Case Number: 2204367/2012

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondents**
Ms F Grabe		The United Reformed Church

REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 7 APRIL 2017

Introduction

1 The Respondents are a Christian denominational church formed in 1972 by the union of the Congregational Church of England and the Presbyterian Church of England. I will refer to them as 'the Church'.

2 Between about 24 November 2008 and 8 June 2012 the Claimant was an ordinand (or trainee minister) of the Church. The Church/ordinand relationship, which she characterises as one of employment, was ended by the Church through its decision to terminate her candidacy for ordained ministry. That decision was communicated to her in a report of the Church's Assessment Board dated 3 March 2012 but did not become final until her appeal was dismissed on 8 June.

3 By her claim form presented to the Tribunal on 17 October 2012 the Claimant has brought complaints of unfair dismissal, breach of contract, direct racial discrimination and victimisation, together with claims for arrears of pay and holiday pay.

4 The claims are resisted on a variety of jurisdictional and substantive grounds.

5 The antiquity of this litigation is largely explained by the fact that it was staed for an extensive period owing to the Claimant's ill-health. Fortunately, she has recovered sufficiently to enable the Tribunal to lift the stay.

6 The matter came before me on 13 March this year in the form of a preliminary hearing to determine the following issues (I quote from the order of Employment Judge Hodgson made on 30 August and promulgated on 7 September 2016):

> **1. Has the claim of unfair dismissal been presented within the period allowed under section 111(2), the Employment Rights Act 1996? If not, was it not reasonably practicable to present the claim in that time? If so, was it presented in such further time as was reasonable?**

> **2. Have the discrimination claims been presented within the period allowed by section 123, the Equality Act 2010? If not, is it just and equitable to extend time?**
> **3. Are there any other claims and have they been presented in time? If not, should time be extended?**

The Claimant appeared in person and the Respondents were represented by Dr E Morgan, counsel. I heard evidence from the Claimant and Ms Fiona Thomas, the Church's secretary for Education and Learning. Although two days were allowed, I was able with the co-operation of the parties to complete the evidence and argument on day one and I decided to reserve judgment then in order to spare both sides the trouble, anxiety and expense of attending on day two.

7 Before me, Dr Morgan accepted that the 'discrimination claims' (Issue 2) should be read loosely as including various complaints under the Equality Act 2010 ('the 2010 Act') and that the claim form also contained money claims which, for the purposes of the preliminary hearing (and without prejudice to the Church's fundamental objection that there was never any form of employment relationship between them and the Claimant), could properly be seen as arising or being outstanding on 8 June 2012.

The relevant law

8 The first requirement of any complaint of unfair dismissal is a dismissal. By the Employment Rights Act 1996 ('the 1996 Act'), s95, it is provided (so far as material) that:

> **(1) For the purposes of this Part an employee is dismissed by his employer if (and … only if) –**
>
> **(a) the contract under which he is employed is terminated by the employer (with or without notice …**

9 The same Act, s111 includes:

> **(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint [of unfair dismissal] 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.**

10 The 'not reasonably practicable' formulation sets a high standard for claimants who bring proceedings late. The statutory language has been interpreted as importing a requirement to show that it was not 'reasonably feasible' to claim within the primary three-month period (see *Palmer-v-Southend on Sea Borough Council* 1984 ICR 372 CA).

11 In principle, a claimant's ignorance of his or her rights *may* make it 'not reasonably practicable' to present a claim within the primary three-month period.

But the authorities have consistently held that the statutory test requires the Tribunal to examine the plea of ignorance with care. In *Dedman-v-British Building Ltd* [1974] ICR 53 CA, Lord Denning MR observed:[1]

> **What is practicable "in the circumstances"? If in the circumstances the man knew or was put on inquiry as to his rights, and as to the time limit, then it was "practicable" for him to have presented his complaint within [the primary period] and he ought to have done so. But if he did not know, and there was nothing to put him on inquiry, then it was "not practicable" and he should be excused.**

Although the statutory test brought in by the Trade Union and Labour Relations Act 1974 ('the 1974 Act'), sch 1, para 21(4) and now preserved in the 1996 Act, s111 is slightly different in that "practicable" is qualified by "reasonably" and "in the circumstances" has disappeared, the guidance in *Dedman* has been consistently applied. In *Avon County Council-v-Haywood-Hicks* [1978] ICR 646, a case decided under the 1974 Act, the EAT observed that the Court of Appeal were not to be read as having decided in *Dedman* that "ignorance however abysmal and however unreasonable" was a universal excuse. Regard must be had to common sense. Overturning the decision at first instance, the EAT held that the claimant, "an intelligent, well-educated man" ought to have known of his rights even if he did not and that accordingly it had been "reasonably practicable" to present the claim within the primary three-month period.

