EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102990/2019

Held in Glasgow on 12 July 2019 (Preliminary Hearing); and Written Representations (12 and 16 July 2019)

Employment Judge I McPherson

Mr James Murdoch	**Claimant** **In Person**
(1) Vary Recruitment Limited	**First Respondent** **Not present and** **Not represented, but** **Written Representations**
(2) Hub Logic Limited	**Second Respondent** **No ET3 –** **No appearance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

(1) the claim for a redundancy payment, having been submitted to the Tribunal within the relevant statutory period, it is not time barred, and the Tribunal orders that that part of the claim shall proceed to a public Preliminary Hearing, before an Employment Judge sitting alone, on a date to be hereinafter assigned by the Tribunal, to consider the first respondent's preliminary issue that they have not any liability to the claimant, as he was not their employee and so, meantime, pending that determination by the Tribunal, this Tribunal makes no further order in respect of the claim for redundancy payment against either of the respondents, notwithstanding the second respondent has not lodged

any ET3 response defending the claim, and so it is proceeding as undefended as regards them.

(2) Further, the Tribunal notes and records that it is not considered appropriate to issue a Default Judgment against the second respondent only, under **Rule 21 of the Employment Tribunal Rules of Procedure 2013**, when the matter of the proper identity of the claimant's employer as at the effective date of termination of any employment is still in dispute, and to be judicially determined by the Tribunal at the forthcoming Preliminary Hearing.

(3) Having considered evidence led by the claimant at this Preliminary Hearing, and further written representations received from the first respondent, and the claimant in reply, the Tribunal finds and declares that, if the claimant was an employee of the first respondent (which matter is not determined by this Tribunal, but is reserved for that further Preliminary Hearing) then the effective date of termination of that employment was 29 October 2018 and, accordingly, having regard to the relevant statutory periods for bringing a claim before the Employment Tribunal, this Tribunal determines that the claimant's claims against both respondents for unfair dismissal, breach of contract (failure to pay notice pay), unlawful deduction from wages (arrears), and failure to pay holiday pay, are all time-barred, having been presented outwith the relevant statutory periods, in circumstances where it was reasonably practicable for those heads of complaint to have been presented in time.

(4) Accordingly, the Tribunal dismisses those time-barred parts of the claim against both respondents.

REASONS

Introduction

1. This case called before me on the morning of Friday, 12 July 2019, at 10.00 am, for a public Preliminary Hearing on the identified preliminary issue of time bar, further to Notice of Preliminary Hearing (Preliminary Issue) issued by the Tribunal to all parties on 9 May 2019. While that Notice of Hearing stated that this Preliminary Hearing would be conducted in private that was a statement made in error by the Tribunal administration, and the Hearing proceeded as a public Preliminary Hearing, in accordance with **Rules 53 to 56 of the Employment Tribunal Rules of Procedure 2013.**

Claim and Response

2. Following ACAS early conciliation between 29 January and 15 February 2019, the claimant, acting on his own behalf, presented his ET1 claim form to the Glasgow Employment Tribunal on 15 March 2019. He sued two different respondents, namely Vary Recruitment Limited, and Hub Logic Limited, both being shown with the same address for service.

3. He confirmed that he had obtained an ACAS early conciliation certificate for each respondent, and provided the relevant certificate number arising from what he stated was employment between 16 November 2015 and 9 October 2018, as Operations Director. He complained of having been unfairly dismissed, and he claimed a redundancy payment, and he further claimed that he was owed notice pay, holiday pay, and arrears of pay. In the event of success with his claim, in whole or in part, he sought an award of compensation only from the Tribunal.

4. At vetting, it appeared to the Tribunal administration that the claim might be time barred, in respect of all heads of claim, with the exception of the claim for a redundancy payment, and that standard time bar letters should be issued to all parties by the Tribunal.

5. By letter to all parties, dated 20 March 2019, the claimant was advised that because his complaints of unfair dismissal, breach of contract, unpaid holiday

pay and unlawful deduction of wages appeared to have been presented outwith the period within which complaints of this type should normally be brought, being 3 months from termination of employment, it may be that he would seek to prove that the claim was in fact submitted within the statutory time limit, or alternatively that the circumstances are such that the Tribunal should consider it although it was submitted late.

6. The standard time bar letter advised that the circumstances varied depending on the type of claim but, for most claims, including a claim for unfair dismissal, the Tribunal must be satisfied that it was not reasonably practicable to submit the claim within the relevant period, and that the claim was then submitted within a further reasonable period.

7. Although the claim was registered by the Tribunal administration, the Tribunal's letter of 20 March 2019 advised the claimant that the Tribunal would have to decide, as a preliminary issue, whether the complaints should be allowed to proceed, and once a response had been received from the two respondents, the file would be referred to an Employment Judge for initial consideration, and the Tribunal would write to the claimant further after that had taken place. If he decided, having become aware of the time limit that he wished to withdraw his complaint, the claimant was advised that he could do so by informing the Tribunal office in writing as soon as possible of his decision to withdraw.

8. The claimant did not thereafter intimate any decision to withdraw the claim, in whole or in part, against either of the two respondents. When Notice of Claim was served on both respondents, on 20 March 2019, they were advised that they were required to lodge an ET3 response to be received at the Glasgow Tribunal office by 17 April 2019 at the latest, and the respondents were further advised that, if they wished to apply for an extension of time to submit their response, they must do so in writing setting out the reasons why the extension was sought and, if the response was not received by 17 April 2019, unless an extension of time was agreed by an Employment Judge, they would not be entitled to defend the claim.

9. In the accompanying standard time bar letters sent to both respondents, entitled "***part of claim accepted out of time***", both respondents were advised that, in order to be allowed to defend the complaints, they must complete and return the ET3 by 17 April 2019 however they might wish to submit a limited (sometimes known as a "***skeleton***") response at that stage dealing only with the issue of time bar, and provide a fuller response dealing with the merits of the case at a later stage, if the decision of the Tribunal was to be that it could consider the complaints.

