Appeal No. UKEAT/0142/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINGS,7 ROLLS BUILDING FETTER LANE LONDON EC4A 1NL

At the Tribunal
On 7 June 2019

Before

HIS HONOUR DAVID RICHARDSON

(SITTING ALONE)

INCHCAPE RETAIL LIMITED APPELLANT

MR A SHELTON RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR KEVIN CHARLES (of Counsel) Instructed by: Crossland Employment Solicitors 99 Park Drive Milton Park Abingdon Oxfordshire OX14 4RY
For the Respondent	MR JAGROOP SINGH JAGPAL (Litigation friend) 83 North Drive Hounslow Middlesex TW3 1PT

SUMMARY

JURISDICTIONAL POINTS – Extension of time: reasonably practicable

The Employment Judge ("EJ") found that it was not reasonably practicable for the Claimant to bring his ET claim for unfair dismissal in time because the Claimant was labouring under a misapprehension that he had to exhaust an internal appeal procedure first. But whether it was reasonably practicable to bring the ET claim depends on whether it was reasonable to expect the Claimant to take steps to find out about the enforcement of his rights, what steps and when. The EJ reached his conclusion without considering or giving reasons on this issue.

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HIS HONOUR DAVID RICHARDSON

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1. This is an appeal by Inchcape Retail Limited ("the Respondent") against a Judgment of Employment Judge Fowell sitting in the London (South) Employment Tribunal dated 4 April 2019. It concerns a complaint of unfair dismissal brought by Mr Adam Shelton ("the Claimant"). By his Judgment the Employment Judge ("EJ") held that the complaint had been brought in time.

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The Statutory Provisions

2. Section 111(2) of the **Employment Rights Act 1996** ("the ERA") sets out the time limit applicable to the bringing of a complaint of unfair dismissal:

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> **"(2) Subject to subsection 3, 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."**

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3. There are provisions which have the effect of extending the time limit where a prospective claimant complies with a statutory requirement to contact ACAS for the purposes of facilitating conciliation; see section 207B of the **ERA**. It is not necessary to set those provisions out in this Judgment.

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The Facts

4. The Respondent is a franchise car dealership group. The Claimant was employed from 7 January 2004 as a Sales Executive at its BMW Thames Ditton dealership. On 9 November 2017 the Claimant reported damage to his company vehicle. He said it must have been struck during the night when parked at his home. Subsequently, however, the Respondent received correspondence from the police indicating that the driver of the vehicle was alleged to have

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committed offences on 8 November 2017 near where the Claimant lived. The offences alleged against the driver included driving without due care and attention and failing to stop.

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5. The Respondent brought disciplinary proceedings against the Claimant on the basis that he had been dishonest in the way he reported the damage. A disciplinary hearing took place on 21 December 2017. The Claimant firmly denied that he had been the driver of a car involved in an accident. Nevertheless, the Respondent concluded that he had been and summarily dismissed for gross misconduct. The Respondent did not at that time obtain a police report.

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6. It is common ground that 21 December 2017 is the effective date of dismissal for the purposes of section 111(2). It follows that the three months' period allowed by section 111(2) expired on 20 March 2017.

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7. The Claimant was expecting a letter to confirm his dismissal. He was anxious to challenge the dismissal and put in an appeal. No letter arrived. The EJ found that none had been sent. Eventually, on 18 February 2018, the Claimant expressly requested the promised letter. The Respondent sent it by email the following day.

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8. On 21 February 2018 the Claimant submitted his appeal. On 7 March 2018 the appeal was heard by the Respondent's Mr Sharman. During the hearing the Claimant told Mr Sharman that the evidence against him had been reviewed by an employment law solicitor. This was not truthful. The EJ described it as a "bluff."

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9. After the appeal hearing the Respondent decided to make further enquiries of the police concerning the alleged offences on 8 November. Therefore, when the three months period expired on 28 March the Claimant was still awaiting the outcome of the internal appeal.

