Appeal No. UKEAT/0433/14/BA

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 June 2015

**Before**

**THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)**

**(SITTING ALONE)**

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SOFTWARE BOX LIMITED — APPELLANT

MISS S C GANNON (DEBARRED) — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR DANIEL BARNETT<br>(of Counsel)<br>Instructed by:<br>Langleys Solicitors<br>Queen's House<br>Micklegate<br>York<br>YO1 6WG |
| For the Respondent | Respondent debarred from taking part in this appeal<br><br>MR GEORGE GANNON<br>(The Respondent's brother)<br>*Observing proceedings* |

**SUMMARY**

**PRACTICE AND PROCEDURE**

**JURISDICTIONAL POINTS - Claim in time and effective date of termination**

The Claimant (who suffered at the time from alcohol dependency syndrome, coupled with anxiety and depression) lodged a claim for unfair dismissal within time, together with an application for remission of fees. The Central Processing Unit did not receive the remission application, so she sent another. The Central Processing Unit replied to her, rejecting her application, stating that Notice of Payment was enclosed, which it was not. Such a Notice - specifying the date for payment, and that the claim would be rejected if payment was not made by that date - was sent to the wrong address. The date for payment passed. Shortly after, the Claimant asked what was happening with her claim, and on being told it had been rejected for non-payment of fees by the set date, promptly borrowed the fee, and issued a second claim. She had believed until then that her original claim remained ongoing. An Employment Judge held that it was not reasonably practicable for her to have made that complaint within three months of her dismissal, and that she had brought it within a reasonable time thereafter. In doing so, he adopted a concept of "acceptance" of a claim and of "valid" presentation (for neither of which was there any warrant within the statute) in dealing with an argument (which he did not clearly resolve) that because the Claimant had actually made a claim within three months, it could not be said that it had not been reasonably practicable for her to have made her second claim within that period. Nor had he clearly considered whether her belief was reasonable (as **Walls Meat v Khan** required). His reasoning was thus flawed: but contrary to the Appellant's submissions it was open to him to determine that it had not been reasonably practicable to make the complaint she did by the second claim (focusing on that) within three months of dismissal, if he had first directed himself appropriately and determined the relevant

facts, as he had not. This finding was not necessarily precluded by the fact she had made a first claim within that time-frame. Remitted for redetermination by the same Judge.

It was observed that a Claimant could have applied (and this Claimant still could apply) to extend time for payment of the appropriate fee in the rare case that time for payment as decided by the Tribunal (in whose name the Central Processing Unit had acted) had elapsed, but it was just to do so.

**THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)**

1. This case raises the question whether a Tribunal may allow an extension of time in respect of a claim for unfair dismissal notwithstanding that a complaint of unfair dismissal has been made within the three months prescribed by that section but has subsequently been rejected for non-payment of fees by the Tribunal.

2. Employment Judge Burton at Hull, for Reasons given on 4 September 2014, in the somewhat exceptional circumstances of the present case, extended time for the lodging of both complaints of unfair dismissal and for money claims. The Claimant, represented by counsel, conceded that the claim which the Judge was considering was out of time.

**The History**

3. The Claimant was dismissed with effect from 4 October 2013. She lodged (I shall use that word for reasons which will become apparent) an application in respect of those claims on 24 December 2013, therefore within three months of her dismissal. On the same day she sent a formal application for remission of fees. She was in receipt of Jobseekers' Allowance.

4. The application for remission was apparently not received by the Central Processing Unit ("CPU") in Leicester, which has the administrative task of dealing with such claims. So the Claimant sent a second such application on 13 February 2014 once she became aware of this. That claim was rejected by letter of 25 February 2014. The letter said that a fee was payable but it spoke of an "enclosed Notice to Pay" although no such notice was actually enclosed with the letter.

5. A second letter was sent by the CPU, which did enclose a Notice to Pay. But that was not sent to her at her home. It was sent to her legal representative, whose retainer had ended in January since she had been unable through financial circumstances to continue it.

