EMPLOYMENT TRIBUNALS

Claimant: Mr M Morar

Respondent: Thera Trust

Heard at: Nottingham Employment Tribunal

On: 17.10.2018

Before: Employment Judge Dyal

Representation:

Claimant: Mr Williams of Counsel

Respondent: Mr Islam-Choudry of Counsel

JUDGMENT

1. It was reasonably practicable to present the unfair dismissal complaint within the primary limitation period but it was not thus presented. The tribunal therefore does not have jurisdiction and the complaint of unfair dismissal is dismissed.

2. It is just and equitable to extend time in relation to the complaint that the Claimant's dismissal was an act of age and/or race discrimination.

REASONS

Introduction

1. The claim came before me to deal with limitation. Mr Williams accepted at the outset of the hearing that all claims had been presented out of time. The issues, then, were limited to deciding whether time should be extended pursuant to the applicable statutory tests.

2. I noted at the outset of the hearing that the discrimination complaints, as identified at paragraph 5 of the Case Management Summary sent to the parties on 14 September 2018, included pre-dismissal detriments some dating back to the commencement of the Claimant's employment in 2012 (but said to span the duration of the employment relationship). Mr Williams confirmed that it was his case that there was conduct

extending over a period within the meaning of s.123(3)(a) Equality Act 2010 such that time ran for all detriments from the date of dismissal. Mr Islam-Choudhry accepted that the Claimant's complaints (*if* well-founded) were capable of amounting to conduct extending over a period. He submitted that I should assume for today's purposes (and without prejudice to his position at trial) that they did so extend given the practical impossibility of actually deciding that matter at a short Preliminary Hearing. There was a helpful discussion of how to proceed and the parties' shared position was that I should simply rule on whether time should be extended in relation to dismissal and leave over to trial the limitation issues that arise in relation to the pre-dismissal detriments complained of where they can more properly be adjudicated upon. That approach was subject to the caveat that if I held that it was not just and equitable to extend time in relation to the dismissal, since the Claimant's case did not get any better from a limitation perspective than it is in relation to the dismissal (the most recent event), all claims should be dismissed. I considered that the parties had offered up a sensible and pragmatic approach to the issues and was content to take it.

Facts

3. The Claimant produced a short witness statement. Mr Islam-Choudhry indicated that there were no factual disputes and that he did not need to cross-examine the Claimant. I therefore read the Claimant's statement, including the documents to which it cross referred (which were in a short hearing bundle). I accept the account of events given in the Claimant's witness statement.

4. The Claimant was employed by the Respondent from some time in 2012 until the effective date of termination which was 15 December 2017.

5. At some point shortly after his dismissal the Claimant contacted his legal expenses insurers asking for a solicitor to take on his case. His case was referred to DAS Law, the well known law firm, on around 14 March 2018. By this stage Early Conciliation had already commenced (it commenced on 28 February 2018). Early Conciliation ended, and a certificate was issued, on 28 March 2018.

6. I accept that the Claimant has given a true account of the efforts he made to engage with DAS Law and to ensure that his claim was presented in time as set out in his witness statement. In summary, he regularly chased up the fee-earner dealing with his case and urged her to get on with and present the case in good time. He was told on 19 April 2018 that the claim would be lodged on 27 April 2018, whether by the fee-earner dealing with his case, or in her absence by someone else at the firm.

7. Despite the Claimant's repeated efforts the preparation of his claim form appears to have been left until the last minute. A draft was prepared and sent to the Claimant for approval on 27 April 2018. The Claimant, who was dealing with some urgent medical issues that had arisen in relation to his wife, managed to review the draft, scramble together some corrections and give his authority for the claim to be lodged.

8. At around 9pm that evening (Friday, 27 April 2018), the fee-earner handling his claim emailed the claim form to '*midlandseastet@hmcts.gsi.gov.uk*'. That is the general email account for this region. Shortly thereafter she emailed the Claimant to say his claim "*has now been lodged*".

