Appeal No. UKEAT/0472/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 December 2012
Judgment handed down on 21 March 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MR H EL-KHOLY — APPELLANT

RENTOKIL INITIAL FACILITIES SERVICES (UK) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAKE DUTTON (Solicitor Advocate) Messrs Waldegraves Ealing House 33 Hanger Lane London W5 3HJ
For the Respondent	MS SAFIA THAROO (of Counsel) Instructed by: Rentokil Initial Facilities Services (UK) Ltd Legal Services Castlegate House Castlegate Way Dudley DY1 4RR

SUMMARY

JURISDICTIONAL POINTS – Extension of time: reasonably practicable

Where a Claimant has retained a solicitor to act for him and failed to meet the deadline for presenting a complaint of unfair dismissal to an Employment Tribunal, the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal. Dictum of Lord Phillips in **Marks and Spencer plc v Williams-Ryan** [2005] IRLR 562 and **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 applied. The approach to "reasonably practicable" in **Employment Rights Act 1996** section 111 is that of the generous interpretation of "practicable" in the predecessor provision given in **Dedman**. **Porter v Bandridge Ltd** [1978] ICR 943 applied. There is no difference in the approach to be taken to ignorance of the right to bring a claim of unfair dismissal and ignorance of the time limit for doing so save in the ease or difficulty of establishing the reasonableness of such ignorance. **Wall's Meat Co Ltd v Khan** [1978] IRLR 499 applied. Each case turns on its own facts. The Employment Judge did not err in deciding that the Claimant had not established that it was not reasonably practicable for him to present his complaint of unfair dismissal in time.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Mr El-Kholy appeals from the decision of an Employment Tribunal ('ET'), the Employment Judge ('EJ') sitting alone. In a judgment sent to the parties on 4 July 2012 the EJ held that the ET had no jurisdiction to hear his claim for unfair dismissal as it was presented outside the time limit specified in section 111(2) of the **Employment Rights Act 1996** ('ERA'). The EJ also held that Mr El-Kholy's claim of harassment on grounds of race was presented outside the time limit specified in section 123(1) of the **Equality Act 2010**. There is no appeal from that decision. The parties will be referred to by their titles before the EJ, as Claimant and Respondent. References to paragraph numbers are to those in the judgment of the EJ unless otherwise indicated.

Outline facts

2. The issue on appeal is whether the EJ erred in holding that the Claimant had failed to establish that it was not reasonably practicable for his complaint of unfair dismissal to be presented before the end of the period of three months beginning with the effective date of termination. Unless this criterion is satisfied and the ET decides that the complaint was presented within such a further period as they consider reasonable, the ET has no jurisdiction to consider the complaint of unfair dismissal.

3. The Claimant was employed by the Respondent as a cleaner from 15 May 2008 until his dismissal on 4 October 2011.

4. On 3 May 2011 the Claimant raised a grievance about racial harassment with the assistance of his union. He gave evidence that before that date he was told by the union that if

there was no satisfactory response from the Respondent, they would take a racial harassment complaint to the ET. The complaint was not presented to the ET until 23 January 2012.

5. Following a disciplinary meeting on 4 October 2011 at which the Claimant was dismissed, the Respondent wrote to him on 6 October 2011 informing him that his last day of employment with the company was 4 October 2011 and that he was entitled to three weeks' payment in lieu of notice. The Respondent accepted that the letter was confusing as it also referred to continuing to search for alternative jobs for the Claimant during his three week notice period.

6. On 15 October 2011 the Claimant instructed solicitors to help him with his appeal against dismissal. The EJ held:

> **"22. The Claimant was very clear in his evidence that he knew he had been dismissed as of 4 October 2011 and his solicitor's letter to the company dated 19 October is also very clear that the effective date of termination is 4 October 2011."**

The EJ recorded evidence given by the Claimant, who is Egyptian, that:

> **"6. …it was very hard for him to understand his rights due to his poor grasp of English. He had instructed solicitors, Ardens, on 15 October 2011 after his dismissal to help him with his appeal against that dismissal. He said however that they had never given him any advice on an unfair dismissal claim or on the time limits relating to such a claim."**

7. The Claimant appealed from his dismissal. The appeal process continued into November and December. The EJ observed that some of this delay may have been at the Claimant's and his solicitor's request.