6. The Judge held that the Claimant did not appreciate the full significance of the letter she had received. She made enquiry of the CPU on 4 April 2014. By then the date set out in the Notice to Pay had passed. Because the fee had not been received by that date the CPU had treated her claim as rejected on that basis. When she was told of this, she immediately borrowed the necessary fee, £250, from her brother and reinstructed her former representatives, who submitted the claim which came before the Tribunal.

7. The Judge plainly had considerable sympathy with the particular position in which the Claimant was. This is a sympathy which is recognised by Mr Barnett in his careful submissions to me today, and entirely appropriately he has made the points which can be made for the Claimant since she had been debarred from responding to this appeal. I should add that her brother has attended, coming all the way from South Yorkshire to do so, in order to tell me today that she intended no disrespect to the Tribunal, that she would wish to proceed with the claim if possible but she has been very ill, and he has sat patiently throughout the hearing, although not participating, to demonstrate that she is not disengaged from the process.

**The Judgment**

8. The Judge was concerned about the impact of the fees regime upon a claim in circumstances such as these. At paragraphs 28 to 30 of his Judgment he said this:

> **"28. I conclude that although the Rules make no reference to the concept of a claim being "accepted" the fact that Rule 11 [that is, of the Employment Tribunal Rules] talks about a claim being "rejected" must mean that if a claim is not rejected by implication it is "accepted".**
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> **29. What was the status of this claim between the 24th December 2013 and the 12th March 2014? [It was on that latter date that the time for payment of the fee expired according to the**

> **notice which the Claimant never received.] At any time during that period if the fee had been paid or a remission application had been granted it would have been "accepted", served and the action would have been normally progressed. I suppose that, strictly speaking, Rule 11(1) suggests that the Application should have been rejected on 24th December as it was not accompanied by a fee or a remission application. That, however, clearly did not happen until 12th March. As life can be breathed into a claim that has been presented but not "accepted" by payment of the fee or the granting of remission so that claim can be irrevocably extinguished if the fee has not been paid or remission granted.**
>
> **30. I can only conclude that, although not expressed to be the case within any of the Regulations, in fact a Claim is not validly presented if it is capable of being administratively rejected without any right of recourse to the Judiciary. In other words the payment of a fee or the granting of remission is an integral part of the process of a claim being "accepted" and therefore validly presented."**

9. He then turned to ask where that, in his view, left the Claimant in passages which run from paragraphs 33 to 37. He came to the conclusion that it had not been reasonably practicable for her to present a claim before she did and she had presented the claim she had put forward within a reasonable time thereafter. It is necessary for the purposes of this Judgment to set out only the following parts of that reasoning. At 33 he said:

> **"33. I accept however that the combination of the three factors, namely the complexities of this fees regime, the fact that she was not provided with the "Notice to pay a fee" and her medical condition at that time were all factors that lead [sic] her to the misunderstanding that her claim was still a claim capable of being relied upon."**

Her medical status was that she had suffered from alcohol dependence syndrome, stress and depression, reducing her to her lowest ebb during the period which he had been considering.

10. At paragraph 35:

> **"35. In those circumstances up until the 4th April she believed that she had lodged a claim within time. In the circumstances that I have described that claim had been extinguished on the 12th March without her receiving any notice that that was to happen and without giving to her the opportunity to finally rectify the situation. When all that was clear to her she immediately took steps to lodge a fresh claim on the same date.**
>
> **36. I have no hesitation in concluding therefore that it was not reasonably practicable to have lodged this claim within time. I suppose that really means that in the circumstances of this case it was not reasonably practicable for her to have navigated her way through the fees and remission from fees process until that point in time when, unknown to her, a claim that was capable of being brought into life was extinguished. This claim was issued immediately after that situation was made known to her."**

11. He had, in those last two paragraphs, had in mind no doubt what he had earlier said about the difficulty of a regime in which, as it appeared to him, there was no right for a Claimant to ask the Tribunal to mollify the harshness of the regime by any form of appeal provided for by the **Rules**.

