EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Marcus McKeown	AND	Mitie Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 14 November 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mrs D Sockett, Unison
For the Respondent: Mrs Louise Mankan of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's unfair dismissal claim was presented out of time and is hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's unfair dismissal claim was presented in time.
2. I have heard from the claimant, and I have heard from Mrs Sockett, a Unison shop steward, on his behalf. I have heard from Mrs Mankan of Counsel who made submissions on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
3. The claimant Mr Marcus McKeown was employed by the respondent Mitie Ltd as a Domestic Assistant at Treliske Hospital in Cornwall. He was employed from 3 March 2014 until his summary dismissal for gross misconduct which was effective on 26 January 2018.
4. In around May 2017 it came to the respondent's intention that the claimant had been arrested on suspicion of a serious criminal offence. The police had commenced a criminal investigation into allegations that the claimant had had a sexual relationship with a minor. The respondent considered this to be an act of gross misconduct. In addition, the respondent believed that the claimant had failed adequately and promptly to report his

arrest to the respondent as he was required to do. The respondent therefore decided to suspend the claimant and to commence its own investigation.

5. At that time the claimant was a member of a recognised trade union namely Unison, who gave him support and advice. Mrs Sockett, from whom I have heard, was his shop steward and she assisted the claimant in obtaining this advice from a more senior officer. At some stage towards the end of 2017 or early 2018 the relationship broke down, and Unison declined to represent the claimant further, apparently on the basis that he had not paid the appropriate subscriptions.
6. In any event there was a disciplinary hearing on 28 December 2017. It was rearranged from 22 December 2017 because the Unison representative was not available. It took place on 28 December 2017. The claimant had confirmed he would attend, but failed to do so. The disciplinary hearing took place in any event in the absence of the claimant and in the absence of any Unison representative on his behalf. The decision to dismiss the claimant was confirmed by letter dated 24 January 2018 and expressed to be summary dismissal for gross misconduct with effect from 26 January 2018.
7. Despite the fact that Unison terminated its formal relationship with the claimant, Mrs Sockett continued to assist the claimant. She put in a letter of appeal on the claimant's behalf which was dated 4 March 2018. An appeal hearing took place on 5 April 2018, which the claimant attended and at which he was accompanied by Mrs Sockett in the capacity of his Unison union shop steward.
8. One of the respondent's managers then determined that a fair process required him to recuse from the appeal process and a second appeal hearing took place on 15 June 2016 by way of a full rehearing. Mrs Sockett again represented the claimant in her capacity as trade union representative. New evidence then came to light and the appeal decision was further delayed, and a subsequent appeal hearing was reconvened again on 31 July 2018. The eventual appeal outcome was confirmed by letter dated 12 September 2018 and the claimant's appeal was dismissed.
9. Meanwhile Mrs Sockett had attended a Unison training course for employee representatives which gave specific training on unfair dismissal claims, the applicable time limit, the ACAS Early Conciliation proceedings, and the fact that an active appeal process does not extend the primary time limit. Mrs Sockett's best recollection is that this was probably during late February 2018 and which prompted her to assist with the claimant's appeal on 4 March 2018, although the training might have been slightly later. In any event it seems clear that Mrs Sockett was aware before April 2018 of the employment tribunal time limit, the need to make contact with ACAS, and the fact that a live appeal process did not extend time.
10. Mrs Sockett then first made contact with ACAS on behalf of the claimant under the Early Conciliation procedure on 13 June 2018 (Day A). The Early Conciliation Certificate was issued on 13 July 2018 (Day B). Mrs Sockett then prepared these proceedings on behalf of the claimant which were presented on 25 July 2018.
11. Having established the above facts, I now apply the law.
12. The relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.
13. Put simplistically, with effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
14. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows. Section 18 of the Employment Tribunals Act 1996 ("the ETA") defines "relevant proceedings" for these purposes. This includes in Subsection 18(1)(b) Employment Tribunal proceedings for unfair dismissal under section 111 of the Employment Rights Act 1996.

15. Subsection 18A(1) of the ETA provides that: “Before a person ("the prospective claimant)" presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.” Subsection 18A(4) ETA provides: “If - (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant." Subsection 18A(8) ETA provides: “A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).
16. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision”). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
17. I have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall’s Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT.
18. In this case the claimant’s effective date of termination of employment was 26 January 2018. The three month time limit therefore expired at midnight on 25 April 2018. The claimant first made contact with ACAS under the Early Conciliation procedure on 13 June 2018 (Day A). The Early Conciliation Certificate was issued on 13 July 2018 (Day B). The claimant does not benefit from any extension of time under the Early Conciliation provisions (because he commenced the Early Conciliation process after the primary time limit had already expired). The claimant presented these proceedings on 25 July 2018 which were therefore presented some three months out of time.
19. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that (i) the claimant was let down by his earlier Unison trade union representative, and it was unclear whether and to what extent Unison remained able to assist him; and (ii) that the claimant and Mrs Sockett were both confused by the appeal process and made the mistake of waiting for that process instead of presenting these proceedings.
20. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall’s Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
21. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the

Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider 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. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

22. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
23. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
24. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
25. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

26. In this case I am satisfied that throughout the process the claimant had access to advice and support from his trade union Unison, both from his original representative, and subsequently Mrs Sockett as his shop steward. I am satisfied that the claimant and his advisers were aware of the applicable time limit, the fact that the Early Conciliation process with ACAS needed to be engaged, and that awaiting the outcome of an appeal did not extend the time limit. The substantial cause of the claimant's failure to comply with the time limit appears to be that both he and his advisers simply waited when they need not have done. There was no physical impediment preventing compliance with the time limits such as illness or a postal strike. The respondent did not misrepresent any relevant matter to the claimant any stage. It was clearly reasonably practicable and reasonably feasible for the claimant to have issued proceedings within time. The first limb of the statutory test is therefore satisfied and I dismiss the claim because it has been presented out of time.
27. In any event I would have dismissed this claim under the second limb of the statutory test because the proceedings were not presented within such further period as is reasonable. It still took three months for the proceedings to be issued after the expiry of the primary time limit, and two weeks after the Early Conciliation Certificate was issued by ACAS, despite the fact that the claimant and his advisers knew that there was a time limit, and that it was not stopped by the appeal process.
28. in conclusion therefore the claimant's unfair dismissal claim is dismissed because it was presented out of time.
29. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 10; a concise identification of the relevant law is at paragraphs 12 to 25; how that law has been applied to those findings in order to decide the issues is at paragraphs 26 to 28.

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Employment Judge N J Roper
Dated 14 November 2018

Judgment sent to Parties on

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For the Tribunal Office