EMPLOYMENT TRIBUNALS

Claimant: Miss J Kennedy

Respondent: Manchester Airport PLC

Heard at: Manchester Employment Tribunal **On:** 2 October 2019

Before: Employment Judge Dunlop

Representation

Claimant: In Person
Respondent: Miss R Kynman (Solicitor)

RESERVED JUDGMENT

1. The correct title of the Respondent is Manchester Airport PLC.

2. The Employment Tribunal has no jurisdiction to hear the Claimant's claim of unfair dismissal as it was presented outside the time limit prescribed by s111(2) Employment Rights Act 1996. The claim is therefore dismissed.

REASONS

Introduction

(1) The claimant, Miss Kennedy, was employed by the respondent from September 2014 as an Aviation Security Officer. She was dismissed following her conviction for a criminal offence which, on the respondent's case, was incompatible with her role. Miss Kennedy seeks to bring a claim of unfair dismissal.

(2) The case came before the Employment Tribunal on 2 October 2019 for a preliminary hearing to consider whether the Tribunal had jurisdiction to hear the claim given the date on which it had been presented.

(3) The claim was originally been brought against Manchester Airport Group, which is a trading name rather than a legal entity. The respondent contended that the correct respondent was Manchester Airport PLC. This corresponded with Miss Kennedy's employment documentation and, by consent, I ordered that the name of the respondent should be amended to Manchester Airport PLC.

The Hearing

(4) In response to a direction from the Tribunal, Miss Kennedy had prepared and sent to the Tribunal a letter dated 6th August 2019 setting out the circumstances around the presentation of her claim and two supporting documents – her letter of dismissal dated 21st December 2018 and a letter from her GP dated 31st July 2019. On the day of the hearing she brought along a further supporting document, namely an email to her dated 6th March 2019, which will be discussed more fully in due course.

(5) Miss Kennedy gave sworn oral evidence during which she confirmed the contents of her 6th August letter and expanded on it in response to questions from the Tribunal and cross examination from Miss Kynman. I accept that Miss Kennedy was an honest witness and was attempting to explain the facts and circumstances as well as she could remember them given the passage of time.

Factual background

(6) Miss Kennedy was dismissed verbally at the end of a disciplinary hearing on 10 December 2018. The dismissal took effect immediately. Miss Kennedy candidly admits that that was her understanding of the situation at the time, and has never sought to say otherwise. The dismissal was confirmed in writing by letter dated 21 December 2018. That letter confirms that the date of termination was 10 December 2018. In the circumstances, it was agreed that the primary limitation period for this claim ran until 9 March 2019. The claimant had until that date to notify ACAS and commence early conciliation.

(7) Miss Kennedy was assisted at the disciplinary hearing by a union representative. She gave evidence that after the meeting they 'discussed options' but that this was primarily focused on an appeal rather than the possibility of a Tribunal claim. It was clear from Miss Kennedy's evidence that she immediately felt that the decision was wrong and was keen to challenge it.

(8) Miss Kennedy has experienced health difficulties over the years. Her GP letter referred to severe anxiety and depression. She gave evidence that the dismissal immediately had a severe effect on her mental health, which I accept. She also gave evidence that, on 17 December, she underwent a surgical investigative procedure related to previous physical health issues. She was a day patient, but was advised that she would require a 10-14 day recovery period. In the context of previous health problems, I accept that this investigative procedure was both mentally and physically debilitating for Miss Kennedy, and would effectively have

prevented her from acting to find out about her rights or pursue a claim until after the new year.

(9) Miss Kennedy referred to some discussions with union legal representatives around this time. Her memory as to when these occurred or what was said was unclear.

(10) However, Miss Kennedy did seek to obtain advice and assistance form another source. She was able to turn to a ‘friend of a friend’, a Mr Lloyd, who worked at a local solicitor’s firm. Miss Kennedy was clear in her evidence that Mr Lloyd was not a qualified solicitor. She was unsure exactly what his professional status or job title was.

(11) Miss Kennedy gave evidence that she first contacted Mr Lloyd on 22 February and attended a meeting with him at the firm’s offices on 25 February. At that meeting she showed Mr Lloyd the letter of termination. Miss Kennedy’s evidence, in both her letter and orally, was that Mr Lloyd told her that he was not a qualified solicitor and that the firm’s Head of Employment would need to consider the matter to see if she had a claim. However, Mr Lloyd did state that time limits were strict. Miss Kennedy’s evidence, which I accept, was that he expressly said that she had three months from the date of the termination letter to bring a claim, and therefore that the deadline was 20 March 2019. An appointment was arranged for 8 March 2019, in advance of which Mr Lloyd was to discuss the matter with the firm’s Head of Employment.