10. Before the due date for lodging ET3 responses had expired, the claimant, still acting on his own behalf, emailed the Glasgow Tribunal office, on 27 March 2019, in response to the standard time bar letter sent to him on 20 March 2019, and in doing so, he sought to point out the following timeline, as follows: -

> ***"Two separate ACAS certificates (one for Vary Recruitment and one for Hub Logic) were both issued on 15 Feb. However, they both show an application date of 29 January. As the termination date of my employment was 29 October, that would suggest that I am one day outside the 3 months in applying to ACAS.***
>
> ***However, what the Tribunal office is unaware of, is that the initial application to ACAS was made on 25 January, not 29 January, which is inside the three months. I recall that ACAS stated that both companies could not be listed on one certificate, and therefore issued a certificate straightaway on 01 Feb (attached) to close that off but the process was continuous by ACAS from that original date of 25 Jan.***
>
> ***I have attached an email confirming contact with ACAS on 25 January and not 29 January.***
>
> ***I hope this helps the tribunal office understand the way the ACAS process was developed by them and my claim will be seen as being within the time."***

11. The ACAS early conciliation certificate numbers provided by the claimant, in his ET1 claim form, were **R111659/19/86** for the first respondent, Vary Recruitment Limited, and **R111662/19/59** for the second respondent, Hub Logic Limited. The single certificate enclosed with his email of 27 March 2019 was number **R105492/19/92**, and it identified the prospective respondent as "***Vary Recruitment Limited (and formerly Hub Logic Limited)".***

12. Following referral to Employment Judge Lucy Wiseman, on 29 March 2019, a response letter from the Tribunal dated 1 April 2019 was sent to the claimant only, advising that Judge Wiseman had directed that his correspondence be placed on the case file, and the issue of whether the claim had been presented late and if so, whether it should still be allowed, would be considered once the Tribunal had received the ET3 response from the respondents.

13. While the claimant had not intimated his email of 27 March 2019 to the respondents, as is required by **Rule 92**, Judge Wiseman instructed, and the Tribunal's letter of 1 April 2019 copied the claimant's email to each of the respondents, for their information.

14. Thereafter, on 4 April 2019, an ET3 response form was lodged, in the name of the first respondent, Vary Recruitment Limited, by Gary H Sutherland, EmployEasily Legal Services Limited, Glasgow, defending the claim against them, and, at section 6.1 of that response, setting out facts on which the first respondent relied to defend the claim, as follows: -

> ***"(1) The respondent will contend that the Tribunal does not have jurisdiction to hear the claim because the claim is time-barred having not been submitted within the statutory time limit.***
>
> ***(2) The respondent will also contend that the claimant was not employed by the respondent so it is not entitled to the protection of sections 94 and 98 of the Employment Rights Act 1996.***

(3) The respondent reserves its right to add further and better particulars of response in due course once the claimant has clarified the nature of their claim, if it is allowed to proceed."

15. While that response was, as per the Tribunal's letter of 20 March 2019, in skeletal form, it is for noting that, at section 3.1, the first respondent agreed with the details given by the claimant about early conciliation with ACAS, and they further agreed that the dates of employment given by the claimant were correct. The ET3 on behalf of the first respondent was accepted by the Tribunal administration, on 13 April 2019, and a copy sent to the claimant, ACAS, and the second respondent, Hub Logic Limited.

16. No ET3 response was lodged on behalf of the second respondent, Hub Logic Limited, by the due date of 17 April 2019, or at all, and similarly there was no application for an extension of time by the second respondent to submit a response out of time.

17. Following initial consideration by Employment Judge Jane Garvie, on 30 April 2019, and as confirmed in a letter from the Tribunal of that date sent to Mr Sutherland for the first respondent, the claimant, and to the second respondent for information only, parties were advised that Judge Garvie had directed that a Preliminary Hearing would be fixed, and the Tribunal would be in touch in due course with a date and time regarding that Preliminary Hearing.

18. Though Judge Garvie's directions, on 30 April 2019, clearly state that further procedure was to fix a Preliminary Hearing on time bar, and allocate a half day, her full instructions as written on the casefile were not intimated to parties in the Tribunal's letter of that date, nor was it intimated that no ET3 having been received for the second respondent, Hub Logic Limited, she decided not to issue any **Rule 21** Default Judgment against that respondent only.

19. When that Notice of Preliminary Hearing was issued to all parties on 9 May 2019, and despite the "***for information only***" copy sent to the second respondent, Hub Logic Limited, no application was made by them, or on their

behalf, for an extension of time to lodge an ET3 response, or to defend the claim.

First respondent's applications to postpone the Preliminary Hearing refused by the Tribunal

20. By undated letter from the first respondent's representative, Mr Sutherland, at EmployEasily, received at the Glasgow Tribunal office on 10 June 2019, Mr Sutherland intimated a request for a postponement of the listed Preliminary Hearing on 12 July 2019 due to: ***"the unavailability of the respondent due to prior commitment."***

21. In particular, it was stated that: -

> ***"The tribunal did not consult the parties as to their availability and that of their witnesses in advance of fixing this date and we regret to inform the tribunal that the respondent will be out of the country on the date of the hearing and most of July 2019 having booked and paid for a holiday several months ago and it is not possible to cancel and/or reschedule the holiday without incurring financial loss. The respondent's evidence is critical to their case and therefore their appearance at the preliminary hearing is essential.***
>
> ***Postponing the hearing to enable the respondent to attend would be in accordance with the overriding objective and would assist the tribunal in dealing with the proceedings efficiently and fairly as, if the hearing went ahead on the original date fixed, the respondent would not be able to present their case effectively and would not therefore be on an equal footing with the claimant.***
>
> ***We confirm that this application has been made promptly, as soon as our client became aware that there were difficulties with the hearing date fixed."***

22. Following referral to the Vice President, Employment Judge Susan Walker, on 13 June 2019, she noted the application for a postponement, and stated

that as the Preliminary Hearing was listed to consider time bar, it is unusual (although not impossible) for the respondent to lead evidence on this matter, and asking Mr Sutherland to confirm, by 21 June 2019, the witnesses that were proposed and the relevance to the issue of time bar. A copy of the Tribunal's letter of 13 June 2019 was copied to the claimant for information.

23. While directed to reply by 21 June 2019, Mr Sutherland did not do so and, following referral to Employment Judge Mary Kearns, on 26 June 2019, a further Tribunal letter was sent to Mr Sutherland, with copy to the claimant for information, advising that the Tribunal did not seem to have received a response to the letter dated 13 June 2019, and advising both the first respondent and the claimant that the Preliminary Hearing on time bar would proceed as planned on Friday, 12 July 2019, at 10am.