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10. During April the Claimant continued to press for a decision. On 9 April 2018, he wrote saying that if Mr Sharman failed to give him a decision, he would need to take "further" legal advice and potentially legal action against the Respondent. This too, the EJ found, was a "bluff". The Claimant had taken no legal advice.

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11. On 17 April 2018 the Claimant wrote again complaining more strenuously about the delay. He raised a grievance against Mr Sharman, saying he would take legal advice on taking the matter to an Employment Tribunal ("ET"). On 23 April 2018 Mr Sharman replied saying that he had to wait for the police report.

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12. On 21 April 2018, the Claimant contacted ACAS for advice. On 27 April 2018 he obtained a conciliation certificate. On Wednesday 2 May 2018 he submitted the ET1 claim form.

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13. The EJ made the following findings of fact as to the reasons why the Claimant did not issue proceedings sooner:

> **(1) The Claimant was not aware of the normal time limit or the procedure applicable to such cases at any time prior to 25 April 2018;**
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> **(2) The Claimant did not take any steps himself to find out until he contacted ACAS on 25 April.**
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> **(3) The Claimant did not take any advice from a skilled adviser at any time;**
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> **(4) The Claimant acted throughout on the assumption that he needed to complete the appeal process before he was in a position to bring a claim to the ET;**
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> **(5) He learned of the time only on 25 April when he contacted ACAS for advice.**

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<u>The Employment Tribunal Hearing</u>

14. Prior to the ET hearing the Claimant prepared a witness statement. In his witness statement he did not deal at all with the question whether he had sought or obtained any advice. He did not suggest he was unaware of the right to claim unfair dismissal. He said he waited to start proceedings because his employer was dealing with the appeal. He said he was under the

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impression he had to exhaust all avenues within the company to demonstrate he had tried everything to resolve the issue prior to going to an ET. He also said that he suffered from anxiety attacks and health issues.

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15. Not surprisingly, the Respondent's primary case at the ET hearing was that the Claimant had taken legal advice as he said at the disciplinary appeal and again on 9 April. If he had taken skilled legal advice it would, on the authorities, have been reasonably practicable for him to have commenced proceedings in time. But at the ET hearing the Claimant gave evidence which the EJ accepted to the effect that he had not really taken legal advice. I am told - although the EJ made no specific finding about it - that the Claimant gave evidence that his belief that he had to exhaust internal proceedings was based on some experience of a colleague's disciplinary case in the past.

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The Employment Judge's Reasons

16. The EJ, after making findings of fact on which I have already drawn, set out the applicable law and his conclusions. He first addressed the question whether it was reasonably practicable for the Claimant to have submitted the claim form within the primary time limit. He said that the explanation was "simply that the Claimant was unaware of the time limit."

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17. The EJ cited from the decided cases, including **Trevelyans (Birmingham) Ltd v Norton** [1991] ICR 488 for the proposition that when a Claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right and failure to do so will usually leave the Tribunal to reject the claim.

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18. He continued as follows in paragraphs 23, 24, 25, 26 and 27 of the EJ's Reasons:

