Appeal No. UKEAT/0277/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 March 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

LOWRI BECK SERVICES LIMITED — APPELLANT

MR P BROPHY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARTIN BUDWORTH (of Counsel) Instructed by: Glaisyers Solicitors LLP One St James's Square Manchester M2 6DN
For the Respondent	MR ANTHONY KORN (of Counsel) Instructed by: Direct Public Access

SUMMARY

JURISDICTIONAL POINTS – Extension of time: reasonably practical

JURISDICTIONAL POINTS – Extension of time: just and equitable

The Claimant had lodged his claims of unfair and wrongly dismissal and of disability discrimination out of time. The ET had decided that time should b3e extended, having found that the Claimant, because of his particular vulnerabilities, had reasonably handed the claim to his brother to deal with and that his brother had genuinely believed that the date of dismissal was when the Claimant's brother's mistaken view was reasonable given the unclear nature of the Respondent's letter. If found that it had not been reasonable period thereafter. It further found that it would be just and equitable to extend time, there being no prejudice to the Respondent in doing so.

The Respondent appealed

Held: *dismissing the appeal*

The ET has applied the correct legal tests. It had made a finding as to the Claimant's brother's genuine subjective but had then gone on to determine that this was objective reasonable given the lack of clarity in the Respondent's letter. It could not be said that finding was perverse. Once the ET had found that the impediment to the in-0time presentation of the Claimant's claim arose from the reasonable misunderstanding as to the date of dismissal, the other objections taken by the Respondent fell away. Tis was not a misunderstanding of law but of fact and the mistaken belief as to when time stared to run meant that further researches as to the operation of the time limit would not have assisted. As for the discrimination claim, a broader test applied. The ET was not bound to require the Claimant to demonstrate a good explanation for his delay but, in any event, had found that he had explained the position. It was entitled to focus on the question of comparative prejudice. The conclusion reached disclosed no error of law.

HER HONOUR JUDGE EADY QC

1. I have reached a Decision in this matter and will be dismissing the appeal. There is one issue, which is the issue I raised at the beginning which I still have a concern about. I think the only thing I can do is just have raised it, and what I am going to say, is it lays there and if there is a point then as it is a jurisdictional point it could still be taken. Therefore, it is not very satisfactory but, I have not felt that I can actually do anything more. Let me give you my Reasons. If you have got a hearing coming up then you will probably want to take a note of this, because I know a transcript will be available but I cannot imagine before your hearing.

Introduction

2. The appeal in this matter gives rise to questions relating to the approach to the question of an extension of time in; (1) a claim of unfair or wrongful dismissal and; (2) a claim of unlawful discrimination. In this Judgment, I refer to the parties as the Claimant and Respondent as below.

3. This is the Full Hearing of the Respondent's appeal from a Decision of the Exeter Employment Tribunal, Employment Judge Goraj sitting alone on 25 and 26 June 2018 ("ET"), by which it was held at that time would be extended for the presentation of the Claimant's claims of unfair and wrongful dismissal and of disability discrimination. Representation before the ET was as it has been on this appeal.

4. The Respondent appeals against the extensions of time allowed by the ET, arguing essentially that the Decisions reached were perverse. For his part, the Claimant resists the appeal relying on the reasoning provided by the ET and contending that the appeal does not satisfy the high threshold for perversity challenge. Although the Respondent's Notice of Appeal did not

include reference to the wrongful dismissal claim, the Respondent applied to amend to ensure that was included and that application has been allowed by consent.

The Background and the ET's Decision and Reasoning

5. The Respondent is a company that provides meter reading services for major UK energy suppliers. The Claimant worked for the Respondent from 31 July 2008 initially as a meter operative, but then gaining promotion to a single phase electricity meter installer in 2015 and subsequently in 2016 being further promoted to install dual fuel meters.

6. The Claimant suffers from dyslexia and the unchallenged medical evidence before the ET explained that this was "severe and manifestations included the impact on his ability to memorise new information, to understand, or to retain verbal instructions unless backed up by an extra explanation or confirmed in writing." The ET also accepted that the Claimant had been supported for much of his life by his brother Michael Brophy and again "including in particular with regard to any official documents or processes."

7. In May 2017, the Respondent had received a report from a customer that raised issues regarding the Claimant's conduct. A disciplinary investigation was undertaken and a disciplinary hearing took place on 21 June 2017 before Mr King the Respondent's Operations Manager for the relevant area.