9. On Monday 30 April 2018, the fee-earner spoke to a clerk at the Nottingham Employment Tribunal by telephone and told her that the claim would be submitted online shortly. It had come to the fee-earner's attention by this stage that email was not an acceptable method for presenting a claim (although it is not clear how that came to her attention). The claim was properly presented online later that day.

10. The claim form was then served on the Respondent. It was not apparent on the face of the document, or at all, that it had been presented out of time. The Respondent lodged an ET3 defending the claim.

11. The matter came before Employment Judge Brewer at a case management TPH on 15 August 2018. The limitation point was identified by the judge and set down for adjudication at an open, attended PH. This was the first that the Claimant (personally) and the Respondent knew of the limitation problem.

Law

How to present a claim

12. Mr Williams accepted that emailing the claim to the tribunal on 27 April 2018 did not amount to presentation of the claim and that the claim was not presented until 30 April 2018. This was a sensible position and in light of it I can set out the law quite briefly:

    a. By rule 8 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013,* a claim shall be presented in accordance with any practice direction made under regulation 11 of the said regulations.
    b. Although rule 85(1) provides for documents to be delivered to the tribunal by electronic communication that is subject to rule 85(2) which makes special provision in relation to claim forms. It provides that a claim form may only be delivered in accordance with the practice direction made under regulation 11 which supplements rule 8.
    c. The *Employment Tribunal (England & Wales) Presidential Practice Direction – presentation of claims (2017)* applied in this case. It sets out the ways in which claims can be presented. With one small caveat, email is not one of the acceptable methods of presentation. The caveat is that an exception was made for the period 26 July 2017 – 31 July 2017 during which email presentation was acceptable.
    d. None of the preceding Presidential Practice Directions on the presentation of claims, going all the way back to July 2013 (several practice directions span this period) allow for presentation by email. It is many years, then, since presentation by email has been permissible (save for the caveat noted above in July 2017).

Limitation and unfair dismissal

13. The limitation provisions in respect of a complaint of unfair dismissal are well known. They appear at s.111(2) Employment Rights Act 1996 ('ERA'). They are modified by the early conciliation provisions at s.207B ERA. The tribunal has revisited these provisions but does not set them out because there is no controversy about them and it is agreed that the claim was presented outside the primary limitation period.

14. Not reasonably practicable means 'not reasonably feasible' (*Palmer v Southend-on-Sea Borough Council* [1984] IRLR 119).

15. In *Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379*, Lord Denning MR said this (at 381):

> *"But what is the position if he [the Claimant] goes to skilled advisers and they make a mistake? The English court has taken the view that the man must abide by their mistake… If a man engages skilled advisers to act for him -- and they mistake the time limit and present [the claim] too late -- he is out. His remedy is against them."*

16. This has become known to employment lawyers as the '*Dedman principle*'. It applies not just to mistakes about the time limit, but to any negligent mistake that a skilled adviser makes that causes the claim to be presented out of time.

17. In *Dedman,* Scarman LJ said this in the context of a claimant who delayed because of ignorance of his rights:

> *"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'.'*

18. In *Wall's Meat Co Ltd v Khan [1979] ICR 52*), Denning LJ said this:

> *"I would venture to take the simple test given by the majority in [Dedman]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights -- or ignorance of the time limits -- 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 reasonably have been so expected, it was his or their fault, and he must take the consequences."* [emphasis added]

19. The *Dedman* principle is controversial and has been the subject of criticism from several quarters. The principle can do injustice not least because in reality, in many cases, a professional negligence claim against a solicitor is not a very effective remedy for the Claimant who has lost his/her job and may not have the skill, appetite or money to pursue a claim in the civil courts. However, I am satisfied that *Dedman* is binding on me and I must apply it. In *Marks & Spencer plc v Williams-Ryan* [2005] IRLR 562 the Master of the Rolls said this at [31]:

> *What proposition of law is established by these authorities* [this followed a careful review of the authorities at paragraphs 19 – 30]. *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 no reasonably practicable to make a timely complaint to an employment tribunal.*

20. There is a lot of learning on what types of advisor the *Dedman* principle applies to. The fee-earner in this case, describes herself in her emails as an 'Employment Litigator'. Mr

Williams was not certain whether she was a solicitor or not, but thought probably not. However, he accepted that the *Dedman* principle applied whether she was a solicitor or not. This was a sensible concession given that she was a fee-earner working for DAS Law, providing specialist employment law services that included drafting and lodging employment tribunal complaints. If I had been called upon to decide the issue, I would have decided that the *Dedman* principle applied to the fee-earner.

