unreasonable. The difficulty with that, however, is that whilst the failure to give fuller advice might not have been unreasonable that might simply be because the Claimant had unreasonably failed to seek advice on the factual matrix upon which she subsequently sought to rely as establishing her right to complain of unfair dismissal under section 104 **ERA**. If the circumstances in which the advice was given - the status of the adviser; the context in which the advice was given; the information provided by the Claimant; the questions asked of her - were relevant to the issue of reasonable practicability, the ET needed to make clear precisely what it had found had occurred.

28. For the Claimant, it is submitted that this was properly to be seen as an exceptional case: the ET was entitled to conclude that most people would have been unaware of the right to bring a claim of unfair dismissal under section 104 and that the Claimant herself was ignorant of that entitlement. Moreover, the nature of the right was such that simply stating the bare facts of the complaint might not alert an adviser who was not professionally qualified to the need to advise of the possible entitlement. Here, the Claimant had referred to the absence of a written contract and her continued requests of the Respondent in this respect (see paragraphs 22 to 25 of the grounds attached to her ET1), but the advisers from the CAB, ACAS and her trade union had - not unreasonably - not picked up that this might found a claim of automatic unfair dismissal for asserting a statutory right to written terms and conditions, and, given the more general advice she was given by three separate sources as to the need for two years' service to bring a claim of unfair dismissal in the ET, the Claimant would not have been alerted to the need to provide any further information or to investigate the point in more detail.

29. I see all of those points and can allow that - given the particular circumstances of this particular case - it might well have been open to the ET to find it was not reasonably practicable for the Claimant to lodge her claim in time. I would also accept that, if the ET had made clear findings on the points relevant to reasonable practicability in these circumstances, it would not be for this court to interfere with that conclusion. What I cannot accept, however, is that the ET's Reasons demonstrate that it did make the necessary findings or, at least, that the Reasons adequately explain the findings relevant to its conclusion in this case.

30. Allowing that the advice given to the Claimant might have been reasonable in the particular circumstances of this case and, at the same time, that the information provided by the Claimant and specific questions raised by her might also have been reasonable, I consider that

the ET could only arrive at a final conclusion on these issues once it had made findings as to the instructions given and questions asked, and as to the status of the advisers and the advice received. Allowing that this is a Judgment of an ET, which is to be viewed as a whole and which cannot be expected to be drafted to the highest standards of legal draftsmanship, I am not satisfied there is sufficient explanation for the conclusion on reasonable practicability, which ultimately comes down to a statement at paragraph 16 as to what may have been the duty of care in respect of a CAB adviser.

31. Having taken the view that the absence of adequate findings and explanation renders the ET's conclusion unsafe, I do not consider that it is open to me to reach my own view on this point. I have allowed that the particular circumstances of this case may, as the Claimant urges, be sufficiently exceptional as to mean that it was not reasonably practicable for her to lodge her claim in time. Whether, however, that is in fact the case will depend upon an assessment of the actual nature and status of the advice given and the context in which it was given, what the Claimant is found to have provided by way of information and what advice she actually sought. As I have stated, I do not consider that the ET has made sufficient findings on those crucial points, although I have been taken to material that was before the ET - including the ET1 and the Claimant's witness statement - that would seem to provide more relevant detail in that regard. It is a matter of assessment for an ET as to whether this really is an exceptional case such as would satisfy that ET it was not reasonably practicable for the claim to have been presented in time. I therefore allow the appeal but remit this matter to the ET.

Disposal

32. Given my Judgment, the Respondent submits that this matter should be remitted to a new ET, not least as the Employment Judge had previously had the opportunity to reconsider

A the matter but had chosen not to do so. For the Claimant, on the other hand, it is urged that I remit to the same Judge, who would have the opportunity to revisit this matter in the light of the guidance given in my Judgment and that was the proportionate course.

B

33. In considering this question I take into account the factors laid down in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 EAT. At least a year will have passed before the matter returns to the ET and it is unlikely that the Employment Judge will have a C very clear recollection of this case. Moreover, the hearing was and is likely to remain short and is unlikely to take substantially more time whether remitted to the same or a different ET. On the other hand, I do not consider that the decision was fundamentally flawed and there is no D question as to the professionalism of the Employment Judge, who - if faced with this case on remission - could approach this matter impartially with the assistance of the guidance laid down in this Judgment.

E

34. In the circumstances, it seems to me that this matter can be remitted to any ET. That may, if convenient, be the same Employment Judge but it need not be. I leave that entirely to the discretion of the Regional Employment Judge, bearing in mind the need to get the matter F back before an ET as soon as is practicable.

G

H