Appeal No. UKEATS/0011/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 6 August 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

NORBERT DENTRESSANGLE LOGISTICS LIMITED APPELLANT

MR GRAHAM HUTTON RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS CORDREY (of Counsel) Instructed by: Shakespeares Solicitors Somerset House Temple Street Birmingham B2 5DJ
For the Respondent	MR GRAHAM HUTTON (The Respondent in Person)

SUMMARY

JURISDICTIONAL POINTS – Claim in time and effective date of termination

A Tribunal accepted it was not reasonably practicable for a Claimant to begin proceedings within 3 months of his dismissal, despite the fact he had entered into detailed email correspondence, and pursued a grievance in respect of related matters during that time, because it was prepared to accept his evidence that he simply became unable to function properly and could not bring himself to do it. It held that it was reasonable for him to delay a further 6 weeks beyond the initial period on the basis it accepted his evidence that he put in an application to the Employment Tribunal as soon as he felt able to do so.

Although reservations were expressed, the Appeal Tribunal held that the conclusion was one of fact, and that (the ET having seen and assessed the Claimant) it could not be said to be perverse and must stand.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This appeal is in the familiar territory of time limits for bringing claims, but it has raised issues that I have found somewhat troubling to resolve. I have to remind myself that the law is clear that when section 111(2) of the **Employment Rights Act 1996** is in play, the relevant findings, where there has been no material misdirection of principle, are matters of fact for an Employment Judge to make. The difficulty where findings of fact are made is frequently that a court on appeal forms a view, and it may be a strong view, that if it had been in the position of the Tribunal, it would not on the available material have come necessarily to the conclusion that the Tribunal did. But that is not to say that there has been an error of law. For that to be the case, findings of fact must extend to the territory of what is perverse, they have to be shown to be misapprehensions of material fact, or a Tribunal has to be shown by reference to its judgment to have accepted facts that are apparently inconsistent one with the other and has failed to resolve the inconsistency. This case is one in which the temptation for a court on appeal is to ask whether the decision is perverse.

The Findings in Fact

2. The Claimant was employed in a senior capacity by the Appellant Respondent. In November 2011 he was suspended following allegations that were made against him, including conspiracy to defraud and theft. After a detailed investigation he was invited to a disciplinary hearing scheduled for 3 January 2012. That hearing was rescheduled to 9 January when the Claimant failed to make contact with his employer or attend, he being absent ill at the time, nor did he participate in the hearing as he had been invited to do in writing. In consequence, while still absent sick, he was dismissed on 16 January 2012. The date of termination of employment

for the purposes of the running of the time limit was treated by agreement as having been 18 January 2012 when the letter informing the Claimant of his dismissal arrived with him.

3. Thereafter he attended an appeal hearing in Manchester, for which he had to travel, on 20 February 2012. The appeal was dismissed on 7 March 2012. Because he had been dismissed on 18 January 2012 for the purposes of the time limit, time for entering a claim expired on 17 April 2012. That date was never clearly flagged up by the Employment Judge, Judge Garvie, sitting in Glasgow, from whose decision (for which Reasons were given on 4 September 2012) this is an appeal. In that decision she found that there was jurisdiction to hear and determine the claims that had been made to the Tribunal in respect of unlawful dismissal and unlawful deduction from wages. To both of those claims the same time limit applies, expressed so far as unfair dismissal is concerned in the terms of section 111(2) as follows:

> **"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."**

4. There are therefore two periods to be considered. The question of reasonable practicability applies within the initial three months. If a Tribunal is satisfied, the burden being on the Claimant, that it was not reasonably practicable for the complaint to be presented before the end of that period, then the question arises of whether it was reasonable to present the complaint within the period that it was in fact presented thereafter. This complaint was filed on 30 May 2012. It was therefore exactly six weeks out of time.