(12) Miss Kennedy explained that she attended the meeting on 8 March, which was a Friday. At that meeting Mr Lloyd had some unexpected news – the Head of Employment had left one week earlier to set up his own firm. As Mr Lloyd would be unable to pursue the claim on Miss Kennedy’s behalf unsupervised, the firm would be unable to take the matter on. Miss Kennedy stated that in that meeting Mr Lloyd printed off an email which he had attempted to send to her on 6th March but she had not successfully received. Miss Kennedy wanted to rely on this email in support of her case. She had brought the email with her, and, with Miss Kennedy’s permission, copies were made for the Respondent and the Tribunal. The email supports Miss Kennedy’s evidence as regards to the Head of Employment having left and the firm therefore being unable to take on the claim. In the email Mr Lloyd states that he has “looked through the paperwork you brought in” which Miss Kennedy confirms included the letter of termination. He gives some general advice about the Employment Tribunal and ACAS processes. Specifically, he states:

“The first thing to do is to contact ACAS as outlined above. Whilst you do have until 20th March 2019 to do so, I would advise to do this without delay.”

(13) Following the meeting Miss Kennedy arrived home mid-to-late afternoon. Acting on Mr Lloyd’s advice, she attempted to call ACAS but the line was busy. She attempted several times, until eventually the line had closed for the evening and she heard a recorded message informing her it would re-open on Monday morning.

(14) On Monday 11 March 2019 Miss Kennedy contacted ACAS and commenced early conciliation. Her evidence was that the ACAS representative she spoke to asked for the date of termination from her P45 and was immediately concerned that any claim may be out of time. It was only at that point that Miss Kennedy became aware of the correct limitation date.

(15) The case remained in early conciliation until a certificate was issued on 11 April 2019. I did not ask the Claimant to elaborate on the period of conciliation. However, there was a further period of almost one month before the claim was presented on 9 May 2019. Miss Kennedy did not talk about this period in her letter of 6 August although she had been asked to explain "why the claim was not presented earlier." In oral evidence, she was able to confirm that she received the certificate by post (rather than email) which would account for a day or two, and that she posted the claim form by recorded delivery on 8 May, so there was no question of a postal delay. Miss Kynman in cross-examination pointed out that the claim itself, though handwritten by Miss Kennedy, is relatively sophisticated, including references to Civil Aviation Authority Regulations, ACAS uplift, and the band of reasonable responses test. Miss Kennedy stated that she had had further assistance from Mr Lloyd in the preparation of the claim from. She was unable to provide any further evidence as to the period between the issue of the conciliation certificate and the presentation of the claim.

(16) I asked Miss Kennedy about her relationship with the firm of solicitors where Mr Lloyd worked over this period. She indicated that she had not signed any client agreement, provided any identity documents or paid any fees. She met Mr Lloyd at their offices, sometimes in scheduled appointments and sometimes as a result of just 'popping in'. She sought help from Mr Lloyd because he was a friend of a friend.

Relevant Legal Principles

(17) The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996 :

> **(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.**

(18) The provisions of section 207B provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect initiating early conciliation "stops the clock" until the ACAS certificate is issued, and if the claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present his claim.

(19) Two issues may therefore arise: firstly whether it was not reasonably practicable for the claimant to present the complaint before the time limit

expired, and, if not, secondly whether it was presented within such further period as is reasonable.

(20) Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal). Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

(21) In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

(22) The position where an employee relies on advice from a professional adviser has been the subject of a number of decided cases. They were reviewed by the EAT in **Northamptonshire County Council v Entwhistle UKEAT /0540/02** in May 2010**.** The then President, Mr Justice Underhill, identified the following principles (paragraph 5 of the judgment):

> **"(1) Section 111 (2) (b) should be given "a liberal construction in favour of the employee". This was first established in *Dedman*** [Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53]**. There have been some changes to the legislation since but this principle has remained: see, most recently, paragraph 20 in the judgment of Lord Phillips MR in *Williams-Ryan*, at page 1300.**
>
> **(2) In accordance with that approach it has consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit. This was first clearly established in the decision of the Court of Appeal in the *Walls* case** [Walls Meat Company Ltd v Khan [1979] ICR 52]**, but see most recently paragraph 21 of Lord Phillips' judgment in *Williams-Ryan* and, in particular, the passage from the judgment of Brandon LJ in *Walls* there quoted, at pages 1300 to 1301.**
>
> **(3) In *Dedman* the Court of Appeal appeared to hold categorically that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a skilled adviser, even if that adviser had failed to advise him correctly. Lord Denning MR said this at page 61 E-G:**
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>> **"But what is the position if he goes to skilled advisers 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: see *Hammond v Haigh Castle & Co Ltd* [1973] ICR 148. I think that was right. If a man engages skilled advisers to act for him, and they mistake the time limit 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 inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the four weeks to pass by without presenting the complaint. If he was not at fault, nor his advisers, 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 it thinks it right to do so, but if he was at fault, or his advisers were at fault in allowing the four weeks to slip by, he must take the consequences. By exercising reasonable diligence the complaint could and should have been presented in time."**