8. The Respondent's disciplinary process provided as follows from paragraph 14 on page 11 of the bundle, "The decision may be given verbally at the hearing and would in any event be conveyed or confirmed in writing within 10 working days of the hearing." At the conclusion of the Claimant's disciplinary hearing Mr King advised the Claimant as follows from paragraph 16

on page 12, "As I said at the start of the hearing, I won't make a decision today. I will consider all the evidence and I will inform you of my decision in writing."

9. Although Mr King said it was his normal practice to telephone an employee to let them know the decision, the ET rejected the suggestion that he had said that that is what he would do at the Claimant's disciplinary hearing. That said, on 29 June 2017 Mr King did contact the Claimant by telephone and told him he was being dismissed with immediate effect for gross misconduct. Mr King also informed the Claimant that this decision would be confirmed by letter and he would then have five days to appeal.

10. The ET found the Claimant was very distressed by this telephone call as he was concerned about the effect of a dismissal for gross misconduct and the difficulties he would have in securing another job. It further found, he did not tell his brother about his dismissal until on 6 July 2017 he received the Respondent's letter dated 4 July 2017.

11. That letter opened by stating from page 162 of the bundle:

> **"Further to the disciplinary hearing held on Wednesday 21 June 2017 and our telephone conversation on Thursday 29 June 2017, I am writing to inform you of my decision."**

12. There then followed a detailed explanation of the Respondent's findings and towards the end of the second page it stated from page 163:

> **"In the circumstances and taking the above into consideration, I have no option but to dismiss you for gross misconduct. This dismissal will be with immediate effect from 29 June 2017 and will be without notice and without payment in lieu of notice in accordance with the disciplinary procedure."**

13. It was thus only after receipt of the Respondent's letter of 4 July that, the Claimant's brother became involved. As the ET explained from paragraph 27 of its Judgment on page 14:

> **"… Mr Brophy is a business man, who has been involved on a strictly lay basis on dealing with a number of employment matters of behalf of other people. Mr Brophy however has no legal training and has never previously engaged with ACAS or the formal Tribunal process. Mr Brophy sought guidance from online sources, including the CAB website. Mr Brophy also has a barrister friend who has knowledge of employment law."**

14. By letter of 10 July 2017, Mr Michael Brophy drafted a letter to the Respondent in the name of his brother setting out his complaints and making a Freedom of Information Act request for information to enable the Claimant to prepare a claim of unfair dismissal. His letter opened with the following statement from paragraph 28 of the bundle:

> **"I acknowledge receipt on 6 July 2017 of Glyn King's instant dismissal letter dated 4 July 2017, which was the latest step along the path of "loss of confidence" and goes to the root of our employment relationship."**

15. There was no response to that letter and it was in or around the beginning of September 2017 that Mr Michael Brophy sought advice from a barrister friend, Mr Clinton Hagdill, concerning the Claimant's dismissal. The advice provided by Mr Hagdill on 5 September 2017 appears to have been in the following terms from paragraph 33 on page 15,

> **"I note from your email that the date of dismissal was in early July, which would give an early October date for submitting an ET1 claim form for unfair dismissal."**

16. Between 5 to 29 September 2017, it seems that Mr Michael Brophy prepared particulars of claim to accompany his brother's ET1 form. On 29 September 2017, he again wrote to the Respondent in the Claimant's name making a number of complaints and referring to the requirement to present a complaint of unfair dismissal within three months of the effective date of termination stating from paragraph 35:

> **"As you know a complaint of Unfair Dismissal must be received by an Employment Tribunal within three months of the effective date of termination of employment, which falls next week.**
>
> **To protect my position please be advised I will be submitting my ET1 claim form (08.17) to the Employment Tribunal in time."**

17. Also on 29 September Mr Michael Brophy contacted ACAS and on 30 September formally initiated the early conciliation process on behalf of the Claimant. The ACAS EC certificate was subsequently issued on 13 November 2017. Thereafter the Claimant's ET claim was lodged on 5 December 2017.

18. In his ET1 the Claimant stated that his employment had ended on 4 July 2017. In considering whether the Claimant's claims were time barred the ET was clear that the effective date of termination of his employment had been 29 June 2017. His ET proceedings had been lodged out of time.

19. Turning to the question whether time should be extended, the ET first asked itself in respect of the Claimant's claims of unfair and wrongful dismissal whether it had been reasonably practicable for those claims to have been presented in time and if not, whether they had then been presented within a reasonable period thereafter. The ET reminded itself that the Claimant bore the burden of proof on these questions, but concluded that he had met that burden reasoning as follows in paragraph 49:

> ...
>
> **"(1). The Claimant is a vulnerable individual who has dyslexia and related issues as identified in the report of Ms Pryce including in respect of his ability to process information whilst under stress.**
>
> **(2). The Claimant was told at the conclusion of the disciplinary hearing on 21 June 2017 (page 271 of the bundle) that the Respondent would inform him of the disciplinary decision in writing.**
>
> **(3). The Claimant relied, upon his brother, Mr Brophy to support and assist him with any difficult matters/ decisions.**
>
> **(4). The conversation on 29 June 2017 between Mr King and the Claimant was very brief and Mr King referred during the conversation to a letter which would be sent to the Claimant confirming the position.**
>
> **(5). Mr Brophy was not privy to such conversation and only became aware of the Claimant's dismissal after the receipt of the Respondent's letter dated 4 July 2017 on 6 July 2017.**
>
> **(6). The letter from the Respondent dated 4 July 2017 (which was prepared with the assistance of the Respondent's HR department and was approved by Mr King) is unclear and contradictory. In the opening paragraph Mr King states that he is writing to inform the Claimant of his decision. Moreover, later in the letter Mr King states, "This dismissal will be with immediate effect from 29 June 2017".**

(7). It is clear from the subsequent correspondence that Mr Brophy was under the impression that the Claimant's dismissal took effect at the beginning of July 2017 pursuant to the Respondent's letter dated 4 July 2017 which was received on 6 July 2017. This is clear from (a) the letter which Mr Brophy wrote to the Respondent on 10 July 2017 (page 276 — 277 of the bundle) (b) from the email Mr Brophy received from Mr Hadgill dated 5 September 2017 (page 281 of the bundle) and (c) from his Mr Brophy's subsequent letter to the Chairman of the Respondent dated 29 September 2017(page 317 of the bundle). Further, Mr Brophy prepared the Claimant's claim form on such basis.

(8). Mr Brophy is not a skilled adviser.

(9). The Tribunal is satisfied that here was a misunderstanding by the Claimant/his brother, Mr Brophy, regarding the effective date of the termination of his employment and the consequential relevant deadline for the purposes of presentation of the claims.

(10) Further the Tribunal is satisfied that such misunderstanding arose in the circumstances referred to above including that (a) the Claimant was told at the disciplinary hearing that the decision would be notified in writing (b) the very brief telephone conversation on 29 June 2017 during which the Claimant was told that he would receive a letter and (c) the terms of the Respondent's letter dated 4 July 2017 as referred to above.

(11) The Tribunal is further satisfied that (a) the claim form was presented within a reasonable period thereafter having regard to the Claimant's/ Mr Brophy's understanding regarding the date of the termination of the Claimant's employment and (b) that time should therefore be extended to entertain his claims of unfair dismissal and wrongful dismissal."

20. The ET then turned to the question of whether it would be just and equitable to extend time for the Claimant's disability discrimination claims. It reminded itself of the guidance in the case law in particular in **British Coal Corporation v Keeble** [1997] IRLR 336 and of the need to balance the prejudice between the parties of allowing any claim to proceed. The ET noted the Respondent had not identified any prejudice other than the requirement to defend the claim that it would suffer if the Claimant was permitted to proceed with his claims of disability discrimination.

21. Having regard to the matters to which it had already enumerated when considering the extension of time for the unfair and wrongful dismissal claims; see above, the ET concluded it was just and equitable to extend time to allow the Claimant's disability discrimination claims to proceed, save to the extent that further particularisation was needed in respect of one aspect of those claims on which the ET allowed that the Respondent could make further representations on the question of the time limit once that particularisation had been provided.

22. I note at this stage that the ET did not address the point that might seem to arise on the facts of this case, namely that if Mr Michael Brophy believes that the Claimant had been dismissed on 6 July 2017 and that time therefore ran from that date, why was the claim not lodged on or before 5 November 2017, which would seem to be the relevant time limit if one allows for a one-month extension for ACAS early conciliation?

23. I am told that was not a point taken before the ET. It has been noted that the Claimant's ACAS EC certificate was only issued on 13 November 2017, thus suggesting if it was understood that time only expired one month later that presentation of the claim on 5 December 2017 was in time. In this case the ACAS EC process could not serve to stop the clock because there was no notification until after the exploration of the primary time limit. The content of the ACAS EC certificate could however have been taken to be relevant to the question of reasonable practicability and the reasonableness of any belief as to when time expired, and thus to the question of whether there was any explanation for why time should be extended on a just and equitable basis.

24. I cannot see that the ET made any finding on this, although for the Claimant it is noted that the ET referred to the date given on the EC certificate and it is said that I can take it that the ET kept this in mind when reaching its Decision on reasonable practicability. In any event, this is not a point that has been raised by the Respondent by way of appeal or it appears before the ET itself and yet further, it has not been suggested that this issue should carry any material weight in my consideration of the appeal.

The Arguments on Appeal

The Respondent's case

25. For the Respondent it was noted that this was not a case where there was any misrepresentation by the employer. The Claimant knew of his right to bring a complaint to the ET. There was no confusion arising from any ongoing internal procedures, no discovery of new facts and no impediment to the Claimant lodging his claim in time; see the guidance provided May LJ in **Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119.

26. Although the grounds of appeal included a perversity challenge the Respondent put its appeal more widely contending that the ET had failed to apply the correct tests. Mere assertion of ignorance as to the right to claim or of the relevant time limit or the procedure for making a claim would not be conclusive. The ET would need to be satisfied, both as to the truth of that assertion and that the ignorance was reasonable an objective inquiry; see **Porter v Bandridge Ltd** [1978] ICR 943, CA; **Avon County Council v Haywood-Hicks** [1978] ICR 646 EAT and **Riley v Tesco Stores Limited** [1980] ICR 323. To the extent the Claimant was relying on his mistake, as to the law as to when time began to run that could not justify the reasonable practicability test; see **Biggs v Somerset County Council** [1996] IRLR 203, CA.

27. Ultimately, the reasons that apparently informed the ET's Decision were unconvincing. The Claimant's vulnerability was irrelevant because from 6 July 2017 he had delegated the presentation of his intended claims to his brother who was not vulnerable. Equally, the brevity of the telephone call of 29 June 2017 was irrelevant given the Claimant's clear evidence as to what he was told and his understanding of what this meant for him and his brother had not been party to that call.

28. What Mr Michael Brophy and the Claimant could read in the letter of 4 July was clear, the Claimant's dismissal was "with immediate effect from 29 June 2017" and that had to be seen against their knowledge that there had been a material telephone conversation on 29 June. Mr Michael Brophy had access to informal employment law advice from a barrister friend, but had apparently failed to provide his friend with the crucial letter.

29. He had already looked online and at the CAB website and in his evidence had acknowledged that this made him aware of his brother's right to bring a claim and of the strict time limits. He had then been working on the Particulars for the Claimant's claim and if he left it late; (1) to obtain advice and/or; (2) to notify ACAS of the claim, he could not complain about any difficulties he experienced as a result.

30. As for the disability discrimination claims whilst there was no absolute rule, it was not wrong to apply the approach that if there was no good excuse for late presentation it would be unlikely to be just and equitable to extend time; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** [2016] IRLR 278. Given the circumstances of this case, it was hard to see that grounds for discharging the burden had been made out; see **Outokumpu Stainless Ltd v Law** UKEAT/0199/07. If there was no good reason for the mistake. There was no good reason for the extension of time.

The Claimant's case

31. For the Claimant it is said that the appeal does surmount the high burden of showing the ET's Decision was perverse in **Crofton v Yeboah** [2002] IRLR 634 at paragraph 95. The ET had heard evidence from the Claimant, from Mr Michael Brophy and from Mr King for the Respondent. There was an agreed bundle of some 340 pages, closing submissions were received

from both sides and the ET expressly referred to the relevant statutory provisions and case law. Where it had made findings of fact on the evidence before it, it was not open to the Employment Appeal Tribunal to interfere.

32. Where he was deciding whether to extend time on a just and equitable basis in respect of the Claimant's discrimination claims it had a wide discretion and applying a multi-factorial approach was entitled to find that a failure to give a reason for the delay was not conclusive; see **British Coal Corporation v Keeble**; **Chief Constable of Lincolnshire v Caston** [2010] IRLR 327 at 330; **Rathakrishnan v Pizza Express** [2016] IRLR 278 at 279 and **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] IRLR 1051 at 1053. In this case the Claimant and his brother had given evidence explaining the delay, but in any event the ET was entitled to find that the balance of prejudice favoured extending time.

33. As to the claims of unfair and wrongful dismissal whilst those face a stricter test of reasonable practicability, it had been held that Section 112(2) of the **Employment Rights Act 1996** ("ERA") should be given a liberal interpretation in favour of the employee; see per Lord Phillips in **Marks & Spencer v Williams-Ryan** [2005] IRLR 562 at 565. Moreover, this was not a purely objective test. What was or was not reasonably practicable was a question of fact for the ET. In the present case the Claimant had not sought professional advice from a lawyer or even a CAB worker, but had effectively relied on his brother who was not a skilled advisor.

34. Although the ET found the effective date of termination was 29 June 2017, it also held there had been a misunderstanding by both the Claimant and his brother regarding the effective date of termination and the consequential deadline for the presentation of his claims; see paragraph 49(9). This conclusion was consistent with the ET's earlier findings of fact and

amounted to a finding that the Claimant, acting through his brother, had made an error not just of law, but also of fact.

35. The ET having made findings as to the misapprehension that Mr Michael Brophy laboured under which related to when the Respondent had actually communicated the decision to dismiss and thus when the Claimant's employment was terminated. It had not been suggested in evidence before the ET that Mr Michael Brophy had acted unreasonably in failing to take further steps to inform himself of the relevant legal test. On that basis the ET had been entitled to reach the Decision to extend time.

The Relevant Legal Principles

Unfair and wrongful dismissal

36. For both the Claimant's claims of unfair and wrongful dismissal any extension of time could only be granted if the ET was satisfied that it was not reasonably practicable for the complaint to be presented before the end of the primary time limit and if so, that it was presented within such further period as the ET considered reasonable; see in respect of unfair dismissal Section 111(2) of the **ERA** and for the wrongful dismissal claim paragraph 7(c) **Employment Tribunals Extension of Jurisdiction England and Wales Order 1994**.

37. As is common ground, there are two limbs to this formula. First, the employee must show it was not reasonably practicable to present his claim in time. If he succeeds in doing so the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

38. The question of reasonable practicability is essentially one of fact for the ET to decide and the Appellate courts will be slow to interfere with the Tribunal's Decision; see **Palmer and Saunders v Southend-on-Sea Borough Council**; **Walls Meat Company Limited v Khan** [1979] ICR 52 CA; **Riley v Tesco Stores Ltd** [1980] IRLR 103 CA. In **Walls Meat Co v Khan** Lord Denning formulated the question for the first instance at the Tribunal as follows from paragraph 15 in the authorities bundle behind tab 1:

> **"…had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights - or ignorance of the time limit - is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could be reasonably have been so expected it was his or their fault and he must take the consequences.…"**

39. In answering this question, what will be relevant will always be fact and case specific. In the **Walls Meat Co v Khan** case Brandon LJ consider the question as follows; see paragraph 44, again I read in full behind tab 1:

> **"… 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 circumstances have made or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."**

40. Brandon LJ then expanded upon the circumstances in which ignorance, as opposed to a mistaken belief, might give grounds for a finding of reasonable impracticability:

> **"46. With regards to ignorance operating as similar impediment, I should have thought that, if any particular case an employee was reasonable ignorant of either (a) his right to make a complaint of unfair dismissal at all , or 9b0 how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial Tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.**
>
> **47. For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as(c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonable ignorant.**

48.

212

While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all , he can hardly be found to have been acting unreasonably in not making enquiries as to how , and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessary all, be difficult for him to satisfy an Industrial Tribunal that he behaved reasonably in not making such enquires."

41. Therefore, whilst a complainant's state of mind can be taken into account as a relevant factor, an assertion of ignorance either as to the right to claim or time limit or the procedure for making a claim is not to be treated as conclusive. The ET must be satisfied both as to the truth of the assertion and if it is, it must be satisfied that the ignorance in each case was reasonable.

42. In any event, where the Claimant satisfies the Tribunal it was not reasonably practicable to present his claim in time, the Tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. Although this is very much a matter of discretion for the ET, it must nonetheless exercise that discretion reasonably and with due regard to the circumstances of the delay.

Disability Discrimination

43. The Claimant's claims of disability discrimination brought under the **Equality Act 2010** were also subject to a primary time limit of three months, but by Section 123(1)(B) it is allowed that the claim might be brought within such other period as the ET considers just and equitable. This provision gives the ET a wide discretion to do what it thinks is just and equitable in the circumstances as the Court of Appeal held **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] IRLR 1050:

"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality

> **Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, paras [30]-[32], [43],[48]; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para [75].**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).**
>
> **20. The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 576; [2003] IRLR 434, para [24]."**

44. Turning to the facts of that case and the contention that it had erred by failing to require the Claimant to prove that she had a good reason for her delay in commencing proceedings, the Court of Appeal continued at paragraph 26 of that report:

> **"26. It is plain that in its second judgment the employment tribunal did give consideration to the reasons why the claimant had not commenced proceedings until March 2012. The identification of those reasons and the weight to be given to them were matters for the tribunal. There was no requirement that it had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour."**

Discussion and Conclusions

45. I take first the appeal against the ET's Decision to extend time for the disability discrimination claims to proceed. Given the breadth of the ET's discretion in this regard, applying the just and equitable test, any appeal would inevitably face an uphill task. The Respondent objects that the Claimant failed in this case to demonstrate a good explanation for his delay.

46. The focus of his case below had been on arguing whether the effective date of termination had been 29 June 2017, the date of Mr King's telephone call with the Claimant or 6 July 2017, when the Claimant received the Respondent's letter confirming his dismissal. He had not suggested that if the effective date of termination was in fact 29 June 2017 this provided a good explanation for failing to lodge the claim in time.

47. Whatever the focus of the Claimant's argument before the ET, it is apparent that evidence was adduced that explained why the claim had been presented out of time. The Claimant had handed the conduct of issues regarding the termination of his employment and any claims of the ET to his brother. Given the Claimant's own vulnerabilities the ET accepted that was entirely reasonable.

48. The Claimant's brother had said that he had proceeded on the basis that the Claimant had only been dismissed from when he received the written notification, i.e. 6 July 2017. That was what it stated in the Respondent's disciplinary procedure. As for the letter of 4 July 2017 that did not say that it was merely confirming what had been said by telephone on 29 June.

49. Mr Michael Brophy considered, as the ET found, that the letter was communicating the fact of the Claimant's dismissal only as from its receipt on 6 July. As the ET concluded Mr Brophy was wrong about that but he accepted that that was his genuine belief. The Respondent is wrong therefore to suggest the Claimant had not explained the delay. He had and the ET had accepted that explanation.

50. In any event the ET did not err by focusing on the question of comparative prejudice as the Court of Appeal has made clear in **Abertawe Bro Morgannwg University Local Health**

Board v Morgan there is no rule that time cannot be extended unless a complainant has shown a good explanation for a delay. The ET had apply the correct test taking into account the relevant factors and reached a permissible Decision on the evidence.

51. The only hesitation I have had in relation to this aspect of the appeal relates to the question whether the ET considered the continued delay from 5 November to 5 December, the former being the date on which the claim should have been presented if Mr Michael Brophy had been labouring under the misapprehension that time only ran from 6 July 2017. That, however, would of itself assume that he also understood that the ACAS notification stopped the clock for a month and, as Mr Korn, has pointed out to me here the ACAS EC certificate stated that it lasted until 13 November.

52. However, I remain concerned that this point was not expressly addressed in the ET's reasoned conclusions; that does appear to be because it was not raised below. Moreover, it forms no part of the grounds of appeal and I have some difficulty in seeing where it can go at this stage. In any event, on the question of any extension of time on the basis of what was just and equitable as I found the ET was entitled to approach his task by ultimately focusing on the question of comparative prejudice. I think therefore that Mr Korn must be right and that, so far as this aspect of the appeal is concerned at least, I must assume that the ET took it into account as part of the overall general factual matrix and considered the question of just and equitable extension on this broad basis against that relevant factual matrix.