12 The Tribunal has jurisdiction to consider claims for (inter alia) breaches of employment contracts or sums due under such contracts by virtue of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 ('the 1994 Order'). The time limit for bringing such claims is three months beginning with the 'effective date of termination' (Art 7(a)), subject to the same 'not reasonably practicable' proviso as applies in unfair dismissal cases (Art 7(c)).

13 The provisions protecting workers from suffering unauthorised deductions from wages under the 1996 Act, Part II and those entitling them to paid annual leave and compensation on termination for outstanding leave under the Working Time Regulations 1998 ('the 1998 Regulations') incorporate the same limitation regime as applies to unfair dismissal and breach of contract claims. In the former case, time runs from the date of the payment from which the alleged deduction was made (s23(2)(a)) and in the latter, from when the relevant right should have been permitted or the relevant payment made (reg 30(2)(a)).

14 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)).

15 In *Eduombi-v-La Retraite RC Girls School* UKEAT/0180/16 DA (unreported, judgment delivered 30 December 2016) Elizabeth Laing J, sitting alone in the EAT,

[1] p 61D-E. The test then (under the Industrial Relations Act 1971) was whether, "in the circumstances it was not practicable" to present the complaint within the primary period.

reviewed the law on limitation under the 2010 Act. Her judgment included the following:

> **21. ... The EJ stated five correct propositions … : (1) the "just and equitable" test is a broader test than the "reasonably practicable" test in the Employment Rights Act 1996; (2) it is for the Claimant to satisfy the ET that it is just and equitable to extend time; (3) the ET has a wide discretion; (4) there is no presumption that the ET should exercise the discretion in favour of a Claimant - it is the exception rather than the rule (Robertson v Bexley Community Centre [2003] IRLR 434 CA); and (5) there is no general principle that an extension of time will be granted where the delay is caused by an internal grievance or appeal hearing (Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116 CA). …**
>
> **22. … the ET referred to British Coal Corporation v Keeble [1997] IRLR 336 EAT, one of the many cases in which the time limit has been considered. The ET summarised this decision as showing that the ET should consider the prejudice that both parties would suffer and should have regard to all the circumstances, including the length of and the reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued had co-operated with any request for information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken to get professional advice once she knew of the cause of action. Those factors are derived from section 33 of the Limitation Act 1980 ("the 1980 Act").**
>
> **23. Mr Coghlin draws attention to paragraph 33 of the decision of the Court of Appeal in London Borough of Southwark v Afolabi [2003] ICR 800, in which Peter Gibson LJ said that it was not an error of law for the Tribunal not to go through all of the matters listed in section 33(3) of the 1980 Act …**

Submissions

16 The Claimant's case was simple. Her principal contention was that her mental health in the summer of 2012 (and for a significant time before and after then) had been such as to disable her from taking measures to safeguard her own interests, including in particular inquiring into her legal rights and issuing Employment Tribunal proceedings to protect them.

17 Dr Morgan helpfully produced outline submissions in writing, which he supplemented orally. Wisely, he did not suggest that the delay in presenting the claim form had occasioned any prejudice. He also accepted that the question whether the Claimant could show that the acts complained of amounted to "conduct extending over a period" for the purposes of the 2010 Act, s123(3)(a) could only be addressed at the end of the case, on a review of all the evidence. Accordingly, his challenge to jurisdiction, for present purposes, proceeded on an assumed footing that time ran for all purposes from 8 June 2012.[2] The nub of his argument was that, when properly examined, the evidence did not substantiate the explanation offered for the failure to present the claim in time.

The facts

18 The relationship between the Claimant and the Church appears to have run into difficulties at quite an early stage. In January 2010 the Church took the

[2] It might be argued that, for the purposes of any claim under the 1996 Act, Part II or the 1998 Regulations, a slightly later date applied, but nothing turns on that point here.

decision to suspend her pastoral placement in Clapton. Her appeal against that decision, held in March 2010, succeeded and the placement was resumed. Unfortunately, however, the concerns (or, as she would say, professed concerns) about her performance as an ordinand and about her suitability for sacramental ministry did not abate and in early 2011 the decision was taken to suspend her from the formation programme.

19 It seems very likely that this turn of events was the cause, or at least a factor which contributed to, an exacerbation of certain physical and mental problems which had begun to affect the Claimant in 2010 or before. She spent some months in the early part of 2011 in Germany (her native country) and visited a spa at Bad Schoenborn, near Kronau. After returning to London she travelled to France, staying first at a mill near Lourdes and then on a farm. The latter period lasted from about October 2011 to February 2012. Thereafter, she was continuously resident in her London flat until some weeks after the Church brought her candidacy for ministry to an end on 8 June 2012, when she returned to France and took up residence again at the mill. She did not return to the UK until after the proceedings were commenced.