…

(5) However, in *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 (page 1301):

> **"… 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 adviser is attributed to the employee."**

He concluded squarely at paragraph 31 (page 1303):

> **"What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in *Dedman* was part of the ratio. There the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal."**

The passage from *Dedman* there referred to is part of the passage which I have set out at (3) above. I think it is clear that Lord Phillips was intending to confirm that what he elsewhere called "the principle in *Dedman*" is a proposition of law …

(6) Subject to the *Dedman* point, the trend of the authorities is to emphasise that the question of reasonable practicability is one of fact for the Tribunal and falls to be decided by close attention to the particular circumstances of the particular case …"

(23) However, in paragraph 9 he concluded that there may still be cases where a mistake by a skilled adviser is not fatal to the claimant's case:

> **"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 adviser 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 of circumstances where the adviser's failure to give the correct advice is itself reasonable. … The paradigm case, though not the only example, of such circumstances would be where both the claimant and the adviser 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). …"**

(24) Other cases have made clear that the Dedman principle applies to advisors practicing in this area who are not solicitors, including trade union representatives, CAB representatives and employment consultants. (See, for example, **Ashcroft v Haberdashers' Aske's Boys School [2008] ICR 613**.)

(25) There are a number of cases which deal with advice received outside a formal client relationship. In **T-Mobile (UK) Ltd v Singleton EAT 0410/10** the claimant sought advice from solicitors by way of a free initial consultation and was advised to await the outcome of an appeal process before submitting a claim. His own understanding was that the time limit ran from the date of the termination, rather than the date of dismissal. This was not corrected by either the employer, or the solicitors he consulted, and he submitted his claim a day late. The EAT held that it was reasonably practicable for the claim to have been presented in time and the fact that the legal advice was received via a free consultation did not make a material difference. In contrast, in **Remploy Ltd v Brain EAT 0465/10** it was not reasonably practicable for a claimant to have presented her claim in time when she had relied on erroneous advice she received informally from an employment law solicitor who was - to put it in the terms of this case - a "friend of a friend", who agreed to discuss the matter informally over a cup of coffee.

(26) I also note the discussion in **Brain** in relation to earlier, apparently conflicting, EAT decisions and difficulty in seeking to apply factual distinctions between cases to automatically lead to a particular conclusion. I remind myself of HHJ Birtles' words, that:

> **"it is always essential to go back to the words of s111 of the 1996 Act itself."**

(27) Looking beyond the question of whether it was "reasonably practicable" for the Claimant to have presented her claim in time, I must also address the second question of whether it was presented within such further period as was reasonable. That is a less stringent test than the test of reasonable practicability. It is a question of fact, taking into account all of the circumstances. Most of the reported cases do not involve the added complexity of the interplay between Tribunal time limits and ACAS early conciliation. Recently, in **Pearce v Bank of America Merrill Lynch EAT 0067/19** the EAT confirmed that no statutory extension applies if the early conciliation period occurs after the expiry of the primary limitation period. In that case there was a further delay of a month in presenting the claim after the issuing of the early conciliation certificate. With no explanation as to the reasons for that delay, the Tribunal concluded that it was not a reasonable further period. The EAT upheld that decision and noted that s.111 does not require the tribunal to identify a precise date by which, in its view, the claim ought to have been presented.

Submissions

(28) The respondent submitted that Miss Kennedy had received erroneous legal advice and was bound by that legal advice. Any health considerations that were in operation were very much in the background, as demonstrated by the fact that Miss Kennedy's evidence about her health was focused almost entirely on the December 2018 period and the

GP letter only stated that her anxiety and stress had "contributed to" a delay. Miss Kynman also relied on the second stage of the s111 test, arguing that even if it had not been reasonably practicable for the claimant to contact ACAS before 9 March, it was certainly reasonable to expect her to have submitted her claim earlier than 9 May.

(29) The claimant emphasised the distress she was in following her dismissal and the impact it had on her. She argued that she was vulnerable and that she had done the right thing by seeking help. She pointed out that she would have been unable to pay for solicitors and considered herself fortunate that Mr Lloyd was prepared to assist her informally. She believes it would be unfair for her to be penalised if that advice was incorrect. She also stated that her health throughout the period had been a concern and "didn't help" in terms of her ability to present her claim.