24. By email to the Tribunal on 27 June 2019, copied to Mr Sutherland for the first respondent, the claimant stated that he wished to see a copy of the letter that was sent to the Tribunal with the first respondent's request to postpone the Preliminary Hearing. Following referral to Employment Judge Lucy Wiseman, on 3 July 2019, the Tribunal responded to the claimant advising that the Tribunal did not copy Mr Sutherland's letter received on 10 June 2019 to the claimant when the Tribunal received it as it appeared to have been copied to him by Mr Sutherland.

25. Thereafter, by email to the Tribunal on 1 July 2019, copied to the claimant for his information, Mr Sutherland made a further application to postpone the Preliminary Hearing listed for 12 July 2019, because he stated he was unavailable to attend "***due to sudden illness and there was no other qualified representative within his firm available to attend in his place".***

26. On 3 July 2019, following referral to Employment Judge Sally Cowen, she instructed the Tribunal clerk to seek the claimant's urgent comments on Mr Sutherland's request for postponement, and for a reply by 6 July 2019. By email to the Tribunal on 5 July 2019, with copy sent to Mr Sutherland for the first respondent, the claimant stated his objections to the application for a postponement.

27. In particular, the claimant stated that he had prepared extensively for the Preliminary Hearing to take place on 12 July 2019, particularly as he was advised on 27 June 2019 that the Hearing would proceed as planned, and he only received the respondent's letter dated 30 May 2019, with application for postponement, on 4 July 2019, which advised the respondent's unavailability despite the advanced notice from the Tribunal of the Preliminary Hearing date.

28. Prior to receiving the letter, the claimant stated he had received correspondence via email from the respondent's representative dated 1 July 2019, appearing to be a second application for postponement, advising medical reasons as to why the respondent's representative was not now available, but he had not seen medical evidence to support this. The claimant further stated that:

> "***The more time that passes the greater the financial impact on me. This places further stress on me and I would expect the employment judge to understand that this is a time I need assistance from the tribunal service. I am not represented therefore there is no prejudice to the respondent. "***

29. Following referral to Employment Judge Robert Gall on 9 July 2019, the claimant's correspondence of 5 July 2019 was placed on the case file, and Employment Judge Gall instructed that, by 12 noon on 11 July 2019, Mr Sutherland, as the first respondent's representative, should provide a soul and conscience certificate from his doctor confirming that he is unfit to attend, as it was noted that medical evidence was confirmed as being something which could be provided.

30. The Tribunal's letter of 9 July 2019 to the claimant, and copied to Mr Sutherland, confirmed that the Preliminary Hearing remained listed at present on 12 July 2019 and it would be heard in public as confirmed previously by Employment Judge Kearns.

31. While, later on 9 July 2019, Mr Sutherland advised the Tribunal office, with copy to the claimant, that he had asked his GP to provide him with a fit note confirming his incapacity, and for that fit note to be provided as a matter of

urgency, he stated that was outwith his control, and he further added that, whilst he had noted the time bar issues as one of the grounds of resistance in this case in the first respondent's skeleton ET3 response, the primary grounds of resistance are that the claimant was never an employee of his client (Vary Recruitment Limited) and evidence being given by them directly at the Preliminary Hearing is essential in establishing this fact, and determining whether or not the entire claim against them should be struck out.

32. Accordingly, Mr Sutherland advised that, in addition to his current application for postponement due to him being incapacitated or unable to attend, that the Employment Judge also reconsider his original application for a postponement due to the respondent (by which I took it to mean the first respondent's director, Roddy Manley, the first respondent being a corporate body) being unavailable on 12 July as he is out of the country, either of which Mr Sutherland submitted would be in accordance with the overriding objectives of the Tribunal.

33. On the afternoon of Thursday, 11 July 2019, no soul and conscience certificate having been provided in respect of Mr Sutherland, the Tribunal wrote to parties advising that I had refused his requests of 1 July 2019 to postpone the Preliminary Hearing listed for 12 July 2019, and that the Hearing on time bar would remain listed for that Hearing on 12 July 2019, and so the respondents' attendance was not required.

34. It was evident, from the clear and unequivocal terms of the Notice of Preliminary Hearing issued, that the only preliminary issue for determination by the Tribunal on 12 July 2019 was, and only ever was, the matter of time bar of the claim.

Preliminary Hearing before this Tribunal

35. When the case called before me, on the morning of Friday, 12 July 2019, at 10.00am, as listed for the time bar preliminary issue, the claimant was in attendance, unaccompanied, and representing himself, while neither of the respondents was present, nor represented.

36. Given the first respondent had indicated that their director, Mr Manley, would be out of the country, and unavailable, and Mr Sutherland had indicated that he was incapacitated, and so he would not be available, and his requests for postponement having been refused, it was clear that the first respondent was aware of the Preliminary Hearing having been fixed and, in those circumstances, I did not instruct the clerk for the Tribunal to make telephone enquiry as to why the first respondent was not present, nor represented, as it was clear to me, from perusal of correspondence in the Tribunal's case file, why that was so.

37. Further, given the second respondent was not present, nor represented, I did not cause enquiry to be made of them by the Tribunal clerk, given that they had not lodged any ET3 response, defending the claim, and I was satisfied, from the Tribunal's casefile, that they had been sent the Notice of Preliminary Hearing as a courtesy, for information only and, notwithstanding that Notice of Preliminary Hearing, they had still made no application for an extension of time to lodge an ET3 response, nor was anybody in attendance from them, or on their behalf, seeking to participate in this listed Preliminary Hearing to the extent that I might allow.

38. In those circumstances, the respondents not being in attendance, nor represented, the listed Preliminary Hearing proceeded in their absence, as per **Rule 47 of the Employment Tribunal Rules of Procedure 2013**, and I took sworn evidence from the claimant, following which I advised him that judgment was reserved, and that a written Judgment and Reasons would be issued to all parties in due course, including the second respondent, Hub Logic Limited, although they had not entered any response defending the claim against them.

39. Before I proceed to narrate the evidence heard by the Tribunal, and detail my findings in fact, it is appropriate to note and record here that, after the Preliminary Hearing had concluded, the clerk to the Tribunal passed to me an email sent in that morning from the agents for the first respondent, EmployEasily, which, although sent at 09:37am, was not marked as urgent, and it did not indicate it required immediate referral to a Judge. As this was

not copied to the claimant, as it properly should have been in terms of **Rule 92**, nor was it submitted, at least 7 days before the Hearing, as per **Rule 42,** I took the view that the claimant had not had the opportunity to comment or object to those written representations.