8. By letter dated 6 January 2012 the Claimant was informed that his appeal was dismissed. In a letter from his solicitors to the Respondent dated 11 January 2012 they wrote that the Claimant had informed them that he intended to take the matter to an ET. The EJ held

that although 11 January 2012 was outside the time limit to bring an unfair dismissal claim, by this stage the solicitors would have known of the Claimant's plans to bring Tribunal claims. In mid January the Claimant's then solicitor suggested that he instruct his current solicitor who specialises in employment law. The Claimant met and instructed his current solicitor on 23 January 2012 who presented his ET1 to the ET on that day.

9. It was accepted on behalf of the Claimant that his claim for unfair dismissal should have been lodged on 3 January 2012. However, it was not lodged until 23 January 2012. There was no dispute that the claim was lodged some three weeks out of time.

10. His representative accepted before the EJ, as recorded in paragraph 25 that the Claimant's then solicitors:

> **"…bearing in mind the information that they had, and bearing in mind their professional status as solicitors should have advised the Claimant (even if he had not specifically asked them) about time limits."**

Employment Rights Act 1996

11. Section 111:

> **"(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."**

The Judgment of the EJ

12. The Claimant's submission to the EJ to explain why it was not reasonably practicable for him to bring the claim in time were that:

> **"20.1. He does not speak or understand English and was thus unable to research time limits by asking someone or looking into the matter on the internet.**
>
> **20.2. His previous solicitors…never informed him of the time limits or of his right to make a claim for unfair dismissal.**
>
> **20.3. The Respondent did not make it sufficiently clear to him that he had been dismissed.**
>
> **20.4. At the appeal hearing of 30 November he was told he would get his job back."**

13. The EJ made the following findings on the reasons advanced by the Claimant for not presenting his claim for unfair dismissal in time:

> **"21. Bearing in mind the findings of fact, the Tribunal notes that as regards the first reason, this may be seen as some explanation as to why it was not reasonably practicable for the Claimant to present his claim. However, the Claimant was able to obtain advice and guidance from both his union and…solicitors.**
>
> **22. The Claimant was very clear in his evidence that he knew he had been dismissed as of 4 October 2011 and his solicitor's letter to the company (page 68) dated 19 October is also very clear that the effective date of termination is 4 October 2011.**
>
> **23. His solicitors clearly knew that he objected to his dismissal as they were assisting him in conducting an appeal against that dismissal. Therefore, bearing in mind that the appeal process was clearly stretching out into November and December (some of which may have been at the Claimant's and [the solicitors'] request) his solicitors should have been aware of and should have told the Claimant that there was a three month time limit to lodge and unfair dismissal claims.**
>
> **24. As regards items 3 and 4, the Tribunal accepts that these may have confused the Claimant but does not accept that they explain why [the solicitors] did not properly advise him of his rights and of the relevant time limits.**
>
> **25. It was accepted by the Claimant's representative that Ardens solicitors, bearing in mind the information that they had, and bearing in mind their professional status as solicitors should have advised the Claimant (even if he had not specifically asked them) about time limits."**

14. The EJ held at paragraph 26 that the authorities "are clear as regards the situation where professional advisers are at fault". She also referred to **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 as making it clear

> **"…that in such a case the remedy for the Claimant is against his solicitors and that this would not satisfy the not reasonably practicable test so as to grant an extension of time."**

The EJ considered other authorities in which the claimant had not demonstrated that they or their advisers had taken all steps reasonably practicable in the circumstances to submit a complaint of unfair dismissal in time.

