THE EMPLOYMENT TRIBUNALS

Claimant: **Mr W Glendinning**

Respondent: **Tesco Stores Limited**

Heard at: **Teesside Justice Centre** **On: 18 April 2018**

Before: **Employment Judge Johnson**

Representation:

Claimant: **Miss C Millns of Counsel**
Respondent: **Mr C Breen of Counsel**

JUDGMENT ON PRELIMINARY ISSUE

1 The claimant's complaint of unfair dismissal was not presented to the Employment Tribunal within the period of three months commencing with the effective date of termination of the claimant's employment. The Employment Tribunal is not satisfied that it was not reasonably practicable for the complaint to have been presented within that three month time limit. The complaint is out of time. The Employment Tribunal does not have jurisdiction to hear that complaint. The complaint of unfair dismissal is dismissed.

2 The claimant's complaint of unlawful disability discrimination was not presented to the Employment Tribunal within the period of three months starting with the date of the acts to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. The complaint is out of time. The Employment Tribunal does not have jurisdiction to hear that complaint. The complaint of unlawful disability discrimination is dismissed.

REASONS

1 This matter came before me this morning by way of a public preliminary hearing to consider whether the Employment Tribunal had jurisdiction to hear the claimant's complaints of unfair dismissal and unlawful disability discrimination, both of which were presented to the Employment Tribunal after the exploration of the three month time limit applicable to those complaints. The claimant was

represented by Ms Millns of counsel and the respondent by Mr Breen of counsel. Ms Millns called to give evidence the claimant himself and also Mr Mateusz Bratko, a legal advisor employed by the claimant's trade union, USDAW. Ms Millns submitted a further witness statement from Mr Tony Doonan, the USDAW Area Organiser. Unfortunately, Mr Doonan was unable to attend today's hearing. Mr Breen confirmed that he would not object to the statement of Mr Doonan being submitted without him being present.

2 The issues to be decided by the Tribunal are agreed to be as follows:-

2.1 Whether the claims of unfair dismissal and unlawful disability discrimination are out of time.

2.2 With regard to the claim of unfair dismissal, was it reasonably practicable for the claim to have been presented in time?

2.3 If not, was it presented within a reasonable period of time thereafter?

2.4 Whether the complaint of unlawful disability discrimination was out of time.

2.5 If so, is it just and equitable for time to be extended?

3 The chronology of the events which are relevant to those issues is as follows:-

- The effective date of termination of the claimant's employment was 24 August 2017.
- The claimant commenced ACAS early conciliation on 22 November 2017.
- But for the requirement to undertake ACAS early conciliation, the time limit for presentation of the claim form ET1 would expire on 23 November 2017.
- The ACAS early conciliation certificate was issued on 14 December 2017.
- The time limit for presentation of the claim form (taking into account the ACAS early conciliation process) was 14 January 2018.
- The claim form ET1 was presented on 13 February 2018.

4 The claimant was dismissed on 24 August 2017 for reasons related to his capability to perform the duties for which he was employed, principally because of his absence record. The claimant alleges that the dismissal was unfair and also that it amounted to unfavourable treatment because of something arising in consequence of his disability contrary to section 15 of the Equality Act 2010 and a failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010.

5 The claimant appealed against his dismissal and that appeal was dismissed on 24 October 2017. The claimant then submitted a second appeal under the respondent's appeal procedure but was not notified of the outcome of that appeal until 10 April 2018.

6 The claimant acknowledged in his claim form ET1 that his claims are out of time. He sets out at the very beginning of his grounds of complaint:-

1 The claimant acknowledges that he submits his claim out of time.

2 The claimant asks that the Tribunal use their discretion to extend time to consider his claim of discrimination on the ground that it would be both just and equitable under section 123(1)(b) of the Equality Act 2010 to consider it and that it was not reasonably practicable to submit his claim for unfair dismissal on time.

2.1 The claimant avers that the respondent will not be prejudiced if the claim is considered by the Tribunal because the claimant was trying to resolve the matter through the respondent's internal procedures. The claimant is still awaiting his second stage appeal and the internal procedure is still not concluded.

2.2 The claimant requested legal advice from the union, however this was delayed due to an administrative delay and the claimant submitted his claim immediately after he was contacted by his union.

