Appeal No. UKEAT/0066/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 July 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

NORTH EAST LONDON NHS FOUNDATION TRUST — APPELLANT

MS S M ZHOU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NATHANIEL CAIDEN (of Counsel) Instructed by: DAC Beachcroft LLP 100 Fetter Lane London EC4A 1BN
For the Respondent	MR ANDREW BOUSFIELD (of Counsel) Instructed by: Messrs Hodge Jones & Allen LLP Solicitors 180 North Gower Street London NW1 2NB

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

The Claimant had instructed her solicitors to lodge her ET claims of whistleblowing detriment and unfair dismissal but, to save costs, had agreed she would complete the formal parts of the form ET1 herself. In so doing, the Claimant failed to transcribe the ACAS Early Conciliation ("EC") certificate number correctly (missing off the last forward slash and final two digits) and her solicitors failed to spot this error before they submitted the claim on the last day of the relevant limitation period. The Claimant's ET claim was duly rejected and the Claimant's solicitors re-submitted the claim - this time with the correct EC number - within a day of receiving the ET's notification of rejection. That, however, was outside the limitation period. Upon considering whether it had jurisdiction to determine the Claimant's claims, the ET held that the claim was initially correctly rejected because it did not contain the right EC number and the re-submitted claim was out of time. Applying **Adams v BT plc** [2017] ICR 382, however, that did not necessarily mean it had been reasonably practicable for the re-submitted, corrected claim to have been presented in time. The Claimant and her solicitors had both believed that a properly constituted claim had been presented in time, albeit that belief was mistaken. The Claimant's belief arose from her confidence in her solicitors; her solicitors' belief arose because they had failed to spot the error in the EC certificate number. Although the solicitors were at fault, that did not necessarily mean their conduct was unreasonable. Seeing this case as akin to **Adams v BT**, the ET concluded that, on this point, it would have "*little difficulty in resolving the issue of reasonable practicability in favour of the Claimant*". So doing, the ET concluded that the ET1 had been re-submitted within a reasonable period once the Claimant and her solicitors became aware of the error and that it therefore had jurisdiction to hear the claim. The Respondent appealed.

Held: *allowing the appeal in part*

The Claimant had believed she had lodged a properly constituted claim in time because she had confidence in her professional advisers. If those advisers had unreasonably failed to lodge a properly constituted claim in time, however, then the application of the **Dedman** principle (see **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 CA) would mean that the Claimant would not be entitled to simply rely on her confidence in what they had done; she would be bound by their unreasonable conduct. The question then became whether the Claimant's solicitors had acted reasonably. The ET found that they were "*unquestionably at fault in failing to check the ET1 thoroughly*" but did not conclude that this automatically meant that their conduct was unreasonable. That was a permissible view given the facts of the case; in particular, the Claimant having undertaken to complete the ET1 form herself to save expense. That said, it could not be assumed that the case was on all fours with **Adams**, given that the question of the application of the **Dedman** principle had not been raised in that case. The ET had therefore needed to demonstrate that it had engaged with the question whether the Claimant's solicitors had acted reasonably. As it was not possible to see that it had answered that question, the appeal would be allowed on this basis and this issue remitted to the same ET for determination.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the correct application of the "not reasonably practicable" test relevant to the possible extension of time for the submission of a claim under section 111(2)(b) of the **Employment Rights Act 1996** ("ERA"). Specifically, it relates to the presentation of an ET1 without a full ACAS Early Conciliation ("EC") number, which was rejected on this basis and to the subsequent resubmission of the claim out of time.

2. In this Judgment, I refer to the parties as the Claimant and Respondent, as below. I am concerned with the Respondent's appeal from a Judgment of the London (East) Employment Tribunal (Employment Judge Foxwell sitting alone on 21 June 2017; "the ET"). Representation below was as now. By its Judgment, the ET ruled that the Claimant's claims - which are of whistleblowing detriments and dismissal as well as for notice and holiday pay - were presented outside the relevant time limit. It further held, however, that it had not been reasonably practicable for the Claimant to present her claims in time and they had been presented within a reasonable time of it being practical to do so; the ET therefore accepted jurisdiction.