15. Mr Dutton who appeared for the Claimant relied on **London International College v Sen** [1993] IRLR 333 before the EJ as he has on appeal. He drew particular attention to the observation of Sir Thomas Bingham MR that:

> **"It is his state of mind and his understanding of his position which matters; it seems strange to me that a complainant who is misled by incorrect advice into misapprehending his rights is unable to rely on the escape clause provided in [Section 111(2)]."**

The EJ set out her analysis of **Sen** in paragraphs 29 and 30:

> **"29. …The Court stated that each case should be decided on its facts and it did not accept that a complainant automatically lost his or her right to claim, that it had not been reasonably practicable to present a claim on time once he or she had consulted a solicitor. If, as in the Sen case, the advice was distrusted and the complainant sought and was offered confirmation of that advice by a member of Tribunal staff, the complainant's rights were preserved. The Tribunal had correctly found that the substantial cause of the late application was Mr Sen's mistaken belief in the incorrect advice of the Tribunal employee. It was therefore not reasonably practicable for him to present the claim in time.**
>
> **30. Once this analysis is undertaken, it is clear that Sen does not necessarily conflict with Dedman. Whilst instructing a solicitor, does not automatically take away a Claimant's right to argue that it was not reasonably practicable to present a claim within the time limit, it is for the Tribunal to look at the facts in each case."**

16. Taking into account the facts of the Claimant's case and the authorities she referred to the EJ concluded:

> **"31. In this case, it is clear to the Tribunal that [the] solicitors should have advised the Claimant of the relevant time limits and their failure to do so means that he has not discharged the burden of proof to show that it was not reasonably practicable for him to file the claim within the time limit. On this basis the Tribunal declines to exercise its discretion to allow the Claimant to bring his claim out of time and therefore has no jurisdiction to hear his unfair dismissal claim."**

The submissions of the parties

17. Mr Dutton for the Claimant submitted that the EJ erred in applying the judgment of the Court of Appeal in **Dedman** in concluding that where professional advisers are at fault in not presenting an unfair dismissal claim to an ET a Claimant does not satisfy the "not reasonably practicable" test for extending the three month time limit within which to bring a claim for

unfair dismissal. He submitted that **Dedman** was distinguishable from the Claimant's case. Mr Dedman knew of his right to bring a claim for unfair dismissal but was unaware of the time limit for doing so. In this case the Claimant was unaware of his right to bring such claim. Further, his solicitor did not advise him that he had such a right.

18. Mr Dutton submitted that what is material in determining whether it is not reasonably practicable to bring an unfair dismissal claim in time is the employee's state of mind. He referred to the observations of Brandon LJ in **Wall's Meat Co Ltd v Khan** [1978] IRLR 499 in which he observed at paragraph 44 that:

> **"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…or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance or mistaken belief with regard to essential matters."**

That ignorance must itself be reasonable. The Court of Appeal held that the Industrial Tribunal had not erred in holding that Mr Khan's ignorance of the need to present a claim for unfair dismissal was reasonable as he assumed it was being dealt with by a National Insurance Act Tribunal before which he had a claim for unemployment benefit.

19. In this regard, as he had before the EJ, Mr Dutton referred to the observations of Sir Thomas Bingham in **Sen** that it is the state of mind of the Claimant and his understanding of his position which matters. He contended that in this case the EJ failed to take into account the state of mind of the Appellant in deciding whether it was reasonably practicable for him to present his claim for unfair dismissal in time.

20. Mr Dutton contented that the approach of Stephenson LJ in **Riley v Tesco Stores Ltd** [1980] IRLR 103 in which he observed of the question whether a claimant had established that it was not reasonably practicable to present a complaint in time that he:

> **"…would hesitate to say that in every case where an adviser is consulted, a tribunal is bound to hold that the burden of proof has not been discharged."**

is to be applied to solicitors as well as to the CAB advisers under consideration in that case. The question is one of fact in each case as was restated in **Marks and Spencer plc v Williams-Ryan** [2005] IRLR 562.

21. Mr Dutton pointed out that since the judgment in **Dedman** the legislation has been amended to introduce the word "reasonably" before "practicable". In his oral submission he did not suggest that **Dedman** was bad law, as he had in his skeleton argument and in Ground One of the Notice of Appeal, but said that the principles there set out should be applied less stringently.

22. Whilst **Porter v Bandridge Ltd** [1978] ICR 943 illustrated that it is reasonably practicable for a claimant to present an unfair dismissal claim not only if he knows of his right to do so but also if he was put on enquiry or ought to have known of that right, it was submitted that on the facts of this case the Claimant did not know of his rights. It cannot be said he should have known of his rights as he was entirely dependant on his solicitors.