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> **"23. These cases impose a high standard on an employee in Mr Shelton's position, but care is still needed in considering his particular circumstances. Even though he was on notice to enquire about such time limits, it does not follow that this automatically translates to an assumption that he did know of such time limits immediately. Ultimately the question is whether his ignorance was reasonable in the circumstances.**
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> **24. Clearly Mr Shelton was focusing on his internal rights of appeal for much of this period. It is an understandable view. It used to be a requirement, before such a claim could be brought to an employment tribunal, that the employee had exercised his or her right of appeal. Then, for reasons which were essentially beyond to Shelton's control, the appeal process was still ongoing at the time the primary time limit expired and so he had not addressed his mind to the practicalities of bringing an employment tribunal claim, although he realised that that was the next step. The position is therefore not quite the same as someone who has been dismissed, given a letter of dismissal, exercise their right of appeal within a few days of that letter, had their appeal hearing within a further couple of weeks, and then has a reasonable further period within the normal time limit in which to turn their minds to the next stage of the process.**
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> **25. I note that simply waiting for the outcome of an appeal by itself is not in itself sufficient to justify the failure to bring a claim in time but it is relevant to consider the reasons for the delay in the appeal process. For the reasons set out above, this was entirely out of his control. I also note that it had not been concluded by the time he submitted his claim form so again, it is not quite the same as those cases in which an individual has waited for the outcome before going onto the next stage. He has pressed repeatedly for an outcome before seeking advice from ACAS at what appears to be a reasonable stage, and then acted appropriately.**
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> **26. Mr Jagpal made the point that he was not in a position to start taking advice about the prospects of a successful claim for unfair dismissal until he received the dismissal letter. That is not an absolute bar to taking advice, but I find that the point has force. Nearly two months elapsed before Mr Shelton was in a practical position to take any advice. I conclude that in all probability, if he had received his dismissal letter promptly no issue would have arisen over timeliness.**
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> **27. Accordingly I conclude this is the case in which, at the time at which the primary time-limit expired, his ignorance of the time limit was reasonable, and hence it was not reasonably practicable for him to have submitted the claim form on time."**

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19. The EJ then turned to the question whether the Claimant had brought proceedings within such further time as was reasonable. He said the following in paragraphs 30 and 31 of the EJ's Reasons:

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> **"30. Mr Ross here laid emphasis on the fact that there was a 16 day delay between Mr Shelton's letter of 9 April 2018, in which he first raised the threat of legal action, and the contact made with ACAS on 25 April 2018. That does not however seem to me a realistic approach. Firstly, that threat of legal action was essentially a bluff as Mr Shelton had no idea of what was entailed. His main purpose was to chase for a response to his appeal. That response appears to have simply been a holding reply. His subsequent letter of 17 April pressed the point further, and indeed raised a grievance about Mr Sharman's handling of matters. As already noted, there was then the reply on Friday 20 April 2018 from Mr Sharman, with the appeal process still unconcluded, a letter which would have arrived on Monday, 23 April 2018. At that point Mr Shelton's patience was at an end and he contacted ACAS on 25 April. That further two-day delay does not seem to me unreasonable, nor the three working day delay following the early conciliation certificate. In fact I am satisfied that it was reasonable, bearing in mind that such legal actions are not matters to be undertaken lightly and for the layman requires some investigation.**
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> **31. For all of the above reasons therefore I accept that the claim was presented in time."**

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Submissions

20. On behalf of the Respondent, Mr Charles submits that once granted the Claimant was untruthful in saying he had been to employment solicitors and once granted he knew he had rights relating to unfair dismissal, the key question was whether he ought to have known about the time limit; that is to say whether his ignorance of the relevant time limit was reasonable; see in particular **Wall's Meat Company Ltd v Khan** [1979] ICR 52. Appropriate questions for the ET to ask would include what were his opportunities for finding out that he had rights? Did he take them? If not why not, and whether he was misled or deceived? see **Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53.

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21. Mr Charles submits that if the Claimant is aware of his rights ignorance of the time limit will rarely be acceptable as an excuse for delay. He will be on an enquiry as to the time limit; see **Trevelyans (Birmingham) Ltd v Norton** 1991 ICR 488. The existence of an impending internal appeal is not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint within the time limit; see **Bodha (Vishnudut) v Hampshire Area Health Authority** [1982] ICR 200, expressly approved by the Court of Appeal in **Palmer and anor v Saunders v Southend-on-Sea Borough Council** [1984] ICR 372.

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22. Given these principles Mr Charles submits that it was necessary for the EJ to address the question whether ignorance of the relevant time limit was reasonable. The EJ ought to have considered the opportunities the Claimant had to obtain advice and assistance from lawyers as he suggested he had, but also from the Internet and other sources of advice. He ought to have asked specifically; was it reasonably practicable for the Claimant, conscious that he had a right to claim unfair dismissal, to take no steps at all to check how and within what time limits he could enforce those rights?