2.3 The claimant suffers from depression which made it more difficult to prepare and submit his claim on his own.

7 The claimant suffers from depression, stress and anxiety and was formally diagnosed with those conditions in 2015. The respondent was aware of the claimant's medical condition. The claimant's depression results in difficulties in concentration and stress management. It affects his sleeping and eating patterns and as a result on occasions he has been in the past unable to leave his bed and attend for work. On occasions when he was at work he would "be sat on my fork lift unable to move". The claimant was prescribed citalopram in 2015 since when he has taken that medication on a daily basis.

8 The claimant's evidence was that he experiences "ups and downs with my condition". At the time of his dismissal he was "in a considerably better state which was noted by my employer". However, the claimant also said that over Christmas 2017 he was "unable to take the tablets for 3-4 days and as a result felt that I was crawling out of my skin and could not leave the house for the entire Christmas period as I felt so bad."

9 The claimant was throughout the respondent's disciplinary process, represented by his trade union. Mr Bryan Brookes accompanied the claimant to the disciplinary hearing where he was dismissed. Mr Tony Doonan represented the claimant at the first appeal hearing. It was as a result of a reminder from the trade union that the claimant submitted his application for early conciliation to ACAS on 22 November 2017. The Tribunal notes that this was one day inside the three month time limit for commencing ACAS early conciliation. The Tribunal found that the claimant's trade union representatives to have been aware of the three month time limit from the date when the claimant was dismissed on 24 August 2017.

10 On 19 December the claimant sent to the trade union what is known as the "member pack application". Mr Bratko acknowledged that this pack was received by the trade union and formally opened on 21 December 2017. There was some confusion at that stage about whether the claimant had only joined USDAW on 11 December 2017 according to Mr Bratko, which may have meant that legal assistance would not be available to the claimant if his dismissal had occurred prior to 11 December. What had actually happened was that the claimant was simply in arrears with his subscriptions to the union, but had completed an application to join the union rather than simply discharge the arrears.

11 Mr Bratko's evidence to the Tribunal was that after the file was open on 21 December 2017, the trade union staff were on holiday over the Christmas period and when the staff returned to work after Christmas, the file was "overlooked". It was only when Mr Tony Doonan, the Area Organiser, contacted Mr Bratko in the USDAW legal department on or about 13 February and enquired the progress, when the error was identified. Mr Bratko immediately became aware that the time limit for submitting the claim had expired on (according to him) 13 January 2018. The claim was then presented on 13 February.

12 The final paragraph of Mr Bratko's witness statement states:-

> "It is clearly unfortunate that an error was made in processing the claimant's request for legal assistance. However I can confirm that we acted promptly once the error was identified."

13 In answering questions in cross-examination, Mr Bratko confirmed that the claimant had returned the members pack on 21 December 2017 and that the pack itself would have been sent to the claimant with a covering letter on or about 18 October 2017. Mr Bratko stated that this covering letter would have provided advice about the Employment Tribunal process and would have included advice about the appropriate time limits, stating that it remained the employee's responsibility to submit the claim to the Employment Tribunal within the appropriate time limit. Mr Bratko insisted that it remained the employee's responsibility to submit the claim on time. Mr Bratko's evidence was that only after the pack was received back from the employee could the trade union decide whether or not to provide legal assistance in the Employment Tribunal assistance. If a decision was taken not to provide legal assistance then it remained up to the employee to pursue the complaint via the Employment Tribunal.

14 Mr Bratko was asked by Mr Breen of counsel and also by myself to why a copy of the covering letter sent to the claimant had not been produced. It was pointed out to Mr Bratko that his witness statement had been prepared at least one week before today's hearing and only served on Monday of this week and that there would appear to be no good reason why a copy of the letter had not been attached to his statement. Mr Bratko's response was that USDAW considered it unnecessary to attach a copy of this letter to his or Mr Doonan's statement because the claimant was to rely upon the "just and equitable ground" to hope to overcome the time limit difficulties on the basis that the claimant's disability made

it more difficult for him to comply with the time limits and therefore it would be just and equitable for time to be extended.

15 Mr Bratko accepted under cross-examination that he was aware that the respondent had denied that the claimant was disabled and that this may make it more difficult for the claimant to argue that his disability meant that it was difficult for him to comply with the time limits.