3. The full procedural history of this case before the ET is somewhat complicated, as recorded at paragraphs 4 to 7 of the Judgment under appeal. This has led to a significant delay in proceedings. The ET1 was presented on 6 October 2015, but the Preliminary Hearing with which I am concerned only took place on 21 June 2017. The appeal itself was initially considered to disclose no proper basis to proceed; Choudhury J so ruling under Rule 3(7) of the **Employment Appeal Tribunal Rules 1993**. After a Hearing, under Rule 3(10), on 12 March 2018, I permitted the appeal to proceed to this Full Hearing. The delays that have occurred - in

particular before the ET - are obviously frustrating to the parties; especially so for the Claimant, who is understandably concerned that her whistleblowing complaints have yet to be heard.

The Relevant Background and the ET's Decision and Reasoning

4. The Claimant was an employee of the Respondent, having started her employment on 23 April 2014. As the ET found, that employment ended on 22 April 2015; that was the effective date of termination for statutory purposes.

5. Some form of dispute between the parties appears to have arisen first in March 2015, and it was then that the Claimant consulted her solicitors about these concerns and her position at work. Those solicitors continued to act for the Claimant throughout the events with which the ET was concerned at the Preliminary Hearing.

6. After her employment had ended and before she could lodge any ET proceedings, the Claimant had first to comply with the ACAS EC requirements. She duly commenced EC on 17 July 2015, and this ended on 31 August 2015. Thus meaning - it being common ground before the ET - that the last day of the primary limitation period was 30 September 2015.

7. In September 2015, the Claimant gave her solicitors instructions to present claims to the ET and put them in funds for this purpose. To save costs, it was agreed that the Claimant would complete the pro forma parts of the ET1 herself. In doing so, however, when completing that part of the ET1 that required her to provide her EC certificate number, the Claimant made an error, missing off the last forward slash and two digits. This arose because she inserted the number contained in a header to an email from ACAS - which seems to have been forwarded to

her by her solicitors - but had failed to read the content of the email itself, which specifically advised:

> **"It is important to quote the full number on the attached certificate, which is a letter (or two letters in the case of a group claim), followed by 10 numbers in the format [formats described]." (ET Judgment, paragraph 27)**

That is guidance that might also have to be discerned from the text at box 2.3 of the ET1 form. In any event, this mistake was not picked up by the Claimant's solicitors, who were familiar with the ACAS EC requirements and had themselves received the relevant email from ACAS.

8. On 30 September 2015, the Claimant's solicitors undertook to lodge the Claimant's ET claim. The solicitor handling this was aware there was a requirement to pay a fee when lodging the claim but was told by the firm's accounts department that the ET fee should be paid using a credit facility the firm had set up with HMCTS. Acting on that information, an administrative assistant was sent to lodge the claim with the London (East) ET and did so by handing it to an employee at the ET offices.

9. In fact, payment through an HMCTS account was not acceptable to the ET central office and by letter dated 1 October 2015, the claim form was returned to the Claimant's solicitors stating that it had not been accompanied by a fee and the claim contained an incomplete ACAS EC certificate number. That letter was received by the Claimant's solicitors on 5 October 2015, and on 6 October the claim was duly resubmitted with a cheque for the fee and with the EC certificate number corrected by hand. That claim was accepted by the ET.

10. Against this factual background, the ET noted that the relevant time limit for the Claimant's claims was three months from the effective date of termination. That time limit might only be extended where an ET was satisfied it was not reasonably practicable to bring the

claim in time and that it had been lodged within a reasonable time of it becoming practicable to do so. The ET reminded itself of the case law relevant to these tests, noting that the test of reasonable practicability was a practical one concerned with the reasonable feasibility of bringing a claim within the ordinary time limit.

11. The ET specifically had regard to the case law relevant to errors made by legal advisers. In particular, it referenced **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 CA, in which it was held that where a Claimant or her advisers were at fault in allowing the time limit to pass without presenting a claim, it could not be said to have been impracticable for the complaint to have been presented in time ("the **Dedman** principle"). The ET noted, however, that some cases suggested a weakening of the **Dedman** principle; see **Marks & Spencer plc v Williams-Ryan** [2005] IRLR 562 CA and **Northamptonshire County Council v Entwhistle** [2010] IRLR 740, in which the EAT had held that the test of reasonable practicability was to be judged by what the Claimant would have done if given such advice as the advisers should reasonably, in all the circumstances, have given.