Mr Dutton submitted that the case of the Claimant is to be distinguished from those under consideration in **Dedman**, **Williams-Ryan** and **Northamptonshire County Council v Entwhistle** [2010] IRLR 740. In each of those cases the claimant knew of their right to bring a claim of unfair dismissal. Their ignorance was of the time limit for doing so. The Claimant's

ignorance of the time limit for bringing a claim was reasonable as he did not know of his right to make a claim of unfair dismissal.

23. Mr Dutton contended that the EJ found that the Claimant did not know until after the expiry of the limitation period of his right to bring a claim for unfair dismissal. In support of that submission, Mr Dutton relied on the following passages in the judgment of the EJ. The EJ recorded at paragraph 6:

> **"He said however that they [his solicitors] had never given him any advice on an unfair dismissal claim or the time limits relating to such a claim."**

Although the EJ did not quote from the solicitors' client care letter, she recorded that the solicitors' advice was only on the appeal against dismissal. Very fairly Mr Dutton drew attention to paragraph 25 in which the EJ recorded that he had accepted that the solicitors should have advised the Claimant about the time limit for bringing an unfair dismissal claim.

24. If the EJ had not made any or any adequate findings of fact regarding the Claimant's ignorance of his right to bring a claim of unfair dismissal, Mr Dutton contended that she erred in failing to do so. Further the EJ should have held whether that ignorance, which should have been found, was reasonable in the circumstances.

25. Ms Tharoo, for the Respondent, submitted that the conclusion of the EJ that the failure of the Claimant's solicitors to advise him of the relevant time limits meant that he had not discharged the burden of proof which was on him to show that it was not reasonably practicable for him to file the claim within time was unassailable. The Claimant's representative had rightly accepted that his then solicitors should have advised him, even if he had not specifically asked them, about the time limit for bringing a claim for unfair dismissal.

Since it had been rightly found supported by the correct concession by the Claimant's representative, that letting the deadline for presenting a claim for unfair dismissal pass, applying **Dedman** the EJ did not err in her conclusion.

26. Ms Tharoo submitted that, depending on the facts, the principle in **Dedman** that it is "practicable" to present a complaint of unfair dismissal in time even if a claimant is unaware of his rights, applies. The unchallengable facts in this case were that the Claimant instructed his solicitors because of an employment issue. He was challenging his dismissal. He asked his solicitors to assist him in his appeal from the dismissal. The finding of fact by the EJ that he knew that he had been dismissed on 4 October 2011 was not challenged. The solicitors knew that he was challenging his dismissal. It was incumbent on his skilled advisers, his then solicitors, to advise him of his right to bring a claim for unfair dismissal. They were at fault in letting the time for doing so go by. The EJ made unchallenged findings of fact in paragraph 23 which supported this conclusion. Although the initial scope of the instructions the Claimant gave to his then solicitors were to help him with his internal appeal against his dismissal, the EJ held that the solicitors should have advised him of the time within which to present a complaint of unfair dismissal.

27. The amendment of the legislation by the addition of the word "reasonably" before "practicable" had been considered by the Court of Appeal in **Porter v Bandridge Ltd**. It was to endorse the liberal interpretation adopted by Lord Denning MR and Scarman LJ in **Dedman**. There was no warrant for taking a different view.

28. Ms Tharoo contended that there is no distinction in principle between the approach to be taken to a claimant's ignorance of the time limit for bringing a claim and of the right to bring a claim for unfair dismissal. In both cases the authorities in particular **Porter v Bandridge Ltd**

establish that where solicitors are at fault in failing to advise a claimant of the time limit for bringing a claim, an ET should not be satisfied that it was not reasonably practicable for the claimant to bring his claim in time. Ms Tharoo relied in particular on the dictum of Stephenson LJ at page 957D. An employee who seeks advice from a solicitor puts themself in the solicitor's hands. His ignorance of his rights is not relevant.