5. The Judge expressed her view having made a number of findings of fact, in detail but often lacking the precision for which an appeal court would have hoped. She accepted the evidence that the Claimant had given to her at a Pre-Hearing Review. He was open for cross-examination at that hearing; no other evidence was called. She found, materially to her decision, that after 7 March 2012 the Claimant could not face doing anything as he was "not functioning at all at these times". That I take to be a comment that he made and that she was prepared to accept. What happened on 2 April was that the Claimant began a short email exchange. He sent a lengthy email on that date to the Respondent. The Respondent replied on 4 April. The Claimant in his email had referred to the complaints that he had had. He argued his case. He indicated in the closing paragraphs that the allegations against him did not stack up and he:

> **"[…] would rather not settle this via a Tribunal and await advice from yourself if that is the only option left to me from your perspective."**

He indicated that he would like quickly to draw a line under the matter and move on.

6. There was a dismissive response to that, ending with the sentence, "This therefore brings the matters to a conclusion from the Company's perspective". Within three hours the Claimant responded in a shorter email reiterating his main point and indicating that he wished to move on, referring to ACAS, and in his final paragraph asking who his "legal people should be in touch with" regarding gathering details to progress matters with the Scottish Tribunal Service.

7. The Tribunal found:

> **"50. After the claimant realised that the respondent was not intending to respond further, this being after Mr Myers had replied by email of 4 April 2012, the Claimant went through a period of approximately one month when he only left his flat in order to go out for food. He was not answering the telephone, and he knew that he was 'just really trying to avoid life'.**

> **51. As to how long this lasted the claimant could only indicate that he 'started to feel a bit better towards the start of May 2012'. It had then taken him a period of three months to prepare the documents which he provided to the Tribunal for the Pre-hearing review."**

8. The Claimant explained difficulties that he had had in bringing himself to make the claim that he subsequently did on 30 May. In early May, but without being specific as to dates, the Tribunal Judge found that the Claimant arranged a holiday for four or five days. He was persuaded to have it. It helped "to some extent", but he was still waking every night with anxiety and sweats. At paragraph 55 the Judge found that having returned home he was still not feeling able to progress with life. He was not opening incoming mail, and he left bills and paperwork unpaid and unanswered. Eventually (paragraph 57) he:

> **"[…] faced up to the fact that he required to complete the claim form to the Employment Tribunals. He had put off doing so because he had "not felt well enough to do so" but then realised in late May 2012 that he would have to engage in the process."**

9. Those findings of fact were reiterated in paragraph 72, in which the Claimant gave as an example, plainly accepted by the Judge, an occasion when he had required to go to the toilet but he soiled himself because he simply could not get out of bed. He was "not functioning at all". She said, importantly:

> **"This was particularly so during April 2012 after the final email correspondence with the respondent."**

10. His evidence was, and she accepted it, that he was still not functioning after his return home from the holiday, which had been intended to be therapeutic, at the start of May.

11. These findings of fact, together with one at paragraph 78, led the Judge to conclude in these relevant words:

> **"102. […] It was only with some effort that he was able to send the emails of 2 and 4 April 2012. It was then at that stage that he appears to have become unable to function effectively and this appears to have continued during the remainder of April through to the beginning of May 2012. He then followed the advice suggested to him by his mother and went away for a short holiday abroad. […]**
>
> **103. On the basis of the findings set out above, I have concluded that it was not reasonably practicable or "reasonably feasible" for the claimant to have presented the claim within the three months. This is on the basis that the claimant remained unwell and was having considerable difficulty as he explained it. He gave evidence about his inability to leave the house except to go to buy food and that he was refusing to answer telephone calls. He was ignoring incoming mail […] and later, he was unable to deal with the outstanding electricity account […]."**
>
> **104. The claimant accepted that he had referred both to 'legal people' and ACAS although he had made no efforts to contact either a solicitor or ACAS. His explanation was that he did not feel able to do so."**

12. At paragraph 106 the Judge found that he was clear that he had put off dealing with the Tribunal application because he did not feel well enough to do so and (at 110) set out his recollection that he completed the claim form as soon as he felt he was strong enough to deal with it. The Judge distinguished the case of **Asda Stores Ltd v Kauser** UKEAT/0165/07, a Judgment of 15 October 2007 of Lady Smith, on the facts, because that was a case, though relating to stress, in which there had been no evidence of illness or incapability. Here, there was, she said at paragraph 114. The matter she relied upon was the Claimant's graphic description of his inability to function normally. She concluded that in those circumstances it was not reasonably practicable for the Claimant to have presented the claim timeously within the three-month period.

13. She then turned separately to look at the second question I have identified, that of whether the claim was brought within a reasonable period thereafter. She repeated at paragraph 119 the Claimant's position that he dealt with the claim as soon as he felt able to and that that must have been on or around 29 May 2012. In that paragraph she observed:

> **"119. There was no reason to doubt the claimant's credibility. It was also apparent that it had taken the claimant a considerable effort to attend the Pre-Hearing Review. There were times when he became quite obviously distressed and was invited to take his time or have a short break which he declined. […]**

120. In all the circumstances, I have concluded that the claim having been presented on 30 May 2012 which is more than five weeks beyond the expiry of the three months' time limit was, however, within a period that was reasonable in all the circumstances."

14. It was on that basis that she concluded that there was jurisdiction. An attempt was made by the Respondent to persuade the Tribunal Judge to change her view on a review. In that review she re-emphasised but did not materially add to the reasoning by which she had concluded that the Claimant should succeed. She did however say at paragraph 57 of the review Judgment that the bringing of a claim represented a barrier that the Claimant was unable to cross until late May 2012:

"Whatever caused his inability to face up to undertaking the task of completing and then presenting the claim form, I was persuaded that it was only by late May 2012 that he reached a stage where he was able to do so and that it took considerable effort on his part."

The Law

15. There is no dispute before me as to the general principles of law that are applicable. First, though, I should emphasise that every case in this area of all areas must necessarily depend upon its own particular facts. The question of what is reasonably practicable is explained in a number of authorities, of which it is necessary only here to refer to paragraph 34 of **Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119, a decision of the Court of Appeal, Dunn and May LJJ. In paragraphs 34 and 35 of the Judgment is said this:

"34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. […] Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in *Singh*'s case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.

35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case,

> **an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."**

16. In **Kauser** Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> **"[…] 'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."**

In my view, to ask whether it was reasonable to expect that which was possible to have been done is a useful insight.

17. In the case of **Schultz v Esso Petroleum Company** [1999] IRLR 488 CA, Stuart-Smith, Potter and Brooke LJJ, the Court of Appeal commented (see paragraph 30) that the approach to what was reasonably practicable in that sense should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation. Put in terms of the test to be applied, it was said, it may make all the difference between practicability and *reasonable* practicability in relation to the period as a whole.

18. Thus the whole of the period, as the statutory language suggests, is to be considered but with what Mr Cordrey, in my view rightly, identified as a particular focus upon the closing weeks of that period. I asked him in argument what would be the likely conclusion of a Tribunal if, say, someone with a potential claim for unfair dismissal suffered a catastrophic injury demonstrable to all two weeks before the end of the three-month period. He answered,

correctly in my view, that the whole of the period had to be viewed, but it is plain, as it seems to me, that in those circumstances a Tribunal is likely and entitled to place a particular emphasis on the inability during the last two weeks and to take into account, as may be the case, whether there have been reasons such as internal appeals, prospects of settlement, conciliation and the like that had in a loose sense justified or made reasonable not putting the claim in earlier within the permissible period, providing, of course, that the catastrophic event was one that was outwith the control of the individual in the sense of being unseen and unanticipated. In short, all depends upon the findings of fact, but, in line with **Schultz**, with particular focus upon the closing weeks of the initial three-month period.

The Appeal

19. This case is not one in which there is any question of ignorance of time limits. There is no excuse to be evaluated. The issue is purely one of capability in the sense of mental capability. As to that, as Mr Cordrey points out in his argument, there was no medical evidence specifically directed to showing that the Claimant could not mentally bring himself to enter a complaint. There was only his word to go on.

20. Mr Cordrey took seven points. He did not argue as one of those points that the Tribunal had given insufficient reasoning for its conclusion. The first ground was that the Tribunal had ignored or given insufficient weight to the objective evidence about the Claimant's level of capability and activity during the initial three-month period. Before his dismissal but whilst he had been certified unfit to work he had emailed the Respondent (8 January 2012; Judgment, paragraph 23); on 14 January he had sent a detailed reply to the outcome of a grievance proceedings running in tandem here with the disciplinary proceedings that were to result in his dismissal (see PHR Judgment, paragraph 25). On 18 January the Claimant, having received the

decision about dismissal, promptly emailed the Respondent to appeal, requesting a copy of the disciplinary procedure. On 20 February 2012, therefore by now a month into the three-month period, he spent a considerable time preparing and then attending a grievance appeal meeting followed by a dismissal appeal meeting. There was material before the Tribunal that showed that the appeal meeting itself had lasted for 3¼ hours and the Claimant had appeared rational and fully able to cope with the stresses of that hearing at that time. Then he relied upon the email exchanges in particular of 2 and 4 April that I have already set out above.