12. The Appellant argues on appeal, as had been argued before the Judge, that he could not come to the conclusion he did, that it was not reasonably practicable to make the complaint the Claimant did within three months of the dismissal because in fact that was exactly what she had done. The Judge's reasoning for saying that she had not presented a claim within those three months, which in effect was the conclusion to which he had come, as the paragraphs I have cited may demonstrate, was based upon the supposition that either that claim was not presented or it was not validly presented.

13. Before I deal with those submissions I shall turn to the underlying law. Section 111 of the **Employment Rights Act 1996** provides :

> **"(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."**

14. Though "complaint" is not defined in the **Act**, nor is the word "presented", the **Rules of the Employment Tribunal** scheduled to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** provide that a "claim" means "any proceedings before an Employment Tribunal making a complaint" and that a "complaint", at least for the purposes of the **Rules**, means "anything that is referred to as a claim, complaint, reference, application or

appeal in any enactment which confers jurisdiction on the Tribunal". Rule 8, headed "Presenting the claim" provides:

> **"(1) A claim shall be started by presenting a completed claim form … in accordance with any practice direction made under regulation 11 which supplements this rule."**

15. The **Presidential Practice Direction** there referred to sets out the methods by which a completed form may be presented: essentially in person, by post or electronically. Mr Barnett submits, on behalf of the Appellant, that presenting a claim is a necessary step prior to the consideration of whether it should be rejected for any of the reasons set out in the **Rules** (Rules 10, 11 and 12 in particular) but also for other reasons, and therefore a claim must be presented within the meaning of the **Rules** and, he would submit, within the meaning of the statute without any clouding of the question by considering whether there was a process of acceptance or valid presentation as compared to invalid presentation.

16. I accept that is so. He supported that argument by reference, within the **Rules**, to Rule 13(4). Rule 13 permits a Judge to reconsider rejection under Rule 10 where a prescribed form has not been used or there has been a failure to supply minimum information or Rule 12 where there is rejection for substantive defects set out in Rule 12(1), and provides that, if the Judge decides the original rejection was correct but the defect has been rectified, the claim shall be "treated as presented on the date the defect was rectified". Those words only make sense if the claim was presented in the first place to the Tribunal before the process of rejection occurred. Similarly, under Rule 16, dealing with the response to a claim, the word "presented" indicates the receipt by the Tribunal of the response. This, to my mind, is entirely consistent with the view of the earlier **Rules**, using exactly the same concept, which was stated as long as **Hammond v Haigh Castle & Co Ltd** [1973] ICR 148, a decision of the National Industrial Relations Court, in which Sir John Donaldson said:

> **"… In our judgment, a claim is presented to a tribunal when it is received by the tribunal, whether or not it is dealt with immediately upon receipt. …" (page 151)**

17. Mr Barnett submitted, further, that there was support for this approach to the meaning of presentation from the **Presidential Practice Direction**. I do not accept that submission. It is plain to me that the **Practice Direction** is consistent with the meaning of presentation which has been adopted but I do not consider that a **Practice Direction** can affect the interpretation of primary legislation contained in the statute. Moreover the purpose of Presidential guidance is expressed in Rule 7 to be guidance as to the way in which the powers conferred by the **Rules** may be exercised. It is dealing, therefore, with the exercise of powers otherwise given by statute. It is not dealing with the process of defining the meaning of statute in the first place.

18. However the rejection of that point has no bearing upon my acceptance of the main point he makes, which is that presentation is a discrete process. The word "present" means what it says in common language. It means what Sir John Donaldson thought it meant in **Hammond v Haigh Castle** and which *Harvey on Industrial Relations* plainly has considered thereafter it has meant in the context of the various editions of the **Rules** that have followed. It is clear to me that it does not involve a precursor to a process such as "acceptance" nor that there is any distinction between presentation which is "valid" for some unspecified reason or "invalid".