29. Whilst Ms Tharoo accepted that there was in **Dedman** a discussion about a claimant's state of mind, or knowledge, it is clear that it was decided that:

> **"If a man engages skilled advisers to act for him – and they mistake the time limit and present it too late – he is out. His remedy is against them."**

Ms Tharoo submitted that where a claimant goes to a skilled adviser, the authorities are clear that the question of whether presenting a claim in time was reasonably practicable did not depend on the claimant's own knowledge. In paragraph 19 of **Dedman** Lord Denning clearly refers to the Claimant's fault ***or*** the adviser's fault. There is no reference in this paragraph to an adviser's fault in addition to the fault or lack of it of the Claimant. The adviser's fault is sufficient to render it reasonably practicable for the complaint to be presented in time.

30. Ms Tharoo submitted that the approach of Lord Denning in **Dedman** to the fault of advisers and the irrelevance in those circumstances of the ignorance of a claimant was followed in **Khan**. Ms Tharoo drew attention to paragraph 44 in which Brandon LJ held that ignorance or mistaken belief will not be reasonable if it either arises from the fault of the complainant 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.

31. Ms Tharoo submitted that the EJ found, as agreed on behalf of the Claimant, that his solicitors were at fault in not advising about time limits for bringing an unfair dismissal claim. The Claimant put himself in the hands of his solicitors. On the unchallenged findings of fact regarding the solicitor's fault and the long established approach of the authorities, the EJ did not err in concluding that the Claimant had not established that it was not reasonably practicable to bring the unfair dismissal claim in time.

Discussion and conclusion

32. The proper approach to the question of whether it is reasonably practicable to present a complaint of unfair dismissal before the end of the period statute provides for doing so has been the subject of many appellate decisions. In this case the unchallenged conclusion of the EJ at paragraph 31 was that the:

> **"…solicitors should have advised the Claimant of the relevant time limits…"**

The Claimant's representative, Mr Dutton who has also represented him on this appeal, accepted before the EJ that the solicitors:

> **"…bearing in mind the information that they had, and bearing in mind their professional status as solicitors should have advised the Claimant (even if he had not specifically asked them) about time limits."**

In light of the EJ's unchallenged conclusion and the position taken on behalf of the Claimant before the ET, on the information available to her the EJ was correct to deal with the issue before her on the basis that it was the solicitors who were at fault in not presenting a complaint of unfair dismissal in time. In this case it was not suggested, as it was in **Sen**, that the Claimant relied not on his solicitor but on someone else for final advice on when to present a complaint. Indeed it has been submitted that the Claimant placed himself "in the hands of his solicitor". His case was that it was the fault of his solicitor, not his or that of anyone else, that a complaint

of unfair dismissal was not presented to the ET in time. It is therefore those authorities on the approach to the "not reasonably practicable" test in circumstances in which a claimant has consulted skilled advisers who have failed to give him proper advice about bringing a complaint of unfair dismissal and doing so within the applicable time limits which are relevant.

33. The judgment of Lord Phillips, then Master of the Rolls, in **Williams-Ryan** provides an answer to several of the grounds of appeal advanced on behalf of the Claimant. The Court of Appeal in **Williams-Ryan** dismissed the employer's appeal from the decision of an ET, upheld by the EAT, that it was not reasonably practicable for Ms Williams-Ryan to have presented her complaint of unfair dismissal in time. Ms Williams-Ryan believed that she had to await the outcome of her internal appeal before presenting a complaint of unfair dismissal. She had sought the advice of the CAB who did not advise her to do so but there were other reasons why she did not present her complaint in time. The Court of Appeal upheld the decision of an ET that it was not reasonably practicable for her to present the complaint in time.

34. In Ground One of the Notice of Appeal it had been contended that the EJ erred in applying **Dedman** because that case could no longer be regarded as good law. Although in his oral submissions Mr Dutton did not contend that **Dedman** could no longer be regarded as good law, he submitted that ERA section 111 required a more generous application of the test of practicability by reason of the addition of the word "reasonably" before "practicable". In **Dedman** Lord Denning held at page 381:

> **"18. But what is the position if he goes to skilled advisers and they made a mistake? The English Court has taken the view that the man must abide by their mistake. There was a case where a man was dismissed and went to his trade association for advice. They acted on his behalf. They calculate the four weeks wrongly and posted the complaint two or three days late. It was held that it was 'practicable' for it to have been posted in time. He was not entitled to the benefit of the escape clause [See *Hammond v Haigh Castle & Co Ltd* [1973] IRLR 91 (1973) ICR 348, p1973] IRLR 91.] I think that was right. If a man engages skilled advisers to act for him – and they mistake the time limit and present it too late – he is out. His remedy is against them."**