Discussion and conclusions

Stage 1 – reasonably practicable

(30) I find that Miss Kennedy was broadly aware of the possibility of challenging her dismissal from the date of dismissal or, at the latest, shortly afterwards. She was initially prevented from taking steps to do so, and from finding out the details of what such a challenge would involve, by her ill-health. Once recovered and able to turn her attention to the matter, she very sensibly sought to secure what advice she could on an informal basis.

(31) On 25 February she received initial advice from Mr Lloyd. Although there is no documentary evidence to confirm whether Mr Lloyd had seen the termination letter and had expressly advised her that 20 March was the latest date on which she could notify ACAS, it was Miss Kennedy's evidence that he had seen the letter, and had given that advice. It would not be appropriate for me to criticise Mr Lloyd, given that I do not know his precise status or experience, he has not been here to put forward his account of events, and it would appear he has acted generously in lending his time and expertise to the claimant in circumstances where she would probably have been unable to secure alternative professional advice. Nonetheless, that advice was wrong. As at 25 February it would have been perfectly practicable for the Claimant to have taken the step of commencing early conciliation well within the period (of almost two weeks) remaining open to her. Unfortunately, both she and Mr Lloyd were led into a false sense of security by his misapprehension of the significance of the delay between the verbal dismissal on 10 December and the confirmatory letter on 21 December.

(32) Were it not for this false sense of security, I have no doubt that subsequent departure of the Head of Employment and the question mark over if, and how, Mr Lloyd, the firm he worked at, or some other firm, might be involved in acting for the claimant or presenting the claim would have caused no issue. The claimant was not required, at this point, to urgently formulate a claim. She was only required to telephone ACAS, a step which

she was, as it turned out, able to do very quickly after the 8 March meeting even at a point when she still believed she had until 20 March.

(33) In terms of the Claimant's own conduct, it was reasonable for her to rely on Mr Lloyd's advice. He was far more expert than she. Whilst she might otherwise have researched time limits herself, or made enquiries with ACAS, the CAB or her union, there was no reason for her to do so when she believed she had firm guidance that the key date was 20 March.

(34) On the evidence before me, Mr Lloyd's mistake was not reasonable. There was no ambiguity about the date of termination. He should have appreciated, or at least been able to easily find out, that time would run from the 10th December and not the 21st. The key question is whether the Claimant is fixed with that unreasonableness. To put it legally, whether the ***Dedman*** principle applies.

(35) Unfortunately for the Claimant I believe that it does. Although there does not appear to have been a formal client relationship, both she and Mr Lloyd were well aware that she was relying on his expertise. Whilst he was careful to explain that he was not qualified, and would not be able to conduct the claim, he did give Miss Kennedy clear and unequivocal advice as to the steps to initiate a claim and the key date. He did so with sight of the documents, particularly the letter of termination. The test is not whether the Claimant would have a claim against her advisors (although that seems to be the underlying principal behind ***Dedman***) but whether, looking at the Claimant's conduct and her advisor's conduct in the round it was reasonably practicable for the claim to have been presented in time. I find it was reasonably practicable for the correct limitation date to have been ascertained, which would have led to a timely commencement of early conciliation and, presumably, a timely presentation of the claim.

(36) In the event that I am wrong in relation to the reasonably practicable test, I also considered whether the claim was in any event presented within such further period as was reasonable. The conciliation period of one month does not formally 'stop the clock' under the statutory provisions when it is commenced after limitation has already expired. Nonetheless, I am not prepared to go behind that conciliation process in giving consideration to whether the claimant was acting reasonably. I do note, however, that the period from 11 March to 10 April provided an opportunity for the claimant and Mr Lloyd to be doing any necessary preparatory work on the claim to ensure that it could be submitted promptly if conciliation was unsuccessful (particularly bearing in mind that Miss Kennedy now knew, from ACAS, that there was a likely problem with limitation). However, there is no real evidence of any reason for the further delay of almost one month before the claim was finally presented. I accept that Miss Kennedy was receiving assistance from Mr Lloyd at this stage and that he will doubtless have had other matters to deal with. Nonetheless, given all the circumstances leading up to this point, and in the absence of any concrete evidence, I am unable to find that the claim was presented within such further period as was reasonable, as required by s111.

(37) I appreciate that this judgment will be disappointing to the claimant, who has not been at fault, and has been the victim of unfortunate circumstances outside her control.

(38) At the conclusion of the hearing the matter was provisionally listed for a full hearing. Those dates will now be vacated.

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Employment Judge Dunlop

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Date: 07.10.19

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 October 2019

FOR EMPLOYMENT TRIBUNALS