21. Accordingly, he submitted, there was, viewed objectively, material that showed that this Claimant could and did function. That rendered the decision of the Tribunal to the effect that he was not capable a conclusion that was impermissible or perverse. He drew attention to the length of the emails, 926 words if the 2 emails were put together, notwithstanding the ill-health from which he claimed to suffer. Moreover, they were in reasoned and coherent form. Given that at this time the Claimant knew of the Tribunal limits and had specifically referred to the prospect of ACAS involvement or Tribunal proceedings and of instructing lawyers, it is remarkable that he did not then issue a claim and that it was not held reasonably practicable by the Employment Judge for him to do so.

22. When taken to paragraphs 50-52, 55, 72 and 74 of the Tribunal Judgment, Mr Cordrey noted that the Tribunal Judge had not said in terms that there had been a sea change in the disposition of the Claimant and his state after 4 April. Judged objectively as at 4 April, he was then fully capable of fighting his corner, making his points and stating a claim, particularly since all that is required to launch a Tribunal claim is a simple, concise statement of that which is complained about.

23. Next he argued that the Tribunal erroneously categorised the case as one of illness or incapacity where there was no supporting medical evidence. At the last minute the Claimant had asked the Tribunal to admit such evidence from his GP. The Respondent had at the Tribunal objected to that course; the Employment Judge had rejected the application. There was no medical evidence to show that he was receiving medication; he had declined to accept it. He himself was unclear whether he had been back to the GP after 4 January and before the end of the year during which he lodged the complaint, and therefore the Judge was concluding that the Claimant had a particularly disabling medical state without any medical material to support it. This, he submitted, was an error of law.

24. Thirdly, and associated, he argued that the Tribunal erred in considering that the Claimant's own description of his state of health crossed the line from stress to illness or incapacity. That could not be done without there being an error of law. He drew attention to references that showed that the Claimant had claimed that from March until April 2012, when he wrote the emails, that he could not face doing anything as he was not functioning at all at these times (paragraph 43), that after 4 April to around 4 May he was "just really trying to avoid life" (paragraph 50), that he was putting things off (paragraphs 68, 72 and 110), did not have the energy to progress the application (review Judgment, paragraph 12), eventually faced up to the fact and had not been in a place to think clearly. Mr Cordrey argued that inability is inability; either one cannot face up to the fact or one can. If this is a case in which the Claimant eventually faced up to the fact, there is no obvious reason why he could not have done so earlier. He submitted that the Tribunal had set the threshold of what was not reasonably practicable too low. For a Tribunal simply to accept an assertion that a litigant could not face submitting a claim would be to invite that sort of evidence from claimants and would deprive the time limit of much of its force and value; it is, after all, a limit and not a target.

25. By reference to what the Tribunal said at paragraph 111, it had misplaced the burden of proof. In that paragraph the Judge had said that there was no evidence before her that the Claimant became fit after 4 January. If matters had stopped there, then Mr Cordrey's observation would have some force; it does not, because the words follow, "Indeed, the evidence is to the contrary […]". It is then set out. But the evidence to the contrary that the Judge took into account in assuming that on the balance of probabilities the Claimant was unfit and had not regained fitness was that he had been advised to take a course of medication by his doctor a week before the Pre-Hearing Review in August 2012.

26. This then led on to the sixth ground of appeal, which was that the Tribunal considered irrelevant material. In determining the state of fitness, the Judge took into account medical evidence that post-dated the period. This, submits Mr Cordrey, is not permissible. It is irrelevant to the state of health at the relevant time; that was therefore an error of law.