35. Waller LJ in **Porter v Bandridge** at page 947C had held that the addition of the word "reasonably" before "practicable" made it clear that the liberal interpretation adopted by Lord Denning MR and Scarman LJ in **Dedman** was to be applied to the new wording. Lord Phillips in **Williams-Ryan** held in paragraph 20:

> **"20. The first principle is that s.111(2) should be given a liberal interpretation in favour of the employee. Lord Denning MR so held in D*edman v British Building & Engineering Appliances Ltd*. In that case the relevant provision was more draconian than s.111(2), in that it required a complaint to the employment tribunal to be made within four weeks of the dismissal unless the employment tribunal was satisfied that this was not 'practicable'. When the provision was changed to its present form, the EAT held that the same approach to construction should be adopted (see *Palmer* at pp.123-124) and, so far as I am aware, that approach has never been questioned."**

Thus the effect of the addition of the "reasonably" has been decided. The authorities do not support a departure from the approach adopted by Lord Denning MR in **Dedman**. The submission that the true ratio of **Dedman** is that a mistake by a solicitor does not render it impracticable to present a complaint of unfair dismissal in time and that **Dedman** is not authority for the proposition that failure by the solicitor to advise does not render it ***reasonably*** impracticable to present the complaint in time is contrary to the authorities of **Porter v Bandridge Ltd** and **Williams-Ryan**. Ground One of the Notice of Appeal is not sustainable.

36. As for Ground Two of the Notice of Appeal, Lord Phillips in **Williams-Ryan** reviewed the authorities on reasonable practicability in circumstances in which a claimant is ignorant of his rights to claim unfair dismissal and has consulted an adviser. These included **Khan**. As Ms Tharoo pointed out, the quotation from the judgment of Brandon LJ set out by Mr Dutton in his skeleton argument did not include the passage in which the judge held that the ignorance or mistaken belief of a complainant can only be regarded as rendering it not reasonably practicable to present a complaint in time if that ignorance or mistaken belief is itself reasonable. In a passage cited by Lord Phillips at paragraph 27 of **Williams-Ryan** Brandon LJ held of ignorance or mistaken belief in paragraph 44:

> **"Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries 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."**

Brandon LJ made it clear in paragraphs 46 and 48 of **Khan** that he did not see any difference in principle between the effect of ignorance of the right to make a complaint of unfair dismissal at all and the need to make the claim within a period of three months from the date of dismissal. However there may be a difference between the two in the ease or difficulty of establishing that such ignorance was reasonable.

37. In paragraph 30 of **Williams-Ryan** Lord Phillips cited the observations in **Sen** relied upon by Mr Dutton in which Sir Thomas Bingham expressed reservations about the principle suggested by the authorities that:

> **"When a prospective complainant consults a solicitor or a trade union official or similar adviser…he can no longer say that it was not reasonably practicable for him to comply with the time limit even if the adviser advised wrongly."**

38. Having reviewed the authorities including **Dedman**, **Khan** and the reservations expressed by Sir Thomas Bingham in **Sen,** Lord Phillips in **Williams-Ryan** held at paragraph 31:

> **"What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in *Dedman* was part of the ratio. There the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment tribunal."**

Accordingly Ground Two of the Notice of Appeal that the EJ erred in holding that it was reasonably practicable to present a complaint in time when it was not so presented due to the fault of his solicitor is not supported by authority.

39. Lord Phillips observed in **Williams-Ryan** that there is a constant theme running through the authorities. He quoted from May LJ in **Palmer and Saunders v Southend on Sea Borough Council** [1984] IRLR 119:

> **"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."**

In **Williams-Ryan** Lord Phillips held at paragraph 34 that the brief conversation with someone at the CAB played only a small part in the overall story and the facts of the case did not raise the question of whether the principle in **Dedman** applied.