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23. Mr Charles particularly emphasises that the Claimant was threatening unfair dismissal proceedings at the disciplinary appeal and again on 7 April. The ET ought to have considered that matter specifically. The mere fact that he was awaiting an appeal decision does not mean that it was unreasonable for him to check how to enforce his rights; see **Bodha** and **Palmer**. In effect the EJ did not apply those authorities. Mr Ross submits that these criticisms apply both to the EJ's conclusion on reasonable practicability and to the question whether proceedings were commenced within such further time as was reasonable.

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24. On behalf of the Claimant Mr Jagpal correctly and wisely does not challenge the authorities to which my attention has been drawn; rather he submits that the EJ both recognised and sufficiently addressed the question whether the Claimant's ignorance of the time limit was reasonable. The Claimant did not receive the letter of dismissal until 19 February, some two months after the dismissal. Only then was he in a practical position to obtain advice. Then he focused on his right of appeal. In addition, because the appeal process was ongoing he did not address his mind to the practicalities of bringing an ET claim. This was the position at the expiry of the time limit. He then continued to wait for the result of the appeal until it became obvious that it was long-delayed, at which point he took advice and acted within a reasonable time of receiving the advice. The EJ was fully entitled to make these findings. He had regard to the correct principles of law and reached an essentially factual conclusion which did not contain any error of law.

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Discussion and Conclusions

25. There is an appeal to the Employment Appeal Tribunal ("EAT") only on a question of law; see section 21(1) of the **Employment Tribunals Act 1996**. It follows that the EAT must

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not intervene on purely factual matters. The question always is whether the EJ, in reaching his Decision, has correctly and sufficiently applied known principles of law.

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26. There is I think no doubt about the EJ's essential reasoning. By reason of the late delivery of the dismissal letter nearly two months elapsed before the Claimant was in a practical position to take any advice: paragraph 26. After that he focused on the internal appeal and for reasons outside his control the appeal process was still ongoing when the time limit expired: paragraphs

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24 and 25. He continued to press for the result of the internal appeal until his patience was exhausted and he contacted ACAS. In these circumstances he brought proceedings within a reasonable time after the time limit.

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27. In the process of reaching his conclusions the EJ expressly said that as of the expiry of the primary time limit the Claimant's ignorance of it was reasonable, and hence it was not

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reasonably practicable for him to have submitted the claim form in time. It seems to me inherent in his conclusions that for some time after the expiry of the time limit the EJ took the view that the Claimant's ignorance of the primary time limit continued to be reasonable.

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28. A helpful starting point in considering the EJ's reasoning is a well-known passage in **Walls Meat Company v Khan** in the Judgment of Brandon LJ (pages 60-61).

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> **"Looking at the matter first without reference to the authorities, I should have thought that the meaning of the expression concerned, in the context in which it is used, was fairly clear. 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 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.**

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On this general view of the meaning of the expression under discussion, the present case is an example of a mistaken belief by an employee, reasonably held, constituting and impediment which prevented or inhibited him from presenting his complaint within the period of three months prescribed.

With regard to ignorance operating as a similar impediment , I should have thought that, is any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) 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 not reasonably practicable for his complaint to be presented within the period concerned.

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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 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 reasonably ignorant.

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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 inquiries 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 necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries."

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29. It follows that an essential question for the ET to consider in a case of this kind is whether and to what extent the Claimant ought to have made enquiries into how and within what period he should exercise his right to claim unfair dismissal. As a matter of practical common sense an applicant who knows of his right to claim unfair dismissal can generally be expected to seek information or advice about the enforcement of those rights; see **Porter v Bandridge Limited** [1978] ICR 943 at 954 and **Trevelyans (Birmingham) Limited v Norton** [1991] ICR 65 at 68.

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30. In these circumstances a mistaken belief that an unfair dismissal claim need not be brought until after an internal appeal procedure has been exhausted cannot of itself render it not reasonably practicable to commence proceedings. It will depend what enquiries the Claimant ought to have made and what knowledge he ought to have acquired. Thus, in **Bodha v Hampshire Area Health Authority** Browne-Wilkinson J said

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"There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an industrial tribunal, as a question of fact, that it was not reasonably practicable to complain to the industrial tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is

sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the industrial tribunal."

31. Whether it is reasonable for a claimant to make enquiries and to what extent will be case specific. Claimants in ETs vary enormously. On the one hand there are claimants with a good education and command of English and ready access to the Internet and sources of advice. It will generally be reasonably practicable for them to find out about the enforcement of their rights, not least by using the Internet. It is not difficult for an educated person to find out from official websites that there is a strict time limit for bringing a complaint of unfair dismissal.

32. On the other hand, there are many claimants with very limited education and English, health difficulties and disabilities, and virtually no access to the Internet and sources of advice. It may be much more difficult for them to obtain advice.

33. In this case the EJ has accepted that the Claimant did not obtain advice and was labouring under the misapprehension that he had to exhaust his internal appeal before beginning proceedings. He has made no findings as to why the Claimant was labouring under this misapprehension beyond saying that it was an understandable view.

34. However, this depends on whether it was reasonable to expect the Claimant to take steps to find out about the enforcement of his rights. Was it reasonable to expect him to look at the Internet, seek advice from sources available to him or even take legal advice as he said he had? Once granted that the EJ accepted the Claimant's evidence that he had not, as he told the Respondent, taken any legal advice, it was essential to address this issue before reaching a conclusion that it was not reasonably practicable to commence proceedings in time.

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35. Similar considerations apply to the question whether proceedings were brought within such further time as was reasonable. The Claimant's reasons for waiting until 25 April are very similar to his reasons for not commencing proceedings within the time limit. Again, the question arises: was it reasonable to expect him, given that he knew of his right to complain of unfair dismissal, to take steps to find out about the enforcement of his rights? Again, this is not really addressed in the EJ's Reasons.

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36. In these circumstances I will allow the appeal. The EJ has to my mind failed to address a key issue which the law requires him to address when he determines whether it was reasonably practicable for a claim to be brought in time in such circumstances as these. This is not a case where the EAT could or should take its own Decision. It involves factual evaluation which is not in the remit of the ET; see **Jafri v Lincoln College** [2014] IRLR 544. The matter will be remitted for rehearing before the ET and I will listen to submissions as to whether it should be the same or a differently constituted ET.

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37. I would say one further thing as I leave this case. In deciding whether, in effect, to extend the primary time limit of 3 months the ET was required to apply the "reasonable practicability" test set out in section 111(2) of the **ERA**. This test concentrates on what it was reasonably practicable for a Claimant to do: the fact that the Respondent had delayed in sending the dismissal letter, had not obtained a police report and had not completed its internal appeal procedure is context for the application of the test, but no more. In many areas of employment law, however, a broader test applies, namely whether it is just and equitable to extend the primary time limit of 3 months – see for example section 123(1)(b) of the Equality Act 2010. This broader test requires the ET to consider the matter in the round, taking into account the position of both sides and looking at the prejudice to both sides if an extension is granted. In this case for example the ET

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could have taken into account that the Respondent had not completed its internal appeal procedure or even obtained a police report at the time when the Claimant brought his claim. There would appear to be very little prejudice to the Respondent in allowing an extension.

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38. Whether the reasonable practicability test should continue to apply has recently been the subject of a Law Commission consultation: see Consultation Paper 239 on Employment Law Hearing Structures dated 26 September 2018 at paragraphs 2.46 to 2.49. Responses to the consultation paper are currently under consideration. Circumstances such as those in this case might be thought to provide powerful support for the proposition that justice can better be achieved by the broader test, especially given the short (3-month) time limit. However that ultimately is a matter for the Law Commission and Parliament. The EJ had to apply the law as it presently stands; and, for the reasons I have explained, I conclude that he left out of account a critical question. Therefore the appeal must be allowed.

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