Limitation and Equality Act 2010 complaints

21. The applicable statutory provisions appear at s.123 and 140B Equality Act 2010. The tribunal has considered these carefully. They are not set out here since there is no controversy about what the applicable provisions are and it is agreed all around that the claim has been presented out of time.

22. In assessing whether or not it is just and equitable to extend time the tribunal may be assisted by the following factors (that have their origins in the Limitation Act 1980), see *British Coal Corporation v Keeble* [1997] IRLR 336:

    a. the length of, and the reasons for, the delay on the part of the claimant;
    b. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced is likely to be less cogent than if the action had been brought within time;
    c. the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests for information or inspection;
    d. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
    e. the extent to which the claimant acted promptly and reasonably once he knew whether or not the act or omission of the respondent might be capable at that time of giving rise to an action for damages;
    f. the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received;
    g. the balance of prejudice.

23. The burden of proof is on the Claimant to satisfy the tribunal that it is just and equitable to extend time: *Robertson v Bexley Community Centre* [2003] IRLR 434.

24. Where the Claimant's advisor is at fault that is a relevant factor. Generally, the fault of an advisor should not be visited on the claimant. The advisor's culpability should not generally be treated as the Claimant's culpability (see e.g. *Virdi v Commissioner of the Police for the Metropolis* [2007] IRLR 24 [34 – 36, 40]; *Chohan v Derby Law Centre* [2004] IRLR 685 [18 – 19]).

25. The just and equitable test is a distinct and different statutory test to the 'not reasonably practicable test'. The *Dedman* principle applies to the latter but does not apply to the former. Rather, when considering the just and equitable test the tribunal is permitted to take into account as a relevant factor in the Claimant's favour that it is his advisors not him that are culpable (see, in addition to the authorities in the preceding paragraph, also *Hawkins v Ball and Barclays Bank Plc* [1996] IRLR 258).

Discussion and conclusions

26. The last date on which the claim could be presented in time was 28 April 2018. It was not presented until 30 April 2018 when it was submitted online. Emailing the claim to the

tribunal on 27 April 2018 did not amount to presentation of the claim since this was not a permitted mode of presentation.

Unfair dismissal

27. In my judgment it was reasonably practicable to present the claim in time.

28. The Claimant put the drafting and submission of the claim into his advisor's hands. He did all he possibly could be expected to do and more to ensure that his claim was presented by 28 April 2018. The issue then, is not culpability on his part, but on the part of his advisor.

29. The fee-earner handling the Claimant's case evidently did not realise that email was not an acceptable way of presenting the claim form. It is of course true that mistakes happen and that this was a simple mistake. However, it was a culpable mistake for which there was not 'just cause or excuse' to borrow Denning LJ's words. To put it more starkly, it was a negligent mistake (i.e. one that would not have happened if reasonable care and skill had been used):

    a. It is or should be obvious to any professional employment law advisor that there are rules as to how a claim can be presented.
    b. Understanding those rules is elementary to anyone whose job it is to, among other things, present claims.
    c. The rules themselves – as set out in the Presidential Practice Direction referred to above - are not complicated.
    d. The practice direction is readily and easily available.
    e. Email has not been an acceptable method of presentation (barring the small and inapplicable caveat set out above in relation to July 2017) since at least 2013.

30. There was no evidence before me that there were any special reasons in this case why the above analysis of culpability was inapplicable. Mr Andrews did mention in his closing submissions that the fee-earner had taken some time out of her career for child-rearing and that this may be why she did not appreciate the applicable rules. However, there was no detail about this (e.g. how long she had taken off or when) nor in any event do I think that this would make a difference. Ultimately the claim was in the hands of DAS Law not just the fee-earner dealing with it. Further, the claim was in the hands of DAS for about a month and half before limitation expired and in the hands of the particular fee-earner for at least a month. There was plenty of time then for the current rules in relation to the presentation of claims to be read and reviewed. Moreover, if the fee-earner simply assumed that the rules had not changed since 2013 that was an obviously unsafe assumption to make and itself a culpable error.