16 Mr Bratko conceded under cross-examination that the trade union did not assume that the claimant would submit the claim form himself if he did not hear back from the trade union. Mr Bratko's explanation was that the file had not been passed onto the union legal advisor due to the uncertainty about the date when the claimant was said to have joined the union.

17 Mr Bratko accepted that the claimant had properly returned a copy of the ACAS early conciliation certificate when the "pack" was returned to the union. He accepted that nothing had been done to review the file after the Christmas break. Mr Bratko stated, "That was clearly our error. It is for the legal department to review the file and it was overlooked. We did not call the claimant at this time as we did not have the file to work on. It was still in the filing department on 21 December 2017 and was only examined when Mr Doonan telephoned to ask if a decision had been made upon whether or not legal representation would be provided to the claimant. Mr Bratko conceded that he knew that action should have been taken by then and that the claim was now out of time.

18 Rather puzzling, even though Mr Bratko readily conceded that the file had been overlooked and this was an error on the part of the trade union, it still remained the claimant's role to ensure that the claim was presented within the time limit. Mr Bratko insisted that the trade union could only be responsible once a decision had been made as to whether or not legal assistance and representation would be granted.

19 Mr Bratko was unable to produce any documentation to substantiate his contention that it remained for the claimant to submit the claim form to the Employment Tribunal within the appropriate time limit.

20 The claimant's evidence was that his brother received a telephone call from the trade union, on or about 22 November, enquiring as to whether or not the claimant had submitted the application for ACAS early conciliation. The claimant's evidence was that the union knew that his brother dealt with administrative matters on the claimant's behalf. The claimant and his brother went onto the ACAS website and completed the application form online. The claimant could not recall seeing any details about a time limit on the ACAS website.

21 The claimant could not recall subsequently receiving any documentation from the trade union, although it must be accepted that he received the "pack" and that it was probably accompanied by a covering letter. The claimant's evidence was that his brother would probably have dealt with this on his behalf.

22 The claimant's evidence was that his mental health was "not too bad" in November 2017 but had "gone down a bit" in December 2017 more particularly because he missed his tablets for a week or so shortly before Christmas 2017. The claimant then said that by January 2018 he had "bombed out" in that he had "shut down completely". His evidence was that he never left the house or spoke to anyone or answered the telephone in this period and was simply unable to motivate himself. The claimant's evidence was that this period of depression had lasted some three to four weeks. The claimant acknowledged that he remained aware of his Employment Tribunal claim but believed that the internal appeal process was ongoing.

23 The claimant's clear and unequivocal evidence to the Tribunal was that he thought that the trade union would bring the Employment Tribunal claim on his behalf. He knew that he could bring the claim to the Employment Tribunal and believed that his trade union were doing so on his behalf. He accepted that he had spoken to Tony Doonan about his appeal and that Mr Doonan accompanied him to the appeal hearing. He accepted that he had been given the pack by the union and he confirmed that he had told Mr Doonan that he wished to pursue a claim to the Employment Tribunal. The claimant accepted that he had never been told by Mr Doonan that he could wait until after the outcome of the second appeal.

24 The Tribunal accepted the claimant's evidence that he genuinely believed that the trade union was to file the Tribunal claim on his behalf. He was never told by the trade union that they would not file the claim because he was in arrears with his subscription. I accepted that the contents of paragraph 19 of his witness statement were accurate, namely:-

> "I sent the member pack application form to my union around 19 December 2017. I was confused about the process and my mental health had deteriorated following my dismissal. I believed that by submitting my member pack application to my union that the Tribunal process would be commenced on my behalf and I did not need to take any further action."

The law

25 The relevant statutory provisions engaged by the issues in this case are set out in section 111 of the Employment Rights Act 1996 and section 123 of the Equality Act 2010:-

EMPLOYMENT RIGHTS ACT 1996

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.

EQUALITY ACT 2010

123 Time limits

(1) [Subject to section 140A] Proceedings on a complaint within section 120 may not be brought after the end of--

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of--

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section--

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

26 Dealing first with the unfair dismissal complaint, in a case where the claim is presented outside the time limit the onus is upon the claimant to satisfy the Tribunal that it was not reasonably practicable for the complaint to have been presented in time. If the claimant can discharge that burden, he must then show that the claim form was presented within a reasonable period of time after the time limit had expired.