19. The essential argument by the solicitor then acting for the employer before the Tribunal and reiterated by Mr Barnett in his submissions before me on the appeal was described by the Judge as simple and compelling:

> **"24. … that it is impossible for the Claimant to demonstrate that it was not reasonably practicable for her to lodge a claim within time because that is precisely what she did do on the 24th December. That claim was subsequently rejected by the Tribunal but that does not, he submits, mean that it was not presented in accordance both with s111 ERA and with Rule 8 …"**

20. Mr Barnett's argument is that the Judge had no choice, therefore, but to conclude that, despite the Claimant having been under a misunderstanding as to the status of her original claim, which the Judge plainly thought was genuine, she could not remedy it by issuing a fresh claim as she did, and the Judge was therefore plainly wrong to conclude as he did.

21. During the course of the appeal it occurred to the court that there might be an analogy between the operation of section 111 of the **Employment Rights Act** and the **Rules of the Employment Tribunal** and the position in respect of the **Limitation Act 1980** where it impacts upon personal injury claims.

22. In **Walkley v Precision Forgings** [1978] 1 WLR 1228 the House of Lords considered the case of a Claimant who had issued a writ within the three-year time limit prescribed by the **Limitation Act 1980**. That writ had lapsed because, within the time that it was valid, he had not issued a claim. When he subsequently sought to do so, he was met with the defence under the **Limitation Act**. The House thought that he could not ask the court to exercise what would otherwise have been its discretion under section 33 of the **Limitation Act** to extend time because that discretion could only be exercised in circumstances where the provisions of section 11 which provided for the three-year time limit prejudiced the plaintiff. Axiomatically, the court thought, they had not done so because he had in fact issued a writ within time. It had therefore been his failure to follow that with a claim by serving the writ and proceeding that had prejudiced him and not the requirements of statue.

23. That decision of the House of Lords suffered the unusual fate of being overruled by a subsequent constitution of the House of Lords, which came to the conclusion, which Lord Hoffmann in particular expressed as surprising, that it should unanimously conclude that the

eminent jurists who had decided **Walkley v Precision Forgings** had all been in error of law. The error of law is summarised in the headnote to **Horton v Sadler & Anr** [2006] UKHL 27, 1 AC 307 in these terms:

> **"… "an action" in section 33(1) denoted any proceedings brought after expiry of the limitation period and it was prejudice to the claimant by application of section 11 to that action to which section 33(1) referred and that action to which the court's exercise of discretion might be directed; that the relevant action, therefore, was not that which the claimant brought within time and in respect of which he suffered no prejudice by section 11 but rather the second action begun after the expiry of the time limit when he was prejudiced by his defeat under section 11 …"**

24. It therefore held that the previous decision of the House was inconsistent with the correct interpretation of the statute. In summary, the House considered that the claim which should have been considered was the second claim brought by the Claimant in Mr Walkley's position not the first. The analogy with the present case is that the focus for the application of the requirements of section 111 might be thought to be on the second claim, that brought in April 2014, rather than the one presented on 24 December 2013.

25. Mr Barnett rightly observes that there are differences between the regime which operates in respect of personal injury claims with which both **Walkley** and **Horton v Sadler** were concerned. The limitation period provided by the **Limitation Act** in respect of such claims is generous. By contrast Parliament deliberately provided a short period of time within which Employment Tribunal claims had to be brought. There was an obvious policy reason for this. Secondly, the legislative provisions are different and each requires consideration in its own right. I accept that there is no exact parallel. If there is anything to be gained from **Horton v Sadler** it is merely that the focus in considering the impact of section 111 must necessarily be on the claim which is presented to the Tribunal for consideration at the relevant time.