12. Further noting the additional complications arising from the EC requirements and the then ET costs regime, the ET observed that a genuine reasonable mistaken belief that a claim had been validly lodged in time might make it not reasonably practicable to lodge a second correctly constituted claim within the primary time limit; see the decisions of different divisions of the EAT in **Software Box Ltd v Gannon** [2016] ICR 148; **Adams v BT plc** [2017] ICR 382 and *obiter* **Baisley v South Lanarkshire Council** [2017] ICR 365.

13. In the present case, the ET concluded that the Claimant's ET1 was initially correctly rejected because it did not contain an EC number and was not accompanied by a fee. The

question was whether it would have been reasonably practicable to present the claim in time. The Claimant and her solicitors believed they had presented a properly constituted claim in time, albeit that belief was mistaken. The Claimant's belief arose from her confidence in her solicitors. Her solicitors' belief arose because they had failed to spot the error in the EC certificate number and had wrongly thought they could pay the fee using an HMCTS account.

14. As far as the EC certificate number was concerned, the ET saw this as a case akin to **Adams v BT** and "*had little difficulty in resolving the issue of reasonable practicability in favour of the Claimant*" (paragraph 72). As for the fee, the Claimant's solicitors had been at fault, but had the claim not been physically accepted when handed in at the ET office they would have rushed a cheque to the office and ensured it was lodged in time. Given both the Claimant and her solicitors laboured under a mistaken belief that a valid claim had been presented in time, the ET concluded it was not reasonable for them to present a properly constituted claim in time in these circumstances. Once the errors were drawn to their attention, the Claimant's solicitors had then presented a properly constituted claim within one day. That was within a reasonable further period and the claim would thus be treated as in time.

The Appeal and the Parties' Submissions

The Respondent's Case

15. The grounds of appeal focus solely on the incorrect certificate number; no challenge has been made to the ET's conclusion on reasonable practicability in respect of the ET fee. By its first ground, the Respondent contends that the ET erred in law as it misapplied the section 111(2)(b) **ERA** "not reasonably practicable" test. The second ground makes much the same point but brings into play the **Dedman** principle, namely that where it is held that where a Claimant or her advisers are at fault in allowing the time limit to pass without presenting a

claim, it could not be said to have been impracticable for the complaint to have been presented in time. As for the third ground of appeal, the Respondent contends that the ET's conclusion is properly to be described as perverse.

16. In general terms, the Respondent observes that the onus had been on the Claimant to demonstrate that presentation within time was not reasonably practicable, see **Porter v Bandridge Ltd** [1978] ICR 943 CA, at page 948D-E. As a matter of fact, the ET found the Claimant had made a mistake in transcribing the EC number because she had failed to carefully read the email from ACAS (and, presumably, also the wording at box 2.3 of the ET1 form). It had further found that her solicitors failed to check the ET1 properly and had thus not spotted the error. In this regard, the ET had held (paragraph 71) that the Claimant's solicitors were "*unquestionably at fault in failing to check the ET1 thoroughly*". The ET had concluded that the claim was presented late because both the Claimant and her solicitors were operating under a mistaken belief that the form had been properly presented on 30 September 2015. A mistaken belief could, however, only be regarded as a relevant impediment - rendering it not reasonably practicable to present the claim in time - if it was itself reasonable, see **Wall's Meat Co Ltd v Khan** [1979] ICR 52 CA at pages 60F to 61A. Moreover, where solicitors were engaged, their actions would bind their client; as such, it would not be open to a Claimant to rely on any error on the solicitor's part, unless that was itself reasonable, see **Marks & Spencer plc v Williams-Ryan**, affirming the **Dedman** principle in this regard.

17. In the present case, it was only in fact necessary to consider the solicitor's fault (1) because that was what the application of the **Dedman** principle entailed, and (2) because factually it was the solicitor's fault that was the operative cause of the error. The question for the ET was, therefore, whether the solicitor's fault had been reasonable. The ET had opined

that "*fault does not necessarily equal unreasonableness*" but it had failed to express a conclusion on this critical question.