31. All in all, it was reasonably practicable / feasible to present the claim by 28 April 2018. It was not thus presented and so must be dismissed.

Discrimination

32. In my judgment it is just and equitable to extend time:

- *the length of, and the reasons for, the delay*

33. The delay was very short, the claim was presented on 30 April 2018. The reason for the delay was that the fee-earner handling the claim made a mistake and failed to appreciate that it could not be presented by email. This was the fee-earner's mistake not the Claimant's. The Claimant was entirely blameless and indeed had been opposed to

leaving the presentation of the claim to the last minute and had done all he reasonably could to expedite matters.

- *the extent to which, having regard to the delay, the evidence adduced or likely to be adduced is likely to be less cogent than if the action had been brought within time*

34. The delay is so short that there is no impact on the evidence its cogency or otherwise.

- *the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests for information or inspection*

35. This is not a relevant factor in this case.

- *the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action*

36. This is not a relevant factor in this case.

- *the extent to which the claimant acted promptly and reasonably*

37. The Claimant acted promptly. He contacted his insurers shortly after his dismissal, well before limitation expired and then chased up DAS Law repeatedly to try and expedite the drafting and presentation of his claim.

- *the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received*

38. The Claimant took all reasonable steps to obtain legal advice. He was advised that the claim needed to presented by 27 April 2018 and he did all he could to ensure that it was.

- *the balance of prejudice.*

39. The balance of prejudice firmly favours extending time. The Claimant would be severely prejudiced if time were not extended. He would be shut out of the tribunal system altogether and deprived of the opportunity to try and prove he was discriminated against in the workplace and obtain full compensation for that if proven.

40. Mr Islam-Choudhry points out if time is not extended for the unfair dismissal claim, the Claimant probably would have a good professional-negligence claim against DAS Law. In those circumstances, if time were extended for the discrimination claim the Claimant would be in the unsatisfactory position of having to litigate on two fronts (the discrimination claim in the tribunal and the professional negligence claim in the civil courts). He submits, in essence, that it would be simpler and better therefore to refuse to extend time for the discrimination claim so that the Claimant can pursue a single piece of litigation: one in negligence against DAS Law.

41. I do see a little bit of merit in those submissions, in as much as I agree that it is generally undesirable for proceedings to multiply. However, I do not think that this factor is very weighty here. There is, firstly, no overriding or absolute imperative to avoid having more than one set of proceedings. The limitations on the tribunal's jurisdiction often mean that prior, concurrent, or subsequent proceedings are also necessary in the civil courts. Moreover, secondly, I think the Claimant would be significantly prejudiced if I refused to extend time notwithstanding the possibility of a professional negligence claim. That is because a professional negligence claim does not come close to removing all of the prejudice of being shut out of the employment tribunal:

a. In professional negligence proceedings there could not be any finding that the Respondent did or did not discriminate against the Claimant;
b. The employment tribunal is the ideal judicial forum for workplace disputes to be resolved: it is relatively informal, it is relatively cheap and yet it is a very highly specialised forum that understands and is skilled at resolving such disputes.
c. The Claimant is far from clear that he would be able to (because of the costs involved and additional challenges of civil litigation) pursue professional negligence proceedings against DAS Law.
d. In professional negligence proceedings the measure of damages would presumably be based upon the 'loss of a chance' of winning the employment tribunal proceedings and it is therefore virtually inconceivable that the Claimant could achieve full compensation for his losses in those proceedings. In the tribunal he has the possibility of full compensation.

42. It is accepted all around that there is no prejudice to the Respondent (beyond having to defend the claims) of extending time.

43. Taking everything into account, the tribunal considers that this is a case in which it is clearly just and equitable to extent time.

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Employment Judge Dyal

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Date 17.10.2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS