EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106417/2019 Preliminary Hearing at Edinburgh on 30 September 2019

Employment Judge: M A Macleod

Lynsey McKay	Claimant Represented by Ms H Hogben Barrister
Debenhams Retail Limited	Respondent Represented by Ms C Jennings Barrister

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The claimant's claim of unfair dismissal is dismissed for want of jurisdiction; and
2. The claimant's claim of discrimination on the grounds of disability is permitted to proceed, on the basis that it was presented within such time as the Tribunal considers just and equitable.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 2 May 2019, in which she complained that she had been unfairly dismissed and discriminated against on the grounds of disability by the respondent.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. Following case management by the Tribunal, and further correspondence between the parties, a Preliminary Hearing was fixed to take place on 30 September 2019, initially to determine two issues, namely time-bar and employment status. However, by the date of the hearing, the only outstanding issue related to time-bar.

4. The claimant attended and was represented by Ms Hogben, barrister. The respondent was represented by Ms Jennings, barrister.

5. The claimant gave evidence on her own behalf, and also called as a witness Stuart Forrest, USDAW Regional Officer for Scotland. The witnesses relied upon witness statements in respect of their evidence in chief.

6. The parties presented a joint bundle of productions to which reference was made during the course of the hearing.

7. Based on the evidence led, and the information available, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

8. The claimant, whose date of birth is 18 June 1986, worked for the respondent as a Click and Collect Advisor from 2013 until the date of termination of her employment, that is, 4 December 2018.

9. The claimant's dismissal followed a disciplinary hearing before the respondent's management, at which she was represented by Daniel Reid, USDAW Area Organiser. Mr Reid also represented the claimant at the hearing held by the respondent to determine whether her appeal against dismissal should be upheld.

10. Prior to Mr Reid's involvement, Tony Sneddon assisted the claimant in the internal disciplinary process.

11. When she was dismissed, the claimant knew that she wanted to make a claim to an Employment Tribunal in respect of unfair dismissal.

12. The claimant applied, as she was required to do, for union assistance to USDAW in order to raise proceedings before the Tribunal. The trade union responded by letter dated 6 December 2018 (32) acknowledging her request, and confirming the process:

"To apply for Usdaw assistance with an employment tribunal claim you must complete and return the enclosed Pack with the relevant documents to my office at the above address within 10 days. it is important to comply with this deadline so as to allow us to consider your application as quickly as possible. If it is late, this may jeopardise your application for assistance."

13. The letter, which was written by Mr Reid, went on to clarify that the Member Pack is to apply for assistance from the trade union, and not an application or claim to the Employment Tribunal itself.

14. Mr Reid further advised the claimant: *"You must ensure that your claim reaches the Tribunal within the time limit which is usually three months less a day from the date of the incident you are complaining about. It is your responsibility to ensure that any claim is submitted in time."* He went on to explain the ACAS Early Conciliation Process which she would require to follow.

15. Deliano Taylor, Senior Legal Adviser at USDAW, wrote to the claimant on 18 February 2019 (35) to confirm that the union was prepared to grant her assistance with her Tribunal claim. She enclosed a copy of the Members' Handbook, which included the union's rules and procedures, and what she could expect at different stages of the claim.

16. The letter went on to confirm that the claimant's Area Organiser (Mr Reid) would continue to have contact with her throughout her case, and to say that she required to co-operate with them and reply promptly to any requests for information.

17. Further, Ms Taylor explained the Early Conciliation process, and its effect on the statutory time limits applicable to Employment Tribunal claims.

18. On that date, Ms Taylor also wrote to Mr Reid to advise that assistance had been granted to the claimant for her claim, and to set out the requirements which this would place upon him.

19. It became apparent that Mr Reid had not been trained nor certified to conduct Employment Tribunal proceedings, and accordingly responsibility for the matter was transferred to Kay Winters. She was notified of this by email dated 25 February 2019 (41).

20. The claimant did not understand that Ms Winters had been appointed by the trade union to act on her behalf. She thought that Mr Reid remained the main contact for her, and apart from one or possibly two phone calls with Ms Winters her contact continued to be with Mr Reid.

21. There was a gap in time through March when the claimant did not hear from the trade union nor did she contact them herself. She understood that the trade union had taken over responsibility for presenting the Tribunal claim on her behalf.

22. ACAS were notified of the claim on 21 February 2019, which was noted as the start of the Early Conciliation process on the Early Conciliation Certificate (44). The Early Conciliation Certificate was then issued by ACAS on 29 March 2019.

23. The claimant believes that she met with Mr Reid at the end of March to go through the terms of her claim, and to draft with him the claim form (1ff).

24. In the course of March or April 2019, Ms Winters was deemed unfit to work due to anxiety and stress. Mr Stewart Forrest, the Glasgow Divisional Officer for USDAW, spoke to her at the point when she went off sick, and asked her if there were any outstanding work issues which needed to be dealt with immediately in her absence. Ms Winters advised that there were none. She did not mention this claim. Mr Reid then raised the question of whether anything further needed to be done with the claimant's claim in the absence of Ms Winters, at which point it was discovered that Ms Winters had received the Early Conciliation Certificate but had taken the matter no

further. Ms Winters left the employment of the trade union in July 2019, though there was no evidence presented as to the reason for her departure.

25. Mr Forrest was advised that the claimant's claim was now out of time, and accordingly he and his deputy took responsibility for ensuring that it was then presented as soon as possible. His evidence to this Tribunal was that he understood that the claim was submitted on the same day that he was advised that the time limit had expired.

26. The claim was presented to the Tribunal on behalf of the claimant on 2 May 2019.

Submissions

27. For the respondent, Ms Jennings presented a written submission, to which she spoke. What follows is a short summary of that submission.

28. She described this as a somewhat unusual case, in that it has been rather difficult to elicit what has happened. The claimant knew what her claim was when she was dismissed, she knew that she had the right to raise a claim before the Tribunal and she sought advice from her trade union well before the claim was submitted. The claimant accepted that at an early stage she was advised of the time limits.

29. Ms Jennings observed that 18 February was the date upon which the claimant was told that the case would be taken forward. In that same letter, she was told that it was her responsibility to engage with ACAS. The claimant understood that the trade union would act as her agent in that regard. She was in contact with Mr Reid on a regular basis, having had representation and assistance from him before she was dismissed. He was the named representative on the ACAS Early Conciliation form.

30. Ms Jennings submitted that the claimant should have been aware of the time limits. She seems to rely upon dyslexia as a reason for not understanding, but there is no evidence that her condition was such that it affected her ability to understand the process for taking a claim to the Tribunal. The error is said to have been at the hands of the trade union,

and particularly Kay Winters. There is no evidence to say at what point she was unwell, nor the dates of her absence. This was, she submitted, wholly unsatisfactory.

31. With regard to the unfair dismissal claim, Ms Jennings asked whether it was not reasonably practicable for the claimant to have presented the claim in time. This is a high hurdle. Some cases have been excluded when presented one minute late. The test is whether it was reasonably feasible for the claim to have been presented in time, by the claimant or her trade union. This is a large trade union. The ball was dropped twice by them. It is widely accepted that a party will be stuck with any fault on the part of his advisers in giving him incorrect advice, including trade union representatives.

32. She also pointed out that even if the Tribunal finds that it were not reasonably practicable for the claim to have been presented in time, it is necessary to determine whether or not the claim was then presented within such further time as the Tribunal considers reasonable.

33. Ms Jennings also addressed the disability discrimination claim, and submitted that while the "just and equitable" test is not so strict as the test in respect of unfair dismissal claims, the same arguments stand. There is, she accepted, a broad discretion. There is evidence that there was a file handler who had mental health difficulties but there was a second file handler who was assisting the claimant. Checks and balances were not in place for the trade union and their actions fell below that which could be reasonably expected.

34. For the claimant, Ms Hogben, similarly, presented a written submission to which she spoke, and the terms of her submission are summarised herein.

35. She confirmed that it is not in dispute that the claimant's claim was presented out of time by 3 days, and she set out, helpfully, a timetable for consideration by the Tribunal.

36. She submitted that with regard to the just and equitable jurisdiction, the Tribunal has a broad discretion to extend time, taking into account anything which it judges to be relevant. She said that while the length of time is not a decisive factor on its own, it is relevant in deciding whether the respondent has been prejudiced by the extension of time if granted. There is, she said, no evidence that that would be the case here.

37. The claimant sought quick advice from the trade union after she was dismissed. Legal assistance was granted by the trade union on 18 February 2019, well within the primary time limit in this case.

38. The claimant did what she had to do in responding to the requests from her trade union. It is known that the Early Conciliation notification was made on 21 February. In circumstances where the claimant's legal advisers are at fault, that fault cannot be laid at the claimant's door. A refusal of an extension cannot be justified simply by the fact that the claimant may have a possible claim against her advisers.

39. Ms Hogben invited the Tribunal to allow the discrimination claim to proceed.

40. Turning to the unfair dismissal claim, Ms Hogben submitted that the question of reasonable practicability requires the Tribunal to take into account a number of factors, including the manner of, and reason for, dismissal, whether the employers' appeals machinery had been used, the substantial cause of any failure to comply with the time limit, whether there was any physical impediment preventing compliance, whether the claimant knew of her rights, whether the employer had misrepresented any relevant matter to the employee, what advice the claimant had received and whether there was any substantial fault on the part of the claimant or adviser which led to the claim not being presented in time.

41. Where a claim relies upon a lack of knowledge of her rights, that may give rise to a finding that it was not reasonably practicable for her to have presented the claim in time.

42. Ms Hogben, having reviewed the relevant authorities, readily conceded that at first blush the authorities appear to be against the claimant on this point. She also accepted that the actions after 25 February are not, on the face of it, a reason for extending time. It may be relevant that the claimant relies on a lack of knowledge of her rights. She does have difficulty with communication. The calculation of time limits is not a straightforward matter even for legal advisers; for a lay person with dyslexia it is more difficult.

43. The Early Conciliation Certificate was issued on 29 March 2019. No-one told the claimant that the certificate had been issued so she had no knowledge as to when the time limit would expire. Ms Winters was absent from work during this time, and it appears that Mr Forrest considers that she misled him as to the need to take immediate action in this or any other case under her care.

44. The circumstances of this case are very different from the norm. The claimant's adviser was off sick at the critical time. She was the only adviser upon whom the claimant could rely at that time.

45. Ms Hogben submitted that the Tribunal can exercise its discretion, and accepted that it is rare to do so. The failures of Ms Winter may have been caused or contributed to by her health, but it would be unfair to hold the claimant responsible for that. She invited the Tribunal to allow the unfair dismissal claim to proceed.

The Relevant Law

46. Section 123(1) of the Equality Act 2010 provides:

"Proceedings on a complaint within section 120 may not be brought after the end of –

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

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

47. Section 123(3) clarifies that:

"For the purposes of this section –

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

48. The respondent argues that the Tribunal should not extend time unless the claimant convinces it that it is just and equitable to do so, and that the exercise of the discretion should be the exception, not the rule (**Bexley Community Centre t/a Leisure Link v Robertson [2003] EWCA Civ 576**).

49. Referring then to **British Coal Corporation v Keeble [1997] IRLR 336** and **DPP v Marshall [1998] IRLR 494**, it is noted that the factors which the Tribunal should take into account when determining whether or not to exercise what is a wide discretion include:

- The length of and reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay;
- The extent to which the party sued had co-operated with any requests for information;
- The promptness with which the claimant acted once they knew of the possibility of taking action; and
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.
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50. Section 111(2) of the Employment Rights Act 1996 ("ERA") provides:

"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."

51. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "That imposes a duty upon him to show precisely why it was that he did not present his complaint." (**Porter v Bandridge Ltd [1978] ICR 943**).

52. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**. The Court of Appeal concluded that "reasonably practicable" did not mean reasonable but "reasonably feasible". On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of **Porter (supra)** ruled, by a majority, that the correct test is not "whether the claimant knew of his or her rights, but whether he or she ought to have known of them." On ignorance of time limits, the case of **Trevelyans (Birmingham) Ltd v Norton EAT 175/90** states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

53. The Tribunal also had regard to the decision in **Marks & Spencer plc v Williams-Ryan [2005] IRLR 562**, and to the analysis in that Judgment relating to the situation where an employee takes advice about his or her rights and is given incorrect or inadequate advice. Referring to Lord Denning's well-known Judgment in **Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520**, and to other well-known authorities, Lord Phillips MR said:

*"There is no binding authority which extends the principle in **Dedman** to a situation where advice is given by a CAB. I would hesitate to say that an*

employee can never pray in aid the fact that he was misled by advice from someone at a CAB. It seems to me that this may well depend on who it was who gave the advice and in what circumstances. Certainly, the mere fact of seeking advice from a CAB cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to an employment tribunal."