53. I turn then to what might be seen as the more challenging question which relates to the ET's extension of time for the unfair and wrongful dismissal claims. Here the test it was bound to apply was far more restrictive. Having found that the Claimant had reasonably relied on his

brother the crucial parts of the ET's reasoning at paragraph 49 had then to be found from sub-paragraph 5 to 10. In this regard it is apparent that the ET accepted Mr Michael Brophy's evidence that he genuinely believed that the dismissal only took place on 6 July.

54. The question for the ET was then whether that belief was reasonable. The ET found that given the wording of the letter it was. Specifically, it found that the letter was unclear and contradictory; see paragraph 49(6). Although not entirely clear as I understand the Respondent's case it says that was a perverse finding. Both parties have taken me to the letter and I note the absence to the earlier telephone call on 29 June and the omission of any statement that the letter was a confirmation of what the Claimant had already been told.

55. For a lay person reading the letter, although it is said that dismissal will be with immediate effect from 29 June, I do not think I can say it was perverse for the ET to find that that was unclear. The ET was not suggesting that the Respondent has sought to deliberately mislead the Claimant, but it had found that the lack of clarity meant that Mr Michael Brophy's misreading of the letter was not unreasonable. Ultimately, I am not persuaded that the Respondent's challenge on the ET's finding on the letter satisfies the high threshold for a perversity challenge.

56. The Respondent further says that, even if that is right, the Claimant himself had been party to the telephone call on 29 June and had understood what he had been told. That might be so, but the ET found that it was reasonable for the Claimant to hand matters over to his brother who had not been party to the telephone call. The Claimant was in any event entitled also to have regard to the written notification of his dismissal.

57. As a matter of law, this could not change the effective date of termination. However, the ET was concerned with the question of what was reasonable for the Claimant and his brother to understand from the communications they had received and whether that understanding gave rise to an impediment that was reasonable in the circumstances. I cannot say that it was not open to the ET to find there was a genuine misunderstanding by both the Claimant and his brother as to the effect of the letter of 4 July and that this was not unreasonable in the circumstance.

58. The Respondent further says that if there was a misunderstanding then it was as to the law the way in which the effective date of termination is to be determined. Ignorance of the law cannot be a good excuse such as to make it other than reasonably practicable to lodge the claim in time; see **Biggs v Somerset**. Again, I disagree.

59. The facts of this case are unusual, but the impediment to the lodgement of the claim in time arose from Mr Michael Brophy's misreading of the letter of 4 July. Having misunderstood what it was saying, effectively he read it as communicating the dismissal rather than confirming a previous communication. He then correctly understood that the law meant that time would run from that communication. His mistake was one of fact not law.

60. The Respondent yet further says that if that was so, Mr Michael Brophy acted unreasonably in failing to obtain advice or research more fully the legal effect of the Respondent's communication to his brother in the telephone call of 29 June and/or the real effect of the letter of 4 July. The difficulty which is that it assumes that Mr Michael Brophy had not formed a view of the date of dismissal from his reading of 4 July.

61. On his reading of the letter, which the Tribunal found was not unreasonable, he concluded that dismissal took effect from 6 July. Any further researches would not have assisted in changing that view. His misunderstanding was based on his reading of the letter, not on his misunderstanding of the law.

62. On that basis and for all those reasons, I cannot see a proper basis to interfere with this Decision, save that I feel I have to return to the question of whether the ET properly considered the issue as to whether the claim was lodged within a reasonable period once it was reasonably practicable for it to have been presented. On the ET's findings it would seem that it would have been reasonably practicable for the claim to have been presented on or before 5 November 2017. There is no consideration in the ET's reasoning as to whether it remained reasonable for the Claimant not to lodge claim until 5 December.

63. It may be that the answer to that question is that Mr Michael Brophy assumed that the extended ACAS early conciliation period to 13 November 2017 meant that the additional month provided by the stop the clock provisions allowed until 13 December for the lodgement of the claim. At this stage I cannot tell what view might have been formed about that, given that I cannot see that there was any consideration of the question. However, that seems to be explained by the fact that it just was not raised before the ET.

64. As it has not been a point that has been raised on the appeal before me, it seems to me that the most I can say at this stage is that if this remains a jurisdictional question that has not been considered then it would be open to the ET at any subsequent hearing to consider this issue. I understand that the matter is due shortly to be heard at a Full Merits Hearing and it might be

A part of the submissions raised at that stage. It does not seem to me that I can really take that matter any further at this point. Therefore for those Reasons, I dismiss this appeal.

B

C

D

E

F

G

H