27 It is now generally accepted from the decision of the Employment Appeal Tribunal in **Asda Stores Limited v Kauser EAT/0165/07** that the relevant test is not simply a matter of looking at what was possible, but to ask whether on the facts of the case as found, it was reasonable to expect that which was possible, to have been done. In a helpful summary of the relevant authorities in a case such as the claimant's was provided by Her Honour Judge Edie QC in **Paczkowski v Sieradzka UKEAT/0111/16/BA**. The leading cases are:-

- **Dedman v British Building & Engineering Appliances Limited [1973] IRLR 379;**
- **Wall's Meat Company Limited v Khan [1978] IRLR 499;**
- **Marks & Spencer Plc v Williams-Ryan [2005] ICR 1293;**
- **Northamptonshire County Council v Entwhistle [2010] IRLR 740**.

28 Her Honour Judge Edie referred to those authorities as "a body of caselaw which has developed in respect of the test of reasonable practicability laid down by section 111(2)(b). The principles that may be extracted from those authorities was set out by Mr Justice Underhill in **Northamptonshire County Council v Entwhistle** as follows:-

- Section 111(2)(b) should be given a liberal construction in favour of the employee.

- It has consistently been held to be not reasonably practicable for an employee to present the claim within the primary time limit if he was reasonably in ignorance of that time limit.

- The Court of Appeal held in Deadman that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a schooled advisor, even if that advisor failed to advise him correctly.

Lord Denham NR said in **Dedman**:-

> "But what is the position if he goes to schooled advisors and they make 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 calculated 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. I think that was right. If a man engages skilled advisors to act for him, and they mistake the timing and present it too late, he is out. His remedy is against them. Summing up, I would suggest that in every case the Tribunal should enquire into the circumstances and ask themselves whether the man or his advisors were at fault in allowing the four weeks to pass by without presenting the complaint. If he was not at fault, nor his advisors, so that he had just cause or excuse for not presenting his complaint within the four weeks then it was not practicable for him to present it within that time. A court has then a discretion to allow it to be presented out of time if _____ his right to do so, but if he was at fault or his advisors were at

> fault in allowing the four weeks to slip by, he must take the consequences. I exercise in reasonable diligence the complaint could and should have been presented in time."

29 In **Marks & Spencer Plc v Williams-Ryan**, Lord Phillips reviewed the relevant authorities in some detail with a view to identifying whether it was a correct proposition of law that, as he put it at paragraph 24:-

> "… If an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the Employment Tribunal in due time. The fault on the part of the advisor is attributed to the employee. In **Dedman**, the employee had returned 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 advisor's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an Employment Triubnal."

30 In **Northamptonshire County Council v Entwhistle**, Underhill J said as follows:-

> "In my judgment the Judge was right not to read Lord Phillips' endorsement of the **Dedman** principle in **Williams-Ryan** as meaning that in no case where a claimant has consulted a skilled advisor and received wrong advice about the time limit, can he claim that it was not reasonably practicable for him to present his claim in time. It is perfectly possible to conceive _____ circumstances where the advisor's failure to give the correct advice is itself reasonable. The **Paradon** case, although not the only example, of such circumstances would be where both the claimant and the advisor had been misled by the employer as to some material factual matter (for example something bearing on the date of dismissal, which is not always straightforward)."

31 Moreover, when the advisor is from an organisation such as the Citizens Advice Bureau, in **Marks & Spencer Plc v Williams-Ryan**, Phillips indicated that it might be relevant to know something of the status of the advice and the advisor.

32 Ultimately, the language of the statute must prevail. The question of reasonable practicability is largely one of fact for the Employment Tribunal and will fall to be determined in the particular circumstances of the case.

33 In the claimant's case, I am satisfied that the claimant throughout the entire process (from the dismissal to the submission of the claim form) was aware that he could bring a complaint to the Employment Tribunal. I find that the status and expertise of the claimant's trade union advisors (particularly those in its legal department) was such that it was fully aware at all times of the applicable time limit. The existence of the time limit must have been at the front of their minds when the trade union representative contacted the claimant via his brother to ensure that the application was lodged for ACAS early conciliation, one day within the applicable time limit.