40. As such, in terms of **Rule 47**, the Tribunal only had regard, at that stage, to the claimant's evidence, on the preliminary issue of time bar, and the ET3 response, and correspondence with EmployEasily, as agents for the first respondent, Vary Recruitment Limited.

41. In those circumstances, on my direction, the clerk to the Tribunal emailed both the claimant, and Mr Sutherland for the first respondent, later in the afternoon on Friday, 12 July 2019, explaining what had happened, and seeking the claimant's urgent comments, by no later than 4.00pm on Tuesday, 16 July 2019, as to whether he had anything to say in response to those written submissions on behalf of Vary Recruitment Limited.

42. The claimant was requested, as per **Rule 92**, to copy his reply to EmployEasily by email at the same time as sending to the Tribunal.

Written Representations for First Respondent

43. The terms of the email of 12 July 2019 at 09:37 from an Ashley Kurthy, employment law / HR advisor, at EmployEasily, were as follows:

"Dear sirs,

We are disappointed that the Employment Judge has refused the application for a postponement of the preliminary hearing due to take place tomorrow due to the respondent's representative being medically incapacitated, not least given the explanation about the potential challenges in securing medical evidence in such a short time scale and remotely, and that the request to reconsider the original application for a postponement has also been refused.

For the reasons stated in the application for a postponement due to the Respondent's representative being medically unfit and unable to attend,

he will not be in attendance at the preliminary hearing this morning. In his absence, we would respectfully ask that the Employment Judge consider the following written submissions in respect the time bar issue:

1) There appears to be contradictory dates for the effective date of termination (EDT).

2) There appears to be three different EC certificates with contradictory dates.

3) The stated date in the ET1 claim form is that the employment terminated on 9 October 2018 but in his written submissions, the claimant appears to be saying his employment terminated on 29 October 2018. The EDT along with the relevant dates in whatever Acas Early Conciliation (EC) certificate is accepted as being correct, are essential in determining whether most of his claims are time barred.

4) If 9 October 2018 is the EDT, the limitation date would be 8 January 2019 and if 29 October 2018 was the EDT, the limitation date would be 28 January 2019. Having initiated Acas Early Conciliation on 29 January, all of the claimant's claims, with the exception of his claim for statutory redundancy pay would be time barred because he initiated EC one day after the limitation date and the extension to limitation period provided for under subsections 207B (3) and 207B (4) would not apply.

5) In submitting his new evidence that he initiated EC on 25 January and not 29 January as previously understood, all of the claimant's claims, with the exception of his claim for statutory redundancy pay would still be time barred because if 9 October 2018 is the EDT, the limitation date would be 15 January 2019 and if 29 October 2018 is the EDT, the limitation date would be 1 March 2019."

Evidence heard by the Tribunal, and Findings in Fact

44. Given the claimant was appearing on his own, unrepresented, and as a party litigant, I sought to clarify with him various matters, arising from my pre-read

of his ET1 claim form, and the ET3 response lodged for the first respondent, Vary Recruitment Limited.

45. The claimant had provided to the Tribunal, at the start of this Preliminary Hearing, a typewritten timeline of events, which I took into consideration, and which was in the following terms:

"1. **10.10.18** I started my annual leave until **24.10.18.**

2. **25.10.18.** I returned to work.

3. **26.10.18** My monthly wage was short paid to bank. Wages were paid monthly on last Friday of each month.

4. **29.10.18** I met with Mr. Manley offsite. I queried wage amount paid to my bank account. I was told by Mr. Manley "you only worked nine days so that's all you are getting". He then continued to say "transport business has gone, there is nothing for you and you have no entitlement to anything else". Mr. Manley then informed me that there was no need for me to return to work.

5. **25.1.19 at 14:12** Email received from ACAS confirming Early Conciliation notification successfully received (R109492/19 Murdoch v Vary Recruitment Ltd – formerly Hub Logic Ltd).

6. **29.1.19 at 15:02** Email received from ACAS confirming Conciliator appointed (R109492/19 Murdoch v Vary Recruitment Ltd – formerly Hub Logic Ltd).

7. **30.1.19 at 09:05** Email received from ACAS confirming Sharon Sweeney as Conciliator (R109492/19 Murdoch v Vary Recruitment Ltd – formerly Hub Logic Ltd).

8. **30.1.19 at 09:05.** Email received from ACAS confirming Sharon Sweeney as Conciliator (R109492/19 Murdoch v Vary Recruitment Ltd – formerly Hub Logic Ltd).

9. **30.1.19 at 09:05** Email received from ACAS confirming Sharon Sweeney as Conciliator (R109492/19 Murdoch v Vary Recruitment Ltd – formerly Hub Logic Ltd).

10. **01.2.19 at 12:00** Early Conciliation Certificate issued (R109492/19 Murdoch v Vary Recruitment Ltd – formerly Hub Logic Ltd).

11. **15.2.19 at 15:12** Email received from Sharon Sweeney stating Respondent not willing to engage in conciliation.
12. **15.2.19 at 15:14** Early Conciliation Certificate issued (R109492/19 Murdoch v Vary Recruitment Ltd – formerly Hub Logic Ltd).
13. **15.2.19 at 15:31** Early Conciliation Certificate issued (R109492/19 Murdoch v Vary Recruitment Ltd – formerly Hub Logic Ltd)."

46. I had available to me, the ACAS EC certificate issued on 1 February 2019, as well as both ACAS EC certificates issued on 15 February 2019. Attached to the claimant's timeline, there was also a copy of the email from ACAS to Dave Roberts, the claimant's then representative, at Magenta Moon, sent on 25 January 2019, at 14:13, stating as follows: -

> ***"Dear Dave Roberts,***
>
> ***Thank you for your notification for ACAS early conciliation. This e-mail is to confirm that your notification has been successfully received by ACAS on 25 Jan 2019 at 14:12:23. In order to progress your notification we need to get some further details from you. Please call us as soon as possible."***

47. The copy ACAS EC certificate issued to Mr Roberts, as the claimant's representative, on 1 February 2019, was issued by email.

48. When I asked the claimant whether he was going to be giving any evidence to the Tribunal at this Preliminary Hearing about why, if his claim was held to be late, it was not reasonably practicable for him to lodge it within the statutory time limit, and to establish that he had done so within a further reasonable period, the claimant started to advise me orally of the explanation, and background, and, in order that I was in a position to fully capture what he was saying, I suggested, and he agreed, that we should adjourn proceedings to allow him to prepare a handwritten note of the matters which he was inviting the Tribunal to take into account.

49. After an adjournment for that purpose, between 10.47am, and 11.35am, when the public Preliminary Hearing resumed, in giving his sworn evidence to the

Tribunal, the claimant spoke to the terms of his written statement, which was in the following terms: -

"***29/10/18*** ***Is the day I was told not to return to work.***

1/11/18 ***I was introduced to Mr Dave Roberts of Magenta Moon Ltd. Dave offered me employment law advice and indicated some timings I would need to be aware of. It was suggested that I would be required to proceed with ACAS (Early Conciliation) within three months of 29/10/18.***

I took the decision to wait until after the Christmas period to contact ACAS.

20/12/18 ***I learned that my mother was in hospital and had been since early November. She was suffering from ovarian cancer which had spread to other organs. I immediately took a flight that day to visit her. It became apparent she only had a short time to live and she wanted to be at home for her last days.***

She lives alone in Lerwick, Shetland. Myself and my brother decided to split and visit at different times so she had constant care. This meant travelling every 4th day each spending three days in rotation between home and Lerwick.

Mid January I was aware of the significance of the end of January being the cut off for notifying ACAS fast approaching and my time being fully absorbed between my family and caring for my mother so I asked Dave Roberts to make the notification to ACAS for me.

25/1/19 ***ACAS notification lodged and confirmed.***

Dave Roberts was handling communication from ACAS on my behalf and keeping me updated whenever possible.

22/2/19 ***My mother passed away.***

Dave Roberts continued to communicate with ACAS on my behalf whilst the early conciliation process continued as I was dealing with affairs in Lerwick and preparing for my mother's funeral.

5/3/19 ***I receive*** (sic) ***an email from Dave Roberts to inform me that ACAS have closed the conciliation window and he sent me two certificates (one in the name of Hub Logic and the other in the name of Vary Recruitment). Dave told me I had to lodge the ET1 by 15th March and advised I should proceed with a local solicitor for this. I visited a few solicitors however the cost (upfront in most cases) was too much for me to afford.***

15/3/19 ***I lodged ET1 online myself."***

50. I found the claimant to be a credible and reliable witness and, while neither respondent were present, nor represented, and accordingly the claimants' evidence was not cross examined, I asked him some questions of clarification, in order to ensure that I fully understood the timeline of events, and the factors impacting on his ability, or inability, to lodge an ET1 claim form sooner than he actually did on 15 March 2019.

51. In doing so, I raised with him the fact that there was a discrepancy between the date of 9 October 2018, in his ET1 claim form, and the date of 29 October 2018, now being relied upon by him, and in that regard, he referred to, and I considered, his email to the Tribunal of 27 March 2019, the terms of which I have noted above earlier in these Reasons, at paragraph 10 above.

52. In his oral sworn evidence to me, in answer to my questions of clarification, the claimant advised as follows, which I have recorded here, as further findings in fact: -

(1) The claimant stated that, when in Lerwick, it was very difficult for him to communicate with others when there was no Wi-Fi, and no broadband in his mother's house.

(2) While he advised me that he does not like to leave things on the back burner, the claimant stated that Dave Roberts, an employment law adviser, not a solicitor, told him to trust him, and he knew what he was doing with dates.

(3) Further, the claimant stated that when he met Mr Manley from Vary Recruitment Ltd on 29 October 2018, off-site, he was told not to come back, and there was no correspondence issued to him terminating his employment with Vary Recruitment Ltd, but he was told he was dismissed, verbally, with no letter of termination, and no P45 issued.

(4) The claimant further stated that Mr Roberts, from Magenta Moon, advised him to sue Hub Logic Ltd too, as the business had transferred in August 2018, but by October 2018, the claimant stated that Vary Recruitment Ltd was his employer and paying his wages, although his only written employment contract was with Hub Logic Ltd, and he had no documents to say he was employed by Vary Recruitment Ltd.

(5) The claimant lodged the ET1 on 15 March 2019 himself, when he realised how simple it was to do online. He further stated that he prepared it on 14 March 2019, in draft, and sent it to Dave Roberts, and a Glasgow solicitor, whom he did not identify, and he stated that they both ran over it, and he lodged it early on the morning of 15 March 2019. He stated that he thought he had 30 days, or a month, from the date of the ACAS certificate to lodge his Tribunal claim.

(6) The claimant advised that he is currently not working, and that he has secured no new employment since what he regards as his employment with the first respondent ended on 29 October 2018. He further stated that he has set himself up, through HMRC, as a sole trader, and he has been doing some consultancy work, and he has

earned around £15-16,000, since his last pay received from Vary Recruitment Limited on 26 October 2018.

(7) The claimant further stated that, post-termination of his employment with Vary Recruitment Ltd, he did not claim any State benefits, and felt that he was probably not qualified for them anyway.

(8) He stated that he would get a job going forward, but that he has a six-year-old daughter, and having tied up his mother's estate about three weeks ago, having sold her house, he was hoping to secure full time employment by the end of the summer, when his daughter goes back to school in August 2019. He explained that his partner works full time, and so she cannot look after his daughter.

(9) The claimant further stated that, looking for a job, aged 52, it is very difficult, and that it is a "***big bad world***" out there, and that he does not have degrees etc, to get an interview for a new job.

Closing submissions from the Claimant

53. Recognising that the claimant was an unrepresented, party litigant, and that he had no previous experience of the Employment Tribunal, or its practices or procedures, nor the relevant law on time bar, I stated that it was my responsibility, as the presiding Employment Judge, to make findings in fact, arising from his evidence, and then apply the relevant law, which I stated had been very briefly paraphrased, in layman's terms, in the Tribunal's standard time bar letter issued to him on 20 March 2019, as detailed earlier at paragraphs 5 and 6 earlier in these Reasons.

54. In reply, the claimant stated that he had no formal closing submissions to make, on the relevant law, but he did ask me to allow his case to go forward, and that he would get a solicitor for any further stage of the Tribunal process. He further advised that it was more a matter of principle for him, having been employed for the last seven to eight years, by Hub Logic Limited, and then Vary Recruitment Limited, that he would not treat anybody the way he had been treated by them.

55. When I asked him if he wished to see, from my bench copy of **Butterworths Employment Law Handbook**, the precise terms of **Sections 111 and 207B of the Employment Rights Act 1996**, which set forth the relevant statutory provisions, about time bar in an unfair dismissal claim, and extensions of time to facilitate ACAS conciliation before institution of proceedings, there being corresponding statutory provisions elsewhere to similar effect for his other heads of claim, the claimant stated that he would not be making any submissions on the relevant law, and he simply left that to me as the Judge to decide.

Further Representations received by the Tribunal

56. As detailed earlier in these Reasons, at paragraphs 39 to 43 above, the claimant's sworn evidence was taken at this Preliminary Hearing before I was advised, by the Tribunal clerk, after the close of the Hearing, that there had been correspondence received that very morning, 12 July 2019, from the representative for the first respondent, sent to the Tribunal only, and not copied to the claimant, as it should have been as per **Rule 92**.

57. In response to the Tribunal's email of 12 July 2019, only the claimant replied, and that in the following terms, by email of 16 July 2019, sent at 15:21, and copied to Mr Sutherland, for the first respondent, as well as the Tribunal, as follows:

> "***Thank you for the email and it was no inconvenience at all.***
> ***I have previously given my explanation and understandings in a statement, to Employment Judge Ian McPherson at a Preliminary hearing on Friday 12th July, of all the dates that are referred to below.***
>
> ***The key dates are:***
>
> ***9th October 2018 – I stopped work to start my annual leave.***
>
> ***29th October 2018 – I was told verbally, no need to return to work.***

25th January 2019 – Initiated ACAS Early Conciliation, confirmed by ACAS

1st February 2019 – Early Conciliation certificate issued by ACAS

15th February 2019 – Two subsequent and separate Early Conciliation certificates issued by ACAS"

58. No further written representations were made by or on behalf of the first respondent. The casefile was returned to me, by the Tribunal administration, on 24 July 2019, to allow me to draft this Judgment and Reasons. I apologise for the delay in doing so, occasioned by my absence from the office on annual leave between 31 July and 19 August 2019.

Relevant Law

59. In coming to my decision, I have taken into account the relevant law to be found in **Sections 111 and 207B of the Employment Rights Act 1996**, as regards the unfair dismissal complaint, as also the equivalent statutory provisions in **Article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994** (breach of contract : failure to pay notice pay), **Regulation 30 of the Working Time Regulations 1998** (failure to pay holiday pay), and **Section 23 of the Employment Rights Act 1996** (unlawful deduction from wages), all of which contain a similar, 3 month period from termination of employment for bringing a claim, subject to ACAS extension of time in certain cases.

60. The statutory right to claim for redundancy pay is subject to the time limits in **Section 164 of the Employment Rights Act 1996**, but I did not require to further address that statutory provision, as the first respondent properly accepts that, if the claimant is an employee of their company (which they dispute) his redundancy payment claim is not time barred, having been presented within the statutory period of 6 months, whether the termination date is either 9 or 29 October 2018.

Discussion and Deliberation

61. The claimant's claim of unfair dismissal against the respondents constitutes a complaint to the Employment Tribunal under **Section 111 of the Employment Rights Act 1996** alleging that he has been unfairly dismissed by his former employer contrary to his right, under **Section 94**, not to be unfairly dismissed by his employer.

62. As the first respondent disputes his employment status, he needs to establish that to vindicate the right to complain of breach of any employment protection rights.

63. In terms of **Section 111 of the Employment Rights Act 1996,** an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, being, in the claimant's case, 29 October 2018, according to the claimant at this Preliminary Hearing, and as per his email of 27 March 2019.

64. Where an Employment Tribunal is satisfied that it was "***not reasonably practicable"*** for a complaint to be presented before the end of the relevant period of three months, **Section 111(2) (b)** provides that the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

65. Further, **Section 111(2) (A) provides that Section 207B** (extension of time limits to facilitate conciliation before institution of proceedings) applies.

66. **Section 207B** inserted with effect from 6 April 2014, by the **Enterprise and Regulatory Reform Act 2013,** provides as follows: -

> **207B Extension of time limits to facilitate conciliation before institution of proceedings.**

"(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(2) In this section—

(a) *Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

(b) *Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is

exercisable in relation to the time limit as extended by this section."

67. Early conciliation through ACAS has an important implication for the time limit for making a claim to an Employment Tribunal, as it "***stops the clock***" so that time is suspended while parties are in the early conciliation process. The early conciliation period starts on the day after a claimant contacts ACAS ("***Day A"***), and ends on the date they receive their Early Conciliation Certificate ("***Day B***").

68. Here, the claimant's case is more complex than in the typical time-bar case because, very unusually in my experience of such matters before this Tribunal, he has made more than one notification to ACAS, and received in total 3 ACAS certificates, the single, original certificate issued on 1 February 2019, and the two, separate certificates issued thereafter on 15 February 2019.

69. Early conciliation can be as short as one day, if a claimant does not wish to take part in early conciliation, or it can last up to one month starting on the date on which a claimant notifies ACAS of their potential claim, and this one-month period can be extended by up to 14 days if, towards the end of the month, ACAS thinks that there is a reasonable prospect of settling the case within those extra 14 days.

70. While parties are taking part in early conciliation, this extends the time a claimant has to make their claim, but if negotiations fail, the clock starts running again from the date the claimant is deemed to have received their Early Conciliation Certificate ("***Day B***"). Time is added to the original time limit for making a claim to make up for the pause during the early conciliation period.

71. However, a claimant will not know the exact new time limit until early conciliation has ended and they have received their Early Conciliation Certificate from ACAS. Here, the claimant's first Early Conciliation Certificate was sent by e-mail on 1 February 2019, and so it is treated as having been

received by the applicant (as prospective claimant) on the same day as it was sent ("***Day B***"). "***Day A***" is 25 January 2019 in this case, when Mr Roberts made application on the claimant's behalf.

72. From the copy email produced by the claimant to the Tribunal, at this Preliminary Hearing, along with his Timeline of Events, it is shown that the ACAS notification on 25 January 2019 came from Dave Roberts at Magenta Moon, and it bears his email address as the recipient of the acknowledgment from ACAS.

73. The email of 1 February 2019, at 12:00, referred to at item 10 in that timeline is the email cited as issuing the EC certificate. As that email was not produced, I take it that it too was sent to the claimant's representative, Mr Roberts, rather than the claimant direct.

74. Even if a claimant is making a claim out of time, they will still need their Early Conciliation Certificate to complete the ET1 claim form, unless they complete the ET1 to state that they are exempt, for one of the stated reasons at section 2.3 of that form. The claimant did not indicate he was exempt from EC for any stated reason.

75. Provided a claimant contacts ACAS before the original time limit expires, they will sometimes have more, but they will never have less, than one month from the date they receive their Early Conciliation Certificate to present their ET1 claim form to the Employment Tribunal.

76. In the present case, while, from the ET1, the date of termination of employment is stated, at section 5.1, to be 9 October 2018, and the ET3, at section 4.1, agrees that date as correct, the claimant's position is that the EDT is 29 October 2019, as per his evidence, and as per his email of 27 March 2019.

77. As such, given I am satisfied that ACAS were notified on 25 January 2019, I find that that was therefore notification before the original 3-month time limit for the claim expired. Had the EDT been 9 October 2018, the notification to ACAS on 25 or 29 January 2019 would have been after the expiry of the

original limitation period, and of no advantage to the claimant in an extension of time before instituting his Tribunal claim against the respondents.

78. While, as an unrepresented, party litigant, the claimant did not address me on the relevant law, and indeed I had no such expectation, given his is not a legal representative, and he advised he had no previous Tribunal experience, I have given myself a self-direction.

79. In **Porter –v- Bandridge Limited [1978] IRLR 271**, the Court of Appeal held that the onus of proving that presentation of a Tribunal claim in time was not reasonably practicable rests on the claimant and imposes a duty on him to show precisely why it was that he did not present his claim within three months. He also needs to demonstrate that his claim was presented within a reasonable time after the expiry of the statutory time limit.

80. The following specific issues arise for determination in this case: -

> (***a) Was the claimant's complaint presented before the end of the period of three months beginning with the effective date of termination?***
>
> ***(b) If not, was presentation in time not reasonably practicable?***
>
> ***(c) If so, was the complaint presented within such further time as the Tribunal considers reasonable?***

81. These three issues will now be considered in turn in the following sections of these Reasons. Before that, however, it is helpful to reflect upon the 5 points made by the first respondent's representative in their written representations of 12 July 2019, as reproduced earlier at paragraph 43 of these Reasons, and what view I have taken of those points, in light of the claimant's evidence at this Preliminary Hearing.

1) There appears to be contradictory dates for the effective date of termination (EDT).

82. I note here that, while the ET1 and ET3 both agreed 9 October 2018 as the EDT, the claimant's email of 27 March 2019 (as reproduced earlier at paragraph 10 of these Reasons) states that 29 October 2018 as the EDT, and that was his position at this Preliminary Hearing.

2) There appears to be three different EC certificates with contradictory dates.

83. I note here that the notification and intimation dates in the three ACAS EC certificates are different, as detailed earlier at paragraphs 10 and 11 of these Reasons, but it is important to recall that the ET1 only referred to the second certificates issued on 15 February 2019, and not the original, single certificate issued on 1 February 2019.

3) The stated date in the ET1 claim form is that the employment terminated on 9 October 2018 but in his written submissions, the claimant appears to be saying his employment terminated on 29 October 2018. The EDT along with the relevant dates in whatever Acas Early Conciliation (EC) certificate is accepted as being correct, are essential in determining whether most of his claims are time barred.

84. My comments at points (1) and (2) above refer again.

4) If 9 October 2018 is the EDT, the limitation date would be 8 January 2019 and if 29 October 2018 was the EDT, the limitation date would be 28 January 2019. Having initiated Acas Early Conciliation on 29 January, all of the claimant's claims, with the exception of his claim for statutory redundancy pay would be time barred because he initiated EC one day after the limitation date and the extension to limitation period provided for under subsections 207B (3) and 207B(4) would not apply.

85. On the evidence given by the claimant at this Preliminary Hearing, which evidence I have accepted as credible and reliable, I am satisfied that, if the claimant is found to be an employee, then the EDT is 29 October 2018, and not 9 October 2018.

86. He went on holiday on the 9 October 2018, but he was still an employee (it being assumed, for present purposes, that that currently disputed issue of employment status is established in his favour, either by concession from the first respondent, or by judgment of the Tribunal after a further Preliminary Hearing on that point) until 29 October 2018. He returned to work on 25 October, and he was paid some wages on 26 October, leading to his meeting with Mr Manley on 29 October 2019.

87. As such, the normal 3-month primary limitation period expired on 28 January 2019, but the claimant, through his representative, Mr Roberts, first notified ACAS on 25 January 2019, and they issued his first EC certificate on 1 February 2019, meaning he had one month from that date to lodge his ET1 with the Tribunal.

88. However, as the information available to the Tribunal shows, the claimant only presented his ET1 to the Tribunal on 15 March 2019. As such, when presented, it was two weeks later after 1 March 2019, and so his claims must be regarded as lodged out of time, except for the claim for redundancy payment.

5) In submitting his new evidence that he initiated EC on 25 January and not 29 January as previously understood, all of the claimant's claims, with the exception of his claim for statutory redundancy pay would still be time barred because if 9 October 2018 is the EDT, the limitation date would be 15 January 2019 and if 29 October 2018 is the EDT, the limitation date would be 1 March 2019."

89. I note here that the ET1 did not refer to the original ACAS EC certificate issued on 1 February 2019, but it referred to the two later certificates issued on 15 February 2019, and the first respondent's ET3, at section 3.1, agreed with the details given by the claimant about EC with ACAS. It maybe that therefore the first respondent's written representations refer to "***contradictory dates***", at their point (1), and here, at point (5), to 25 January 2019 being "***new evidence***."

90. That said, I am satisfied that the ACAS EC certificate issued on 1 February 2019, as produced by the claimant to the Tribunal on 27 March 2019, along with his email, and as spoken to in evidence by him at this Preliminary Hearing, is the appropriate certificate for the Tribunal to have regard to.

91. It is in appropriate form, duly dated and with a full reference number from ACAS, and other than it being a single certificate naming two limited companies, there is nothing before the Tribunal to suggest that this certificate is invalid in any way, and that the Tribunal should not have regard to it as per its terms.

92. While it describes the prospective respondent as "***Vary Recruitment Limited (and formerly Hub Logic Limited)"***, an online search of the publicly accessible Companies House website shows that they are, and always have, been two separate companies, and this is not the case of one company, changing its name, but retaining the same company number as before, as sometimes happen.

93. Here, Vary Recruitment Ltd is company no. **SC358385**, and it is showing as an active company, while Hub Logic Ltd (formerly Insta Logistics Ltd, before change of name, as per section 8.2 of the ET1 claim form) is company no. **SC489376**, and it is showing as having applied for voluntary strike off on 28 May 2019, meaning that, unless cause is shown to the contrary to Companies House within two months of that date, it will soon become a dissolved company.

94. The online Companies House search also shows that Hub Logic Ltd's registered office address changed, on 16 August 2018, to 1/1 104 Berryknowes Road, Glasgow, Scotland, G52 2TT, from its former registered office address, at Tontine House 8 Gordon St Floor 2/1 Glasgow G1 3PL, which is the address given by the claimant in the ET1, and the address to which the Tribunal has been sending correspondence, none of which has been returned as undelivered.

95. In light of this fact, I have instructed the clerk to the Tribunal to send the second respondent's copy of this Judgment to that new address, and I have also instructed the clerk to amend their address for service on the Tribunal's casefile.

96. Further, arising from a possible dissolution of that company, within the next few days, the claimant may wish to seek urgent, independent legal advice as to whether he objects to Companies House about their Strike-Off application, and whether or not he insists on his Tribunal claim against them, as if they are dissolved, there will be no longer be any limited company there with any standing to be sued, as it will no longer legally exist after dissolution.

97. At the Preliminary Hearing, the claimant was aware of the Strike-Off application, for it was discussed in my clarifications with him about the identity of his employer, and he advised me that he would take advice on whether or not to withdraw his claim against that company, but as he described the transfer of his employment from Hub Logic Ltd to Vary Recruitment Ltd as a "***not cut & dried TUPE situation***".

Was the claimant's complaint presented before the end of the period of three months beginning with the effective date of termination?

98. The first respondent disputes that they employed the claimant, as alleged by him, The disputed matter of his employment status is not for determination at this Preliminary Hearing, which was listee only to address time-bar points at this stage, and as such, that disputed preliminary matter is reserved for consideration by the Tribunal at a future Preliminary Hearing on that discreet preliminary issue, unless the first respondents concede the point before hand, or the claimant withdraws his claim.

99. Having heard the claimant's evidence and submissions at this Preliminary Hearing, I have found it appropriate, at this stage, to simply state that the Tribunal finds and declares that, <u>if</u> the claimant was an employee of the first respondent (which matter is not determined by this Tribunal, but is reserved

for that further Preliminary Hearing) then the effective date of termination of that employment was 29 October 2018.

100. Taking 29 October 2018, for the purposes of this Preliminary Hearing, as the effective date of termination of the claimant's contract of employment with the first respondent, then, subject to any extension of time on account of ACAS EC, to comply with the normal 3 month time limit under **Section 111(2) (a) of the Employment Rights Act 1996** , the unfair dismissal complaint should have been presented by not later than 28 January 2019, using the method of calculation approved by the Employment Appeal Tribunal in **Pruden v Cunard Ellerman Ltd** [**1993] IRLR 317** .

101. The ET1 claim form was presented on 15 March 2019, and that is not in dispute. The question arising is whether or not it was, notwithstanding ACAS EC extension, presented out of time.

102. I have already stated earlier in these Reasons, at paragraphs 87 and 88 above, that while the claimant, through Mr Roberts, first notified ACAS on 25 January 2019, and they issued his first EC certificate on 1 February 2019, the claimant only presented his ET1 to the Tribunal on 15 March 2019. As such, when presented, it was two weeks later after 1 March 2019, and so his ET1 claim form must be regarded as lodged out of time, except for the claim for redundancy payment.

Was presentation in time not reasonably practicable?

103. This is a question of fact and the onus is on the claimant. The concept of what is reasonably practicable is broadly similar to ***"reasonably feasible***", being somewhere between "***reasonable***" and "***reasonably physically capable of being done"***, per **Palmer v Southend-On-Sea Borough Council** [**1984] IRLR 119.** In this respect, the claimant will ordinarily have to be able to point to some impediment or hindrance which made compliance with **Section 111(2)(a)** not reasonably practicable.

104. In **Palmer**, the Court of Appeal held that whether it was reasonably practicable for a complaint to be presented in time is pre-eminently an issue of fact for the

Employment Tribunal, taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie.

105. Depending upon the circumstances of the particular case, an Employment Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a post-strike or something similar.

106. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee.

107. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the adviser's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases of the Employment Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit.

108. The Employment Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. However, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time.

109. In **Schultz v Esso Petroleum Co. Ltd [1999] IRLR 488**, the Court of Appeal held that whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

The surrounding circumstances will always include whether or not the claimant was hoping to avoid litigation by pursuing alternative remedies, such as an internal appeal.

110. In that context, the end to be achieved is not so much the immediate issue of proceedings as issue of proceedings with some time to spare before the end of the limitation period. Accordingly, in assessing whether or not something could or should have been done within the limitation period, while looking at the period as a whole, attention will in the ordinary way focus upon the closing rather than the early stages.

111. In the present case, it was submitted by the claimant that, as he himself recorded in his handwritten statement produced to me at this Preliminary Hearing, having been introduced to Dave Roberts of Magenta Moon, on 1 November 2018, and it having been suggested that he would require to proceed with ACAS within three months of 29 October 2018, it was the claimant who took the decision to await until after the Christmas period to contact ACAS.

112. Again, referring to the claimant's evidence, as per his written statement, it is clear that, by mid-January 2019, the claimant was aware of the significance of the end of January being the cut off for notifying ACAS fast approaching and his time being fully absorbed between my family and caring for my mother he then asked Dave Roberts to make the notification to ACAS for me, which he did on 25 January 2019.

113. Significantly, the claimant states that: ***"Dave Roberts was handling communication from ACAS on my behalf and keeping me updated whenever possible."***

114. Following the death of the claimant's mother, on 22 February 2019, the claimant's evidence is that Dave Roberts continued to communicate with ACAS on his behalf whilst the early conciliation process continued as the claimant was dealing with affairs in Lerwick and preparing