40. The EJ in the case now before the EAT made clear findings of fact that:

> **"…the Claimant's solicitors clearly knew that he objected to his dismissal as they were advising in conducting an appeal against that dismissal."**

The appeal process was stretching out into November and December. From these unchallenged facts the EJ concluded that:

> **"…his solicitors should have been aware of and should have told the Claimant that there was a three month time limit to lodge any unfair dismissal claims."**

It was the Claimant's case before this Employment Appeal Tribunal that the Claimant was ignorant of his rights and put himself in the hands of his solicitors. It is clear from paragraph 25 of the judgment that his representative accepted before the EJ that the Claimant's solicitors:

> **"…bearing in mind the information that they had and bearing in mind their professional status as solicitors should have advised the Claimant (even if he had not specifically asked them) about time limits."**

41. It is clear that on the authorities and on the unchallenged facts that the EJ did not err as contended in Ground Two of the Notice of Appeal.

42. In Ground Three of the Notice of Appeal it is contended that the EJ erred in failing to consider and apply **Williams-Ryan**. **Williams-Ryan** is not, as was suggested by Mr Dutton, authority for the proposition that a CAB adviser must be regarded as a skilled adviser whose incorrect advice can be relied upon to establish that it is not reasonably practicable for a claimant to present a complaint of unfair dismissal in time. **Williams-Ryan** did not give rise to a decision as to whether or not a CAB adviser was a skilled adviser. Further, as Lord Phillips made clear in paragraph 34 of his judgment the upholding of the decision of the ET that it was not reasonably practicable for an unfair dismissal complaint in time did not turn on whether a CAB adviser's fault would be attributed to a complainant. On the facts, a conversation with someone at the CAB played "only a small part in the story".

43. Ground Four of the Notice of Appeal was added following the rule 3(10) hearing (Employment Appeal Tribunal Rules, rule 3(10)). The suggestion that the proposition in **Dedman** that a solicitor adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an ET if a claimant is aware of his right to claim unfair dismissal but not if he is not aware of that right is not supported by authority and contrary to observations of the Court of Appeal. The passage in the judgment of Brandon LJ in **Khan** in which he held that he saw no difference in principle in the effect of ignorance as between the three cases he referred of which two were ignorance of the right to bring a complaint of unfair dismissal and ignorance of the time limit for doing so is set out above. Giving his judgment in **Khan** Lord Denning MR was of the same view. He held at paragraph 15:

> **"I would venture to take the simple test given by the majority in *Dedman's* [1973] IRLR 379 case. It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonable have been so expected, it was his or their fault, and he must take the consequences. That was the view**

adopted by the Employment Appeal Tribunal in Scotland in *House of Clydesdale Limited v Foy* [1976] IRLR 391 and in England in *Times Newspapers v O'Regan* [1977] IRLR 101 – decisions with which I agree."

Lord Denning MR gave the lead judgment in **Dedman**. In **Khan** he referred to that judgment in stating that if a claimant or his advisers could reasonably have been expected to have been aware of his rights or the time limit for exercising them he must take the consequences. The consequence is that, absent some relevant and material fact, he cannot show that it was not reasonably practicable to present a complaint of unfair dismissal in time.

44. Having regard to the unchallenged findings of fact made by the EJ that the Claimant's case was and is that he put matters in the hands of his solicitors who were at fault in not advising him about the time limit for a claim for unfair dismissal, and necessarily therefore of his right to bring such a claim, Ground Four of the Notice of Appeal is not reasonably arguable. Lord Denning MR expressly stated in **Khan** that the principle in **Dedman** of the effect of fault by an adviser applied both when the claimant was ignorant of his right to bring a complaint for unfair dismissal and when he was ignorant of the time limit for doing so. In the relevant passage, Lord Denning MR in **Khan** referred to **House of Clydesdale Ltd v Foy** [1976] IRLR 38. It cannot be said that the EJ "erred in her understanding of **Dedman**". She applied it and all the relevant authorities correctly. The EJ did not err in failing to consider whether despite the negligent advice the Claimant could have been reasonably expected to inform himself of the time limits. The weight of authority and the facts are against this proposition.

Disposal

45. Despite the carefully developed arguments of Mr Dutton on behalf of the Claimant the appeal is dismissed.