18. To the extent the ET had purported to answer this question by relying upon the EAT's decision in **Adams v BT**, such reliance was misplaced:

(1) The ratio of **Adams** was merely that if the first claim is presented in time and then a second claim presented out of time, it does not automatically follow that it was reasonably practicable to present the claim in time. What was or was not reasonably practicable remained a question of fact for the ET, see the EAT in **Chard v Trowbridge Office Cleaning Services Ltd** UKEAT/0254/16 at paragraph 80; and

(2) There was a material distinction between the present case and **Adams**, in that the Claimant's solicitors here had been involved throughout and for more than six months before the last day of the limitation period. Whereas the solicitors in **Adams** had only been instructed on the very last day.

19. It was, moreover, apparent that ACAS had emailed the solicitors in the present case the details regarding the EC certificate. Thus, to the extent that the ET had purported to answer the question raised by application of the **Dedman** principle, its conclusion was perverse. Moreover, even if it was not correct to look solely at the solicitor's error, it was the Respondent's case that the Claimant's conduct itself could not be held to have been reasonable.

The Claimant's Case

20. For the Claimant, Mr Bousfield reminds me that the determination of the question of reasonable practicability is a matter of fact for the trial Judge, see **Palmers & Saunders v**

Southend-on-Sea Borough Council [1984] ICR 372; on the facts found by the ET, it had been entitled to find the present case to be on all fours with **Adams**. Moreover, it would be wrong to place artificial barriers in the way of genuine claims, see **SoS for Business, Energy and Industrial Strategy v Parry & Another** [2018] EWCA Civ 672 per Bean LJ at paragraph 31.

21. The ACAS EC provisions provided an opportunity for the parties to explore conciliation. Those provisions should not be used or interpreted to create a layer of satellite litigation, see **Mist v Derby Community Health Services NHS Trust** UKEAT/0170/15 at paragraph 53, **Drake International Systems Ltd & Others v Blue Arrow Ltd** UKEAT/0282/15 at paragraph 35 and **De Mota v ADR Network & Another** UKEAT/0305/16.

22. The **Employment Tribunals (Constitution and Rules of Procedure) 2013** ("ET Rules 2013") should, moreover, be read subject to the overriding objective, see Rule 2 of the **ET Rules 2013**, which imported the requirement that the Rules were to be interpreted in a way that enabled the ET to deal with the case justly, which meant that it should deal with the case proportionately in a way that avoided unnecessary formality and allowed for flexibility in the proceedings and which saved expense.

23. In the present case, it was apparent that the ET correctly directed itself as to the ratio of **Adams** and had found that any fault on the part of the Claimant's solicitors did not necessarily equal unreasonableness. That did not reveal an error of approach, see per Lady Wise at paragraph 30 **Baisley v South Lanarkshire Council** [2017] ICR 365 EAT. That was also the answer to the **Dedman** principal point, specifically in a situation where to save costs the Claimant had elected to unbundle legal services and to undertake some parts of the claim herself, for example, completing the ET1. Any duty on the solicitor to check the Claimant's

completion of the form must be limited and, as allowed in **Northamptonshire County Council v Entwhistle**, it was possible to conceive a circumstance where an adviser's failure to give the correct advice was itself reasonable, see per Underhill P (as he then was) at paragraph 9.

24. In this case, the relevant circumstances included the way in which the Claimant had agreed to undertake some of the work herself in order to save costs. It was this, in part, which made this case materially the same as **Adams**. As for the perversity challenge, the Respondent had to meet the high threshold laid down in **Yeboah v Crofton** [2002] EWCA Civ 794, but that was not made out on the ET's findings in this case.

The Relevant Legal Principles

25. The starting point is section 111 of the **ERA**, which provides as follows:

> **"111.** ***Complaints to employment tribunal***
>
> **(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.**
>
> **(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal -**
>
> > **(a) before the end of the period of three months beginning with the effective date of termination, or**
> >
> > **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."**

26. Section 111 **ERA** must now be read alongside the relevant procedural Rules governing the presentation of an ET claim and the EC requirements.

27. By Rule 8 of Schedule 1 of the **ET Rules 2013**, it is provided that an ET complaint is started "*by presenting a completed claim … (using a prescribed form)*".

28. Rule 10 is then headed "*Rejection: form not used or failure to supply minimum information*". It is a mandatory Rule that requires an ET to reject a claim if "*it does not contain all of the following information - [namely] (i) an early conciliation number*" (paragraph (1)(c)).

29. The result is that if the minimum information thus required is not provided within the form, the ET has no option but to reject the claim unless that omission is capable of being excused by considering some other Rule.