26. I have come to the following conclusions. First, the Judge's logic seems to me to have been to some extent in error. He described the process as "lodging", no doubt to avoid using the word "presenting". But in paragraph 29 he talked of the possibility that life could be breathed into a claim that had been presented but not accepted and in the next paragraph, paragraph 30, expresses the concept of a claim which was not "validly presented". He then equated both acceptance and valid presentation. It seems to me unnecessary and unrealistic to talk of a claim being accepted. Though this was a word used in one section of *Harvey,* it does not describe any process which so far as I can see is provided for by the **Rules** or by statute. Once a claim is presented, it is presented. No question of acceptance as a separate act seems to me to be necessary. A claim which has been presented may be rejected for various reasons. It may subsequently be struck out. It may be amended. It may be modified. It may be withdrawn. It may be heard and determined. But it is unnecessary to talk of any process of acceptance. The **Rules** provide that, once a claim is presented, what can happen to it is not a process of acceptance but only a process of rejection or determination by one of the various means I have just described.

27. Secondly, the Judge did not deal clearly with what he made of the argument put to him by the solicitor for the Respondent that it could not be said not to be reasonably practicable to present a claim before 4 April because exactly that had been done. It is worth noting here that the word in section 111 is "complaint". It is not "claim", although the **Rules** appear from the quotations I have cited above to equate the two. The Judge thought, in part of this reasoning, that there had to be some means judicially of righting a wrong which, in his view, the Claimant had suffered. He considered that, if the administration had mistakenly rejected a claim because the fee had been paid or lost, or if permission was refused when it should have been granted, there was nothing that an Employment Judge could do about it. Mr Barnett echoes something

of that submission in what he says about the **Rules** where he argues in his skeleton argument that rejections under Rule 10 and Rule 12 may both be reconsidered under Rule 13 but that there is no provision made for reconsideration of a rejection under Rule 11.

28. It occurs to me that the Judge was wrong in thinking that there was no judicial route to fairness available in circumstances such as the present where a fee was required to be paid by a particular date and had not been. It would indeed be surprising if there were none for if a notice providing for a short period of time only within which a fee had to be paid was sent to someone who had earlier applied for remission, and that person was, for instance, hospitalised or for a period of time abroad and did not receive the letter for completely understandable reasons, it would seem unacceptable that there should be no means of remedying the problem. Although the process of fee payment and remission is dealt with administratively, the law treats it as a decision made by the Tribunal. Thus, under Rule 11(3):

> **"If a remission application is refused in part or in full, the Tribunal shall send the claimant a notice specifying a date for payment of the Tribunal fee and the claim shall be rejected by the Tribunal if the Tribunal fee is not paid by the date specified."**

29. The word there is "Tribunal". Though in practice the functions of the Tribunal may be dealt with administratively, the legal position is that it is the Tribunal, a judicial body, not "the administration", that deals with it. Thus at Rule 5 the rule relating to extending or shortening time applies:

> **"The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired."**

30. Thus on the face of it, as Mr Barnett was in the end, subject to one submission, constrained to accept, the Tribunal may extend the period of time within which it is decided that a fee should be paid and they may do after the time has expired. If it did so, the effect of such a

decision would be that the application to which the fee related would proceed. Mr Barnett's one submission contrary to that would be that the effect of rejection for non-payment of fee is to treat the claim as if it had never existed at all, so that there is nothing before the Tribunal in respect of which it may exercise its powers under Rule 5. He distinguishes this from the case of strike-out where much the same might have been said, because that is by way of a judicial decision in respect of a claim which has not been rejected. This therefore would apply a particular force to the concept of rejection.

31. If it is necessary for me to resolve that question, I would hold against Mr Barnett's submission for two reasons. First, it does not seem to me that there is any inherent difference in principle between rejection on the one hand and strike-out on the other. In respect of the latter it is well recognised that the power to extend time exists. Secondly, in the circumstances which I have postulated, there will be, albeit as a matter of fact exceptionally, circumstances in which it will be entirely just and right that the effect of non-payment of a fee by a date specified by the Central Processing Unit administratively should not result in a striking out of the claim without there being any prospect of it being resurrected thereafter because it will by then be out of time, and it would have been demonstrated that it was reasonably practicable to submit it in time because that had actually happened.

32. In this respect I echo the concern of the Employment Judge that, if the **Rules** are capable of being construed so as to provide that justice should prevail in individual cases, that construction is to be preferred to one which eliminates the possibility. Regard to Article 6 of the **European Convention on Human Rights and Fundamental Freedoms** merely adds force to this approach. Accordingly, had the Judge been faced with an application here for an extension of time within which the fee should be paid, I would have held that he had the power

to extend time should he have wished to do so. However, the appeal here is not in respect of the Judge's failure to deal with the first claim. He was never asked to do so. It can be no error of law affecting his reasoning that he dealt just with the second claim. That is all the parties asked. The fact that, had he been asked to consider the first claim, he might have done so and come to a conclusion favourable to the Claimant had he wished is besides the point. I am concerned only with what I have termed the second claim.

33. As to that, insofar as the reasoning relied upon the inability of a Judge to remedy the unfairness in respect of the first claim, (a) I do not see that as entirely relevant to the decision on the second claim; and (b) it was not a matter then before him. As to the second claim I consider that he should have focused upon the claim itself and the application of the not reasonably practicable jurisdiction in respect of that claim.

34. In **Wall's Meat Co Ltd v Khan** [1979] ICR 52 Brandon LJ said, in a familiar passage, page 60F:

> **"… 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 the 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.**
>
> **…**
>
> **With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.**
>
> **For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be**

**said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant."**

35. The Judge in deciding as he did, did not make any finding other than implicitly as to the reasonableness of the Claimant's understanding. The tenor of what he said suggests that he thought it reasonable, but it is not clear beyond doubt that that is so. He does not express it as such. Second, he does not deal, as Brandon LJ would think he should have done, with the question of whether she should have made further enquiries after receipt of the letter in February 2014 telling her that a fee would be payable even though it did not then give her a date by which it should be paid. It seems to me that, in the light of that, the Judge simply did not deal with those issues. Therefore, on the basis on which the Judge decided the case, I have concluded that his reasoning was in error.

36. The next question I have to determine, therefore, is whether or not, in the light of Mr Barnett's submissions, there was only one conclusion to which he could have come, namely that because there had been a complaint made within three months, the second claim could not be shown to be one which it was not reasonably practicable to make earlier. Because of the way in which the argument progressed, Mr Barnett asked for time to consider some authorities which, with his extensive knowledge of the case-law, he thought might assist. It is to his credit and entirely in line with the way in which cases should be conducted before this Tribunal that he drew my attention in the event only to one case, that of **Marley (UK) Ltd & Anr v Anderson** [1996] IRLR 163, a case which he accepted and indeed put forward on the basis that it was against his submissions. That was a case in which the employee did not present a complaint of dismissal until after the three-month period had expired. He first learnt of matters which gave him grounds for thinking that his dismissal might have been unfair, about a month after time had expired. He took just over a further month to make his complaint. Subsequently

he had further information for the first time which gave him additional grounds for thinking that his dismissal might have been both procedurally and substantively unfair and amended his application by consent to add that second ground. The Tribunal considering jurisdiction thought that, although it was not reasonably practicable for Mr Anderson, given the extent of his knowledge, to have presented a complaint within the three months, he had not done so within a reasonable time thereafter insofar as the first complaint was concerned. That therefore could not proceed. It went on to find, however, that the second complaint was dealt with within a reasonable time and could.

37. The Court of Appeal upheld that reasoning. In the headnote there is a passage which reflects accurately, in my view, what is said in the Judgment, although it does not echo the precise words of any Judge. It says:

> **"Neither the Act nor the Industrial Tribunals Rules of Procedure contains any specific restriction on the number of complaints which may be brought by any one complainant in respect of one dismissal. The questions posed by s.67(2) [that is the forerunner of the current section], reasonable practicability of presentation within time and the reasonableness of any subsequent period elapsing before presentation, are both matters to be weighed separately, ground by ground and fact by fact, under each head of unfair dismissal upon which a complaint or complaints is or are founded. There is nothing in the authorities which could be regarded as restricting that proposition.**
>
> **Nor is there any principle of justice or fairness which would justify restraining an employee precluded by lapse of time from proceeding with his complaint under one head, from proceeding with a second ground of complaint raised within a period found by the tribunal to be reasonable. …"**

38. He went on to observe that complainants who abuse the procedure by reasserting claims which have already been decided (and for present purposes I would include rejected) can be struck out. Plainly that is on the ground of abuse.

39. In the course of the Judgment, at paragraph 26, the court observed that:

> **"26. … As the picture unfolds, the employee ought to be allowed the maximum opportunity of adding to, or changing, his grounds of complaint. The present case illustrates how strikingly that unfolding picture may develop - with knowledge limited at first to facts providing the employee with grounds for denying redundancy (or alternatively a fair selection for redundancy) becoming expanded to include grounds for contending that he had been**

**dismissed for another reason altogether … If he was to be precluded by lapse of time from proceeding this complaint under the first head, I know of no principle of justice or fairness which would justify restraining him from proceeding with grounds of complaint, raised within a period found by the tribunal to be reasonable, under the second head."**

40. The case is, in my view, not exactly in point. Mr Barnett submits that it is capable of being distinguished. It seems to me I do not need to rely upon what is said there for the decision which I shall reach. It is nonetheless indicative of an approach which recognises the changing circumstances which may affect a claim and the need to focus upon the claim when presented in deciding whether or not the complaint within section 111 has been made within a time which permits the Tribunal to have jurisdiction to determine it.

41. Here, as it seems to me, the fact that a complaint was made within time and then rejected does not and should not, as a matter of principle, preclude the consideration of whether a second claim traversing the same ground is one in which the Tribunal should have jurisdiction. The purpose of the **Act** is to ensure that claims are brought promptly. But the need to do so within a short period of time is balanced by the interests of justice which Parliament has regarded as encompassed in the test of reasonable practicability. If the approach to reasonable practicability is taken as it was by Brandon LJ in **Wall's Meat v Khan**, it requires a focus upon what is reasonably understood by the Claimant. If there is a case in which a Claimant reasonably considers that there is no need to make a claim, not therefore understanding (for very good reasons) that the time limits apply to the claim, as they do, because she had already made a claim which remains effective, it seems to me to be open to a Tribunal to consider a second claim made once she realises that her view was mistaken. It does not seem to me much to matter whether the analysis is that within section 111 the complaint has already been made, but the claim in respect of it is a repeat of the same complaint, which was made within time, restricting improper use of that by the doctrine of abuse as indicated in

**Marley**, or whether (as I would prefer) the **Act** requires focus upon the complaint which is made, as and when it is made and presented, in this case the effective claim presented in April. Accordingly, the Tribunal could decide to permit her claim to continue if satisfied that on this footing it was not reasonably practicable to bring her second claim earlier.

42. I suspect that a case such as the present will, following this ruling, never recur because it is likely that practitioners will have regard to the possibility of applying for an extension of time, as I have suggested might be possible. It may be that in this present case the Tribunal would, in the alternative, entertain an application by the Claimant to extend time for her first claim so that, as it were, if the Tribunal were minded to think that it was just for the complaint to proceed, she might have the benefit of both approaches.

43. The Tribunal has to have regard to the principle underlying section 111. For the reasons which I have expressed, accepting much (as will be clear) but not all of that which has been submitted to me by Mr Barnett, I think it erred. The appeal succeeds, but the consequence is not that I am bound to hold that the Tribunal had no jurisdiction but that the matter must be remitted to the Tribunal for it to consider afresh.

44. Mr Barnett has made succinct and appropriate submissions that the matter be remitted to another Judge. I think that the matter should be remitted to the same Judge for hearing in the light of the observations I have made. It saves time and expense and is proportionate to do so. I make it absolutely clear that he is in no sense bound (and indeed his professionalism is recognised by Mr Barnett) by the inclination, which has been apparent from the case before me. He will, I hope, consider what I have said and come to whatever conclusion is in accordance with the law as I have expressed it.