Discussion and Decision

54. It is appropriate, given the different legal tests to be applied, to consider the question of jurisdiction in relation to each of the claims separately.

Unfair Dismissal

55. The effective date of termination in this case was 4 December 2018. The three month time limit within which an unfair dismissal claim should have been presented to the Tribunal would therefore expire on 3 March 2019. The date of presentation of the Early Conciliation request ("Day A") was 21 February 2019, and the Early Conciliation Certificate was issued on 29 March 2019 ("Day B"). The modified time limit, in terms of section 207(3) and (4) of the Employment Rights Act 1996 (ERA), expired on 29 April 2019. The claim was presented on 2 May 2019.

56. The fundamental question to be considered by the Tribunal was whether it was not reasonably practicable for the claim to have been presented within that modified timescale.

57. The evidence demonstrates that the claimant had the benefit of advice from her trade union throughout this process, from before her dismissal until the point where the ET1 was presented, by her trade union on her behalf, on 2 May 2019.

58. The substantial cause of the claimant's failure to present her claim in time, in this case, is difficult to establish from the evidence. It is clear that the claimant was, from the point of her dismissal (and indeed before it), aware of her right to make a claim to the Employment Tribunal. Her trade union wrote to her, in response to her application for assistance with her claim, on

6 December 2018 (32), in the course of which they advised her that she "must ensure that your claim reaches the tribunal within the time limit which is usually three months less a day from the date of the incident you are complaining about. It is your responsibility to ensure that any claim is submitted in time." Accordingly, she knew at or shortly after that date that there was a time limit placed upon her claim, should she wish to bring it to the Tribunal.

59. On 18 February 2019, the claimant was advised that the trade union would grant her assistance with her Tribunal claim (35), and given further details as to the process to be followed. In particular, the letter went on to advise her of the need to commence the ACAS Early Conciliation process. It appears that the trade union, in the person of Daniel Reid, initiated this process on her behalf.

60. What happened thereafter is much less clear. Due to Daniel Reid's lack of accreditation, he could not pursue the claim on the claimant's behalf (though in the end he did in fact present the claim for her). Kay Winters was asked, towards the end of February, to take over the process for her, but it is not known what action, if any, she took to do so. She spoke to the claimant on one, if not two, occasions, but that seems to relate to a request for further information from her. That information was already, in the claimant's evidence, provided to the trade union.

61. Ms Winters, who did not give evidence before this Tribunal and whose actions must be judged in light of the fact that she has not been in a position to defend herself, appears then to have become unwell in April 2019, but when handing over her work to Mr Forrest did not mention this case as one which required urgent attention.

62. Mr Reid appears to have met with the claimant towards the end of March, in order to draft the ET1 which was in time submitted on the claimant's behalf. Why the claim was not then submitted on the claimant's behalf by the trade union, either in the person of Mr Reid or another officer taking over the file, is entirely unclear. Although Mr Forrest spoke to Ms Winters about her

caseload at the point when she went off work, there is no evidence to suggest that any alternative arrangement was made for her caseload in her absence. In any event, Mr Reid continued to assist Ms Winters and to be the primary contact for the claimant. It was he who eventually realised that the time limit had expired and that urgent action was needed on this case.

63. The claimant's explanation for not taking responsibility for presenting her own claim in this case seems to be two-fold: firstly, that she relied upon the trade union to do it on her behalf; and secondly, that she was dyslexic and had difficulties with communications.

64. Taking that second point first, there is very little evidence before me as to the extent to which the claimant's dyslexia actually affected her understanding of this process. A letter from the claimant's General Practitioner (42) written on 28 February 2019, is very limited in its scope, and makes no reference at all to any effect which the claimant's condition had, or would have, upon her ability to present a Tribunal claim. In fact, the GP makes the disclaimer that the diagnosis of dyslexia is not within the skill set of a GP, but should be dealt with by an educational psychologist. Before me, the claimant appeared to be an intelligent and articulate individual whose understanding of the process was reasonably good. I am therefore unable to find that the claimant's condition affected her to the extent that it was not reasonably practicable for her to have presented her claim to the Tribunal in time.