30. Rule 12 of the **ET Rules 2013**, deals with rejection for substantive defects and allows that in certain prescribed circumstances, an Employment Judge might allow that the claim should not be rejected; see Rule 12(2A) and (1)(e) or (f). As was observed in **Adams v BT plc** [2017] ICR 382, the consequence of this provision is that Rule 12(2A) provides an escape route for minor errors in relation to a name or address both identified as the mandatory minimum information to be supplied under Rule 10 (failing which an ET will reject the claim). Contrariwise, however, a minor error in relation to the earlier EC certificate number itself - if the EC number entered on the claim form was not the same as the EC number on the certificate - is not capable of being corrected in the same way under Rule 12(2A). As Simler P opined in **Adams** (see paragraph 7), "*It is difficult to see any justification for this distinction*".

31. Returning to Rule 10, by paragraph (2) it is provided that "*The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected*" and that the notice should "*contain information about how to apply for a reconsideration of the rejection*".

32. Rule 13 deals with reconsideration and provides that a Claimant, whose claim has been rejected under Rule 10, may apply for reconsideration on the basis that the decision to reject it

was wrong or that the notified defect can be rectified. Rule 13(4), however, provides "*If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified*".

33. In **Sterling v United Learning Trust** UKEAT/0439/14, it was held that the wording of Rule 10 - which had not significantly been an issue in that case - required an EC number to be set out and that it was implicit that the number should be the accurate number; where a claim was presented and contained an inaccurate EC number, it would therefore be validly rejected by the ET for that reason.

34. The EAT in **Adams** - where this point was at the heart of the appeal - agreed with that conclusion. Moreover, as was noted in **Adams**, the Claimant will not succeed in avoiding this consequence by applying for a reconsideration of the rejection. As Rule 13(4) provides, the original decision to reject would have been correct and the Rule affords no discretion as to how to treat the date of presentation of the claim. Rule 13(4) is similarly expressed in mandatory terms and provides that it is not the date when the claim was officially presented but the later date, when the defect is rectified, that will be relevant.

35. Thus the course that a Claimant must take in these circumstances is to re-present her claim with the relevant error rectified. If that is still within the relevant time period, that creates no difficulty. If, however, the original claim was lodged in time but time expires before the rectified claim is presented, then the question becomes - for the purpose of an unfair dismissal claim, for example (a different test may arise in other claims, e.g. those involving complaints of discrimination) - whether it had been reasonably practicable for the claim to be presented in time.

36. In **Adams**, the ET had considered that, as the original ET1 had been lodged in time, it must have been reasonably practicable for a correctly completed claim to have been presented in time and, as this had not been done, the Claimant's complaint of unfair dismissal was held to be out of time. The EAT in **Adams** held, however, that the ET had erred in its approach:

> **"16. … the employment judge focused on the first claim without any reference to the circumstances relevant to the second claim. … In effect the employment judge treated the fact that the first complaint was presented in time (albeit on a defective basis) as excluding the possibility of finding it was not reasonably practicable to present a second claim in time. That question was addressed in *Software Box Ltd* … para 41 by Langstaff J (President), where he held that the fact that a complaint was made within time and then rejected does not as a matter of principle preclude the consideration of whether a second claim traversing the same ground is one in which the tribunal should have jurisdiction."**

See also **Software Box Limited** [2016] ICR 148, to like effect.

37. As for the approach to be adopted to the question of reasonable practicability, it is trite law that the question of what is or is not reasonably practicable is a question of fact for the ET, a test that was considered in **Wall's Meat Co Ltd v Khan** [1979] ICR 52 CA by Brandon LJ in the following terms:

> **"… The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstance 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." (Pages 60F-61A)**

38. The focus is accordingly on the Claimant's state of mind, viewed objectively. That said, where a Claimant has instructed professional advisers to act for her (as here), she will not be able to escape a finding that it was reasonably practicable to present the claim in time by virtue of the fact that the failure arises from an error made by her advisers, see **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 CA ("the **Dedman** principle").

That rule might be mitigated in certain circumstances. For instance, the answer might not be the same if the adviser is working in a voluntary or lay capacity - see **Marks & Spencer plc v Williams-Ryan** [2005] IRLR 562 CA - or where it was reasonable for the advisers to have given the wrong advice in the particular circumstances of the case - see **Northamptonshire County Council v Entwhistle** [2010] IRLR 740.