34 I find that the trade union's knowledge of the applicable time limit and the requirement to comply with that time limit applied throughout the process. The trade union's evidence to the Tribunal is that there was an oversight within its administration of the claimant's claim and as a result the time limit was missed. The claimant's case, was simply that the "oversight", or "error" by the trade union should not be attributable to him and because he placed his reliance entirely upon the trade union, this means that it was not reasonably practicable for the claim to have been presented in time. I reject that argument. The authorities referred to above fully support Mr Breen's submission on behalf of the respondent that it was reasonably practicable for the complaint to have been presented within the time limit. The trade union's error, oversight or negligence cannot be relied upon by the claimant in these circumstances.

35 This is not a case where the claimant was ignorant of any facts which form the subject matter of these proceedings. At no stage was the claimant misled by any act of the respondent or any misrepresentation by the respondent. The ongoing appeal process did not affect the effective date of termination, nor does it alter the requirement to present the claim form within the three month time limit. This is not a case where any conduct by the respondent could be said to have had any adverse impact on the claimant's ability to present the claim form in time. (**Bodha v Hampshire Area Health Authority [1982] ICR 200** and **Palmer v Southend-on-Sea Borough Council [1984] ICR 372**).

36 The claimant has failed to discharge the burden of showing that it was not reasonably practicable for the claim form to have been presented within the three month time limit. For those reasons the complaint of unfair dismissal is out of time and is dismissed.

37 Turning now to the complaint of unlawful disability discrimination. The test under section 123 of the Equality Act 2010 is different to that under section 111 of the Employment Rights Act 1996. There is no burden on the claimant to show that it was not reasonably practicable for him to have presented the claim form within the three month time limit. The claimant accepts that the claim form was presented out of time and must therefore persuade the Employment Tribunal that it would be just and equitable for time to be extended so as to allow the claim to proceed.

38 The grounds relied upon by the claimant are exactly the same as those relied upon in the unfair dismissal claims. They are:-

- There was an ongoing appeal process.
- The claimant was suffering from depression at the relevant time.
- The claimant relied upon his trade union advisors to present the claim form in time.

39 In **Robertson v Bexley Community Centre [2003] IRLR 434** the Court of Appeal reminded the employment law community that time limits are of considerable importance in this jurisdiction:-

> "It is of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule."

40 In **Chief Constable of Lincolnshire v Natasha Caston [2010] IRLR 327** the Court of Appeal referred to the Employment Tribunal's indication that a "liberal" approach should be taken to extending time. The correct approach is neither liberal nor reactionary. Each case depends upon its own facts. The Court of Appeal said:-

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices at the EAT is a well known example) policy has led to a consistently sparing use of the power. That does not happen and ought not to happen in relation to the power to enlarge the time for bringing employment tribunal proceedings. Limitation is not at large. There are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law – it is a question of fact and judgment, to be answered case by case by the tribunal in the first instance which is empowered to answer it."

41 Frequently reference is made to the list of criteria contained under section 33 of the Limitation Act 1980 in respect of personal injury claims. The primary limitation period there of course is three years, rather than the three months here. The three years better explains some of the criteria. In discrimination law, the factors have become known as the **Keeble Factors [1997] IRLR 336**:-

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

42 However, although in the context of the "just and equitable" formula, these factors will frequently serve as a useful checklist, there is no legal requirement on the Employment Tribunal to go through such a list in every case, "provided of

course that no significant factor has been left out of account by the Employment Tribunal in exercising its discretion". (**Southwick London Borough v Afolabi [2003] EWCA-Civ 15**.

43 Where a delay in commencing a claim of sex discrimination was due to reliance on incorrect legal advice, an extension may be granted even though it would not have been granted under the _____ "not reasonably practicable" test. (**Hawkins v Ball & Barclays Bank Plc [1996] IRLR 258** and **Chohan v Derby Law Centre [2004] IRLR 685**). On the other hand, reliance on that advice from the trade union was held to be immaterial to the question of an extension of time where the time limit had expired before the advice was given. (**Hunwicks v Royal Mail Group Plc UKEAT/0003/07**).

