EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Ward	v	**London Borough of Lewisham**

HEARING

Heard at: London South **On: 4 December 2019**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: in person
For the Respondent: Mr C Kennedy of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claim of unfair dismissal was presented outside the primary time limit contained in section 111(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within the primary time limit. The claim of unfair dismissal is dismissed.

2. The claim of disability discrimination was presented outside the primary time limit contained in section 123(1)(a) of the Equality Act 2010 and it is not just and equitable to extend the period within which the claim falls to be lodged. The claim of disability discrimination is dismissed.

3. The hearing fixed for 2, 3 and 4 December 2020 is discharged.

REASONS

Preliminary

1. This preliminary hearing was fixed in order to consider whether the time for lodging the claim should be extended to allow the claim to proceed. The Claimant gave evidence on his own behalf speaking to a short statement.

Chronology

1. The Claimant's dismissal occurred on 16 May 2018. The time limit for presenting a claim is three months beginning with the date of dismissal - 15 August 2018.
2. The Claimant entered into ACAS early conciliation on 15 August 2018 and the certificate was made on 30 August 2018.
3. Taking all the calculations into account the time limit expired on 30 September 2018. The Claimant's claim was presented to the Tribunal on 08 October 2018 which means that the claim was presented out of time.
4. The claim can still be considered by the Tribunal even though it has been presented out of time if:
    (i) With regard to the unfair dismissal claim - it was not reasonably practicable for the claim to be presented in time and it was presented within a reason time period.
    (ii) With regard to the discrimination claim - it is just and equitable to consider it.

Evidence

7. The Claimant gave evidence that, at his dismissal hearing, he was supported by his Unison shop steward, Mr Steven Foster. After a period of hearing nothing, he was told by Unison that they were not supporting his case and Mr Foster was not qualified to do so. He also sought advice from Unite the union who advised him to contact ACAS. The claimant states "ACAS agreed to support my claim for unfair dismissal and filed the relevant papers on my behalf in August 2018."

Submissions

8. The Tribunal received oral submissions from both parties.

Law

9. Section 111(2) of the Employment Rights Act 1996 (ERA 1996) provides:
"an Employment Tribunal shall not consider a complaint…unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination."

10. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:
"It was "not reasonably practicable" for the complaint to be presented in time
The claim was nevertheless presented "within such further period as the Tribunal considers reasonable" (Section 111(2)(b), ERA 1996.)

11. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present the claim in time. The burden of proving this rests on the Claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

12. In **Dedman v. British Building Engineering Appliances Ltd.** [1974] ICR 53 Lord Denning held that ignorance of legal rights, or ignorance of the time limit, is not

just cause or excuse unless it appears that the employee or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the applicant is saying that he did not know of his rights, relevant questions would be:

> 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing in ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse".

The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'

13. This approach was endorsed in **Walls Meat Co. Ltd. v. Khan** [1979] ICR 52. Brandon LJ dealt with the matter as follows:

> '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'.

14. **Palmer & Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA followed this line and talked in terms of reasonable possibility at page 384-385.

15. The issue was considered more recently in **Marks & Spencer plc v. Williams-Ryan** [2005] ICR 1293 CA, where Lord Phillips MR, having reviewed the authorities, upheld the **Dedman** principle as a proposition of law (at para 31):

> *'[In Dedman] 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.'

16. The question in **Williams-Ryan** was whether a claimant could rely on the escape clause where she had received advice from a CAB. Holding that there was no binding authority equating advice from a CAB with advice from a solicitor, Lord Phillips MR stated (at para 32):

> '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.'

17. The Equality Act 2010 provides:

123 Time limits

(1) [Subject to section 140A and 140B] 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.

17. Harvey provides a non-exhaustive list of factors which may prove helpful in assessing individual cases:

— the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);
— the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;
— the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;
— the conduct of the claimant over the same period;
— the length of time by which the application is out of time;
— the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;
— the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

Discussion and decision

18. The claimant sought advice from ACAS and received a certificate on 30 August 2018. The ACAS website provides a guide which gives the dates by which a claim has to be made. The claimant did not explain why he did not comply with the guidance. He provided no evidence why he had delayed lodging the claim until 8 October 2018. The claimant says that the delay in the claim being filed was caused by the initial delay in Unison advising him of their position but the Tribunal did not accept this His evidence about union involvement related to an earlier period and the issue of advice from the unions does not arise. The claimant has plainly misunderstood the role of ACAS. In the absence of any reason for the claim not being lodged between 30 August and 30 September, there was no basis upon which the Tribunal could exercise any discretion. The Tribunal decided that the claim should have been lodged it time and that it was reasonably practicable to do so and it would not be just and equitable to extend the time.

Employment Judge Truscott QC

Date 10 December 2019