20 In her evidence the Claimant described the effect upon her of her increasingly unhappy association with the Church. She listed a range of conditions and symptoms which she attributes to treatment applied to her by decision-makers within the Church, ranging from gastritis (said to have been stress-related) to sudden and early menopause, to fibromyalgia, to severe insomnia, to depression. I cannot describe her narrative as measured or focused or concise or methodical. That said, I accept the picture which she painted as broadly reflecting her experience. I find that the bad news which she received in early 2011 and the worse news of June 2012 (which appeared to mark the very end of her aspirations to a future as a member of the Church's clergy) hit her very hard. I accept her evidence that she found it exceedingly difficult to attend to any task. For long spells in 2011 and 2012 she had great difficulty even in getting out of bed. Her cognitive functions, including memory, were badly affected. During much of her time in France she retreated into a profoundly isolated existence.

21 The Claimant told me, and I accept, that not long after 8 June 2012 she visited the offices of Bindmans, solicitors with a view to obtaining advice as to her legal position. She did not have an appointment. She saw a receptionist who advised her to set out her story in writing. She left with a business card. Around the same time she visited a CAB. She was seen by a volunteer new to the organisation who suggested that she should return when she felt a bit better. That advice seems to me to have been consistent with the Claimant's description of her own troubled mental state at the time, or at least with her having presented as distressed and troubled.

22 Neither the receptionist nor the volunteer said anything to the Claimant about time limits for bringing claims. That is not intended as any form of criticism: I imagine that neither was qualified to offer any advice on that subject.

23 The Claimant told me, and I accept, that she was not aware until October 2012 that it might be open to her to bring an Employment Tribunal claim. I further

accept that she knew nothing of the Employment Tribunals system or the time limits which operate in this jurisdiction. And there was no suggestion that she had any experience of litigation in any other forum, in this country or anywhere else. She was not and is not a worldly individual. I accept her evidence that she had long since given up watching television.

24 When, in early July 2012, the Claimant travelled again to France and stayed again at the mill near Lourdes, I have no doubt that she was in a bad way. I will not repeat my general findings at para 20 above. In and after August she was telephoned regularly by Dr Isabelle Sicard, a university lecturer friend. That contact may have stimulated her to take action in relation to her grievance against the Church. She managed to put together some sort of narrative in manuscript. Eventually, on 2 October 2012, she spoke by telephone with a solicitor at Bindmans. That was one of several lengthy conversations which took place over the ensuing fortnight. As a consequence of advice received in the course of one or more of those conversations she understood for the first time that there was, as she put in evidence, "a time pressure". It seems that she succeeded in assembling a typewritten account (no doubt modelled at least in part on her handwritten notes), which she sent to the solicitor by email. As I have mentioned, the claim form was presented on 17 October 2012.

25 In reaching my findings I have had regard not only to the Claimant's evidence but also to the further material from other sources which she put before me. In the end it was necessary for me to hear from only one of the long list of witnesses whom she originally intended to call, namely Ms Elizabeth Smith. She has had a long association with the Claimant through her counselling service which operates from the Kenton Baptist church. She is not qualified in psychiatric medicine. I do not ascribe to her medical expertise which she does not profess. But I found her a frank and straightforward witness and her evidence helpful to the Claimant as corroborating her general case as to the symptoms which she experienced in the summer and autumn of 2012 and their impact on her ability to function. During that time she had regular contact with her, initially face to face and, after the Claimant travelled to France, by Skype, email and text messages.

26 The supporting evidence also includes numerous letters and reports from medical practitioners in Germany and the UK. I find that material broadly corroborative of her account. Among many other things it confirms her assertion that she was prescribed Fluoxetine, an antidepressant, in 2011 (see the report of Dr Hanna Hund of 10 May 2011). Documentary evidence also shows that in July 2012 she was taking that medication in "high dosages". I have no reason to doubt her evidence that she continued to do so well into 2013.

27 I have found further support for the Claimant in the written statements of a number of individuals with no medical or quasi-medical background who have given telling descriptions of her state, particularly in 2011 and 2012 (Bundle, pp269-300).