39. When considering reasonable practicability for these purposes and the particular impediment to the in-time presentation of the claim, the reasonableness of the steps taken - not necessarily simply a question of fault - can be relevant. As Lady Wise observed in **Baisley v South Lanarkshire Council** [2017] ICR 365 EAT:

> **"30. I have reached the view that the employment tribunal in this case did rely on what was regarded as fault on the part of the claimant's advisers as determinative of the issue. There are two main problems with such an approach. First, on the facts found, the only conceivable "fault" on the part of the advisers was that they did not take an active step to contact the tribunal to ensure that the facsimile transmission they had sent had actually been received. Standing that the problems they had encountered with their fax machine were not understood to include the non-receipt of faxes by the recipient, describing such an omission as "fault" seems to me to demand something approaching a perfectionist method of working. I do not consider that it can safely be concluded that any reasonable solicitor would have made such an inquiry. Secondly, and more importantly, even if on the facts found there was clear fault on the part of the claimant's advisers, there were other factors to be weighed in the balance before it could be proper to reach a conclusion whether discretion should be exercised in terms of rule 5. There is on the face of the judgment, no attempt to address the balance of prejudice. A failure to address the issue of balance of prejudice in such circumstances is in my view a clear error of law. I am fortified in that conclusion by the decision of the current President, Simler J, in *Adams v British Telecommunications plc* …"**

See also the approach adopted by Simler P at paragraphs 30 to 31 of **Adams**, when the EAT itself determined the question of reasonable practicability for the purpose of disposing of the appeal in that case.

Discussion and Conclusions

40. As the Claimant has stressed, it is trite law that the question of what is or is not reasonably practicable is a question of fact for the ET, see **Wall's Meat v Khan** and also **Palmers & Saunders v Southend-on-Sea Borough Council**. In this case, correctly focusing

on the Claimant's state of mind, viewed objectively, the ET held that she believed that she had lodged a properly constituted claim in time because she had confidence in her professional advisers. If those advisers had unreasonably failed to lodge a properly constituted claim in time, however, then the application of the **Dedman** principle must mean that the Claimant would not be entitled to simply rely on that confidence in what they had done; she would be bound by their unreasonable conduct. The question therefore became whether the Claimant's solicitors had acted reasonably. They had plainly failed to spot the error on the ET1 and the ET found that they were unquestionably at fault in failing to check the ET1 thoroughly. It did not conclude, however, that this automatically meant that their conduct was unreasonable.

41. The Respondent contends that there could in fact only have been one answer to this question in this case; it was not on all fours with **Adams** and the ET's finding as to the Claimant's solicitors having been at fault was sufficient to make it clear that they had been unreasonable. At its highest, the Respondent's argument draws on the fact that the language used in **Wall's Meat v Khan** and in **Dedman** is simply that of "fault"; there is no suggestion in those cases that this would result in anything other than a finding that the Claimant or her advisers had not acted reasonably. The Respondent further observes that had the Claimant's solicitors acted reasonably - if they had not failed to check the ET1 thoroughly - they would have spotted the error in the transcription of the EC number and the claim would have been properly lodged in time; the ET thus ought to have held that it had been reasonably practicable for the claim to have been presented within the relevant time limit. For the Claimant, it is said, there is no material difference between this case and **Adams** and it was clear that the ET had found the Claimant's solicitors had not acted unreasonably; moreover, the EAT should be careful not to import unnecessary obstacles to the lodgement of a claim and it was right to look at the question of prejudice.

42. On that last point - the question of prejudice - in written argument for this hearing, the Claimant had sought to read across the reasoning of the EAT in **Adams** on the question of the adjustment from extension in respect of the race discrimination claim in that case. At the oral hearing, however, Mr Bousfield has accepted that was a bad point; the present case is concerned only with the reasonably practicable test for unfair dismissal purposes - the question of balance of prejudice does not arise. That said, the Claimant maintained that the error at issue in this case had given rise to an unnecessary and artificial barrier.