65. With regard to the first point, it is well-established that the failings of an adviser, even one without legal qualification, must fall, in most circumstances, upon the claimant. It is not for this Tribunal to express a view as to whether or not the trade union acted negligently in its failure to present the claim in time, but there is no doubt that the claimant placed reliance upon them to do so, and the sequence of events which led to them failing to do so suggest strongly that there was at the very least a failure to communicate between different responsible officers about the time limit, and in addition a failure, where there was continuity in the person of Mr Reid, to maintain a clear diary entry to ensure that the deadline was not missed.

66. The claimant was, in addition, advised that the responsibility for presenting the claim in time.

67. While I am not without sympathy for the claimant in these circumstances, as it does appear that she was let down by her representatives, it is my judgment that it was reasonably feasible for her to have presented her claim to the Tribunal within the statutory deadline. I acknowledge that the prejudice falling upon her is significant, in that she loses the right to advance her unfair dismissal claim before this Tribunal, but the explanation given as to her failure to present the claim in time is inadequate, in my judgment, to persuade me to exercise the Tribunal's discretion to allow the claim to proceed. The fact that the calculation of time limits is a difficult matter for lawyers, far less for unqualified parties, does not persuade me that this is a sufficient ground for extending time within which to present the claim. The claimant had the information on which to make her claim from the point when she was dismissed, and was able to assist Mr Reid in drafting her claim at the end of March. That the claim was not presented until 2 May, when they had until 29 April to present it, is not satisfactorily explained by the claimant or her trade union.

68. Accordingly, the claimant's claim for unfair dismissal is dismissed for want of jurisdiction.

Disability Discrimination

69. The claim of disability discrimination was also presented to the Tribunal three days after the expiry of the modified time limit available to the claimant.

70. The question for determination here is whether the claim has been presented within "*such other period as the employment tribunal thinks just and equitable".*

71. It is accepted by both parties that the Tribunal has a broad discretion in relation to this test, but it is also correct to acknowledge that the exercise of the discretion may still be regarded as the exception rather than the rule.

72. The delay was not significant: it amounted to three days beyond the modified time limit. The reasons for the delay, as has been established, were largely due to the claimant's reliance upon her trade union representative, and the failures of that trade union in attending to the matter within the statutory deadline.

73. The claimant herself could have acted more expeditiously. She could have made contact with Mr Reid earlier than she did. It is plain, though, that she had provided Mr Reid with all the information which he needed to prepare a draft of the claim, since what was presented on 2 May is, according to the claimant, the complaint which was drafted at the end of March with Mr Reid.

74. The cogency of the evidence is, in my judgment, unlikely to be affected in any significant way by the delay, which was relatively brief.

75. The respondent does not appear to have provided the claimant with any misleading or unhelpful information about the Tribunal process.

76. The claimant did, herself, seek to act promptly by asking her trade union for legal assistance, and by providing the necessary information to them on request. She also took steps to obtain appropriate professional advice once she knew of the possibility of taking action.

77. It is my judgment that the claimant presented her claim within such time as the Tribunal regards just and equitable. The claimant was, to put it bluntly, let down by her trade union (on the information available to me), and while she might have acted more proactively herself, it is entirely understandable that she would rely upon those officers who had taken responsibility for her case. There was a failure to communicate comprehensively with her – for example, she did not know that Mr Winters had been asked to take over her case – and that led her into a situation where she was uncertain about what steps to take. The fact that she was told at the outset that there was a time limit is a factor to be taken into account, but of course, as Ms Hogben observed, this is a very complex area of the law and it is not surprising that she placed faith in an experienced union rather than take matters entirely into her own hands.

78. While I consider that the claimant is not entirely blameless for the delays which occurred, the primary responsibility falls upon her advisers, who failed, ultimately, to present the claim timeously on the claimant's behalf.

79. It is just and equitable, in all of these circumstances, to permit the claimant's claim of disability discrimination to proceed, on the basis that the Tribunal does have jurisdiction to hear it.

Date of Judgement: 6th November 2019

Employment Judge: M MacLeod

Date Entered in Register: 11th November 2019

And Copied to Parties