28 Dr Morgan drew attention to a number of points in support of his central thesis that the Claimant's case as to her mental state at the relevant time was substantially overstated. I have had careful regard to all of them. The most

important, in my view, are the following. First, although the documents refer to post-traumatic stress disorder ('PTSD') there is no evidence of a diagnosis before 2013. Second, the Claimant declared herself in late 2011 to be fit to attend an appeal against her suspension from the formation programme, and was judged by her GP and Inter Health (an occupational health provider) to be well enough to do so. Third, she was able, in March 2012, to produce a coherent and properly reasoned appeal against the decision of the Assessment Board and did not rely on her impaired health as an obstacle to the timely pursuit of the appeal. Fourth, she was able, as early as 30 June 2012, to write an email setting out a series of money claims.[3] Fifth, she continued to be involved in some 'ministry opportunities' following the setbacks of early 2011 and June 2012. (There was, however, as Ms Thomas accepted in cross-examination, no evidence of such activity between June and December 2012.)

Analysis and conclusions

29 Was it reasonably practicable (or reasonably feasible) for the Claimant to present the complaint of unfair dismissal and the money claims within the primary three-month period? In my judgment it was not. I am satisfied that the Claimant cannot reasonably be criticised for having been unaware of the applicable time limit. In the first place, it was by no means obvious that if any legal remedy was open to her, it would be accessible through proceedings in a forum designed for employment disputes. (Indeed, the Church contends strongly that this litigation is not about an employment relationship at all and, as an Employment Tribunal claim, is accordingly misconceived.) Secondly, given the Claimant's mental state, I consider that it would be quite unfair to hold that she *ought* to have been aware of the applicable limitation period. That view may reasonably be taken in the case of someone unencumbered by ill-health contemplating a claim based on something recognisably amounting to a workplace dispute. Barring unusual circumstances, such a person can fairly be said to be put on enquiry as to his or her employment rights and a failure promptly to ascertain and enforce those rights may render him or her a casualty of the somewhat harsh 'not reasonably practicable' regime. But I am very clear that this case is different. It involves someone understandably unaware of the legal remedies which might be open to her and afflicted at all relevant times by a disabling mental state. I do not accept Dr Morgan's contention, moderately and tactfully advanced, that her evidence was substantially exaggerated and overstated. The fact that, *before* the events of June 2012, she was able to pursue the appeal against the 2011 decision does not cause me to doubt her evidence about her state *after* 8 June 2012. Nor does the fact that, in the crucial period from 8 June to 2 October 2012, she wrote one email making claims for money said to be owing to her. Having placed the burden of proof firmly upon her, I am entirely persuaded that hers falls into the unusual category of case in which it was not reasonably practicable to meet the primary time limit.

30 Was the claim presented within such further period (7 September to 17 October) as was reasonable? In my judgment it was. I bear in mind that the focus of the legislation is upon the reasonableness of the *period*, not the explanation. Nonetheless, the explanation for the delay must feature in the assessment of

[3] For reasons which do not matter for present purposes, the email was in fact sent to Westminster College, Cambridge.

reasonableness. I have found that the Claimant was unaware of her rights or the time within which they could be enforced and cannot fairly be reproached for her ignorance. I have accepted that she found it inordinately difficult to piece together her story. I have little doubt that she found it very hard to bring herself to make fresh contact with Bindmans. And after contact was made, there was rapid progress (the time danger having become clear), enabling the claim to be presented within a fortnight. I find no culpable delay and I find that such delay as occurred was not unreasonable.

31 For the purposes of the claims under the 2010 Act, would it be just and equitable to substitute a longer period for the primary three-month period? In my judgment it plainly would. The factors which inform my decision under the 1996 Act apply, and are all the more compelling, here. I have taken account of the explanation for the delay, the extent of the delay, the (admitted) absence of any prejudice attributable to the delay and all the other circumstances of the case. I am satisfied to a high standard that it would be just and equitable to substitute for the primary period a longer period such that, applying that period, the claims under the 2010 Act are within time.

Outcome and further conduct

32 For the reasons I have given, I hold that any claim for the purposes of which time began to run on 8 June 2012 is within the Tribunal's jurisdiction. In so far as there is a dispute about whether, for the purposes of any claim under the 2010 Act, time ran from an earlier date, it will be for the Tribunal at the final hearing to decide (a) whether time did run from an earlier date and, if so, which date; and (b) depending on its adjudication on (a), whether the Tribunal has jurisdiction to consider that claim.

33 The question of a final hearing needs, however, to be put to one side, at least for the time being. As Employment Judge Hodgson has already directed, the next stage in this litigation must be to determine whether, for the purposes of any of her claims, the Claimant was 'employed' within the meaning of the applicable legislation. Preparation of a preliminary hearing to resolve that issue will be the subject of the next case management hearing which, with the agreement of the parties, I listed on a provisional basis for 10.00 a.m. on 20 April this year. Given my decision on the time issue, that date stands and is hereby confirmed.

Employment Judge Snelson

7 April 2017