44 A delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings may justify the grant of an extension of time, but it is merely one factor which must be weighed in the balance along with all of the others which may be present. (**Robinson v Post Office [2000] IRLR 805**). In **Robinson v Post Office**, the claimant making a disability discrimination claim delayed presentation of the claim whilst he pursued an internal disciplinary appeal. He was refused an extension of time as he knew of the time limit for bringing a race discrimination claim and refused to take his union's advice to lodge an application in time. In **Aigwu v London Borough of Hackney [1999] IRLR 303** the Employment Appeal Tribunal rejected the suggestion that there is a general principle that an extension should always be granted where a delay is caused by a claimant invoking an internal grievance or appeal procedure, unless the employers could show some particular prejudice.

45 In **Bowden v Ministry of Justice UKEAT/0018/17/LA** His Honour Judge Richardson said that an Employment Tribunal is wise to address the section 33 check list is an aid to a good decision, so long as it does not treat that check list as exhaustive. The Tribunal must always pay attention to all of the other factors which are relevant to the circumstances of the case before it.

46 Mr Breen submitted that the claimant's cannot properly be regarded as an exceptional case. He has admitted that it was clearly a matter for the trade union to submit the claim form in time on behalf of the claimant. That was the union's clear and unequivocal responsibility. Mr Breen submitted that the trade union could not place any reliance upon the letter which accompanied the information pack as the union had "consciously chosen to exclude that letter in the documents before the Tribunal". The union was obviously aware of the time limits because it had contacted the claimant via his brother one day before the time limit expired for commencing ACAS early conciliation. Mr Breen submitted that it was entirely reasonable for the claimant to have left matters in the hands of his trade union. The trade union had a dedicated legal department and would have to accept the consequences of its failure to properly lodge the claim in time. Mr Breen submitted that the claimant's state of mind in December was not relevant at all because once he placed the case in the hands of the trade union, any onus on his part could not be relied upon to defeat the time limit.

47 Miss Millns for the claimant most professionally accepted the line of authorities referred to and relied upon by Mr Breen. However, Miss Millns argued that the Tribunal must ask itself why the claimant had not understood that it was his responsibility to submit the claim form in time. Miss Millns sought to persuade me that the Tribunal's focus should be on the claimant's ill health at the relevant time, particularly in the appeal shortly before Christmas when the claimant was clearly unable to function to the extent where he could have presented the claim form himself. Miss Millns submitted that the union's covering letter to the claimant enclosed in the information pack is little more than a "red herring" as it was a matter of "common sense" that the trade union would not be able to take responsibility for submitting the claim form and managing the claim until such time as the claim had been assessed and the trade union had agreed to pursue it on the claimant's behalf.

48 Miss Millns went on to submit that the claimant could not be said to be guilty of any culpable conduct whatsoever and that the Tribunal should accept that he was suffering from a mental impairment at the relevant time which affected his ability to submit the claim form. Miss Millns submitted that there could still be a fair trial of all of the issues between the parties, a point which was conceded by Mr Breen on behalf of the respondent. Miss Millns submitted in those circumstances that the prejudice to the claimant far outweighed any prejudice to the respondent. Having carefully considered all of those submissions I find that it would not be just and equitable for time to be extended in this case. It is not sufficient to argue that the balance of prejudice operates in favour of the claimant simply because he would lose his right to bring a claim if it was found to be out of time. That argument must apply to any claimant who presents a claim out of time. The opposite side of that argument is that a respondent is entitled to presume, once the time limit has expired, that he will not face any legal proceedings relating to its dismissal of the employee. Time limits are there to be observed. Granting an extension of time is the exception rather than the rule. It must be just and equitable to do so. It would only be just and equitable in the claimant's case if the fault of the trade union was not to be attributed to him or if his mental health at the relevant time was such that it was a factor which had to be taken into account. Whilst there may have been a deterioration in the claimant's mental health shortly before Christmas, it was not sufficient to prevent him from turning to his trade union information pack containing the ACAS early conciliation certificate. Thereafter it was up to the trade union to ensure that the claim form was properly presented within the time limit or otherwise to inform the claimant that he must do so himself. I see no good reason why the trade union's fault should not be attributed to the claimant in all the circumstances of this case.

49 The Tribunal finds that it would not be just and equitable for time to be extended in this case and the claimant's complaint of unlawful disability discrimination is dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT

14 May 2018

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