43. On that last observation, I have some sympathy with the Claimant's objection. The barrier is, however, erected by virtue of the **ET Rules 2013** - see the earlier discussion in this regard above - and, as Simler P observed in **Adams**, there appears to be no sensible reason for the failure to afford the ET a similar discretion in respect of transcribing the EC number than that provided in respect of a party's name. Given the mandatory language of Rule 10(1)(c)(i) of the **ET Rules**, however, I am unable to see how the requirement could be mitigated by means of the overriding objective. The barrier is thus one created by the **ET Rules** themselves and not by the approach of the ET or the EAT.

44. For all that, I also agree with the Claimant that it is hard to characterise the error in question as anything other than minor and technical and I do not consider it could be said that this kind of mistake was anticipated by the earlier case law (such as **Wall's Meat** or **Dedman**); those cases plainly did not address the kind of additional requirements now imposed under the EC regime. And in this context, I consider the ET was entitled to make the observation that fault does not necessarily equal unreasonableness for these purposes. It seems to me that the particular nature of the error might, in particular cases, be a relevant factor for an ET to weigh in the balance when determining the reasonableness of the conduct for the purposes of

A reasonable practicability. That is not to suggest that the test of reasonable practicability should be taken to equate to that applicable to the just and equitable extension permitted in other contexts. As was acknowledged in **Adams**, however, the nature of the error may be relevant to understanding why there was an impediment to the in-time presentation of a claim

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45. In circumstances in which it might not have been unreasonable for a Claimant or, I would allow, her advisers not to appreciate that an initial claim lodged in time contained a minor but a fatal error, an ET would be entitled to find it was not reasonably practicable for the corrected claim form to be presented in time. This question will inevitably be fact- and context-specific but, as Lady Wise allowed in **Baisley**, it might not always be right to assume that every omission, however technical, is not reasonable.

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46. As to whether this case is or is not on all fours with **Adams**, I do not think that is the real question. The **Dedman** principle point does not seem to have been raised in **Adams**. That might be because the solicitors in that case came in at a very late stage and did not advise on the content of the form - it is hard to tell from the EAT's Judgment - but certainly the **Dedman** principle does not appear to have been raised as an issue in that case. In any event, my focus has to be on the case that is before me and whether the ET applied the correct test and reached a permissible conclusion on the facts of this matter. I therefore return to the ET's Judgment in issue on this appeal.

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47. The Judgment in question followed a Preliminary Hearing, which concerned a far wider range of points than that which occupies me on this appeal. In almost every respect, it is a Judgment that is a model of perfection. It correctly sets out the applicable legal framework and carefully records the findings made on the relevant issues, save, I am driven to conclude, on the

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question that is at the heart of this appeal; that is, whether it was reasonable for the Claimant to place reliance on the submission of the first ET1 given the error made by her solicitors in failing to check the form sufficiently thoroughly to pick up on the mistake she had made.

48. If the Claimant's solicitors had acted unreasonably in this regard then, given the application of the **Dedman** principle, it would have been reasonably practicable for the claim to have been presented validly and in time, at least so far as the EC number was concerned. That was the crucial issue with which the ET needed to demonstrate it had engaged. I am unable, however, to see that it did and to that extent I must allow the appeal.

49. That said, I do not agree with the Respondent that the answer to this question was, or is, inevitable. Although the ET was critical of the Claimant's solicitors for not checking the ET1 thoroughly, it allowed that this was not necessarily unreasonable. That was neither an error of approach, nor did it evidence a perverse conclusion, given the particular circumstances of the case. The Claimant had expressly unbundled the services that were to be provided by her solicitors to save costs; not an unreasonable step to take. In addition, she had undertaken to complete the formal parts of the ET1 herself. That being so, if the solicitors checked everything she had done, there would have been no saving in cost. Their error might thus not have been unreasonable in those circumstances. The Respondent objects that all the solicitors needed to do was check those matters that were mandatory requirements for the valid presentation of the claim. That might be a relevant point but I do not consider it can be said to be determinative; ultimately, it would be a matter of weight and balance for the ET.

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50. As for the Claimant herself, she had erred in failing to read the content of the ACAS email but the ET was entitled, as the EAT itself concluded in **Adams**, not to find that that was necessarily unreasonable conduct.

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51. I therefore uphold the appeal, insofar as I agree that the ET failed to ask itself the correct question or, to the extent it did, failed properly to explain its reasoning in this regard, in particular with reference to the **Dedman** principle. To the extent, however, that the appeal raises a question of perversity, it is dismissed.

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