27. Seventh, and finally, he argued that it was not permissible for the Judge to conclude that six weeks was a reasonable further period. This is because the Tribunal itself recorded the Claimant's own evidence that he had been unable precisely to explain why it was that it was not until 29 May 2012 that he compiled the form that he then submitted, it being received the following day. If he himself could not explain the delay, then the Tribunal Judge was not in a position to assess the delay as having been reasonable, since it was his explanation for the delay that was the starting point for any of the necessary enquiry.

Mr Hutton's Submissions

28. Mr Hutton sought to answer by raising a number of matters of fact. He represented himself before me, as he had done before the Tribunal. He did, however, observe in respect of the last point that his evidence had been, and was accepted by the Judge, that as soon as he was able to complete the Tribunal form he had done so. That is the effect, he submitted, of the finding at paragraph 119.

Principles and Conclusions

29. I would have wished for a Judgment that focused more closely upon the precise time limits and expressed with greater precision that which the Claimant could or could not do at relevant times. I would have wished to see a Judgment that explained why it was that the Claimant could issue the emails of 2 and 4 April as he did and yet it be accepted that he had been medically, physically (because of his mental state) incapable of submitting a Tribunal application form between 4 April and 17 April, focussing, as the law requires one to do, in particular upon those last few weeks. However, it is frequently the case that a Judgment of a Tribunal is not drafted as an appeal Judge might wish in order to make the resolution of the issues on appeal easy for him. A Tribunal Judgment, as has often been said, cannot be expected to be a faultless piece of legal draughtsmanship; it has to be read as a whole.

30. Read as a whole, in my view, the Judge did draw a distinction that although not clearly signposted was sufficiently clearly there in the reasoning to be identifiable to the effect that there was a marked difference in the Claimant's ability to function after 4 April. In the central paragraphs of her reasoning the Judge accepted his evidence. That is a matter of considerable importance. A Tribunal Judge sees the witness; an appeal court does not have that advantage. Where evidence is given by an individual that they have been unable to function and they give

that evidence without supporting medical material and in the teeth of an apparent ability to function immediately before the relevant period and, if one takes paragraph 43 into account, in the middle of a period of general inability, any Tribunal must be sceptical. Those are the inevitable points that will be made in cross-examination. Here, the Respondent was represented at the Tribunal. The Judge was in the best position to judge. I suspect that the answer to the "floodgates" argument that Mr Cordrey gave as his fourth ground is simply that in most cases in which a claimant asserts that they were unable to bring themselves to put in a claim a Tribunal Judge will have little difficulty in refusing to accept that as a realistic evaluation of what occurred. It will be a very rare case in which it is accepted. But there seems to me no reason in principle why it should not be; it is, after all, essentially a question of fact and the assessment of a witness.

31. Accordingly, there is, to my mind, here a sufficient basis for the Judge finding, albeit upon the evidence alone of the Claimant, that he was in the state in which he said he was. If he was in that state, then it is not in the least inconceivable that he could not sensibly file a claim whilst so suffering. The force of the point that Mr Cordrey made in respect of the burden of proof is answered, as it seems to me, by appreciating that he was regarding a state as necessarily one that is unchanging. It is implicit in this Judgment and from the nature of that which the Judge was considering that the condition from which the Claimant suffered was not an unchanging one; it did alter over time. She described his evidence about it getting "a bit better". She accepted that he put in the claim when he felt able to do so and as soon as he felt able to do so. Those are permissible findings, though, as I have indicated, they are likely to be rare findings in the sense that cases in which they are made will be rare.

32. The matter that has troubled me most is a matter that is not directly addressed by any of the seven grounds of appeal but is implicit in Mr Cordrey's submissions: that is, that there is an unexplained inconsistency between that which the Judge found as facts and that which she concluded as fact. In particular, though Mr Cordrey did not stress this in his initial argument to me, I have concern about the possible discrepancy between paragraph 43, which describes a state in which the Claimant said that he was not functioning at all between early March 2012 and 2 April 2012 and the period after 4 April 2012 when he was not functioning at all, only – and, it might be thought, surprisingly – to function in the period in between - on the 2, 3 and 4 April.

33. Reading the decision as a whole, and bearing in mind the guidance of the authorities, I have come to the conclusion on balance that the decision is nonetheless permissible. This is because, despite the way in which those findings might be put in argument, the Judge did draw a distinction between the period before 2 April and that after (see paragraph 102, the part quoted above), and at paragraph 72 she found that the "not functioning at all" was "particularly so during April 2012". I would have wished for an explanation, which the Claimant must have given, for his ability at the start of April and subsequent inability, to be set out, recorded and assessed by the Judge, but there is sufficient in the Judgment in the findings of fact to come to the conclusions she did without it going to the lengths of being perverse.

34. The matters running through his grounds that Mr Cordrey relies upon in paragraph 1 are all matters that pre-date the last two weeks of the period within which the appeal had to be lodged. This is not a case in which there had simply been nothing happening at all in the period before. The Judge did not expressly focus upon the last two weeks as being the only two weeks that she could have in contemplation and explain why it was not reasonably practicable for the

Claimant to have put his complaint in during the two or three days of functioning in April that it is plain on the objective evidence he must have had, subject only potentially to evidence that although he could correspond with his employer he could not bring himself to issue a Tribunal claim for the stresses that involved, or something of the sort. But this is to ask too much of the Employment Judge, whose assessment necessarily had to be an overall one, taking into account all the circumstances, and in which too great a degree of analysis might obscure the eloquence of the totality of the facts that had to be considered.

35. As to the second argument, medical evidence is, as Mr Cordrey frankly acknowledged, not an essential factor; it is a desirable one. Here, moreover, the Claimant could, but did not, call his mother to give evidence, but no point was taken as to this before the Employment Judge, and it is too late to take it now. Mr Hutton objects that the Respondent cannot rely upon the absence of medical evidence when the Respondent shut it out by application. I reject that particular argument for two reasons: first, the reason it was rejected was his own lateness in making the application; but secondly, it is actually very difficult for me to see what possible help that medical evidence could really have been here, given that the last time a doctor undoubtedly saw the Claimant was 4 January, the relevant period was after 18 January and in particular towards 17 April, and he did not see a doctor again until August 2012. The doctor might have been able to hazard some guess as to the extent of functioning at an earlier stage or to say how consistent the Claimant's account was with the general medical model of illness such as depression, but beyond generalities this must be difficult to assess and it is difficult to think that he could have relied on any more than the Claimant's own input in assessing what was the situation. The Tribunal Judge assessed that input; it is on her assessment of credibility that the whole case ultimately depends. This was an incapacity case, as the Claimant put it; that is how the Judge treated it.

36. The question of whether the burden of proof was applied correctly and irrelevant material considered requires a finding that it was impermissible for the Tribunal to have regard to what the GP had said in August 2012 in order to assess whether the Claimant had been suffering throughout a prior period. In my view, the evidence is not irrelevant. That is for this reason. If the question is whether there is a particular state of affairs at a particular time, then it is relevant, though by no means conclusive, that before the time period under investigation the state exists and shortly after the period under investigation the same state exists. If those are so, there is a probability, though by no means a certainty, and certainly a permissible argument, that the state has existed throughout the period under investigation. I cannot therefore dismiss as irrelevant the doctor's evidence as given. I do not think it of the greatest of assistance, but it is of some.

37. The Tribunal's supposed error (ground 7) as to the question of the reasonable further period is in my view answered, again, by the Tribunal's conclusion of fact by accepting the Claimant's evidence that he dealt with the claim as soon as he felt able to. This is not a case in which "feeling able to" was a question of making a choice, when both options were freely open to the individual. The case is one in which one option was precluded by a form of mental ill-function. Looked at in that light, which is the light shining through the Judgment, although the Claimant understandably could not say why he did not feel better than he did previously, if it was once accepted that as soon as he did feel well enough he did put the claim in, then the conclusion that the time within which he did so was reasonable was not an impermissible one.

38. In conclusion, the Tribunal's Judgment is undoubtedly favourable to the Claimant. I have to ask essentially whether it is outside the entitlement of the Tribunal Judge to reach it so

as to amount to an error of law. Ultimately, the case comes down to an assessment by the Judge, having seen the Claimant, of that Claimant's credibility. There is no basis upon which it can be said that there is such inconsistency as to vitiate that finding. That being the case, with all the reservations I have expressed, I am bound to hold that this appeal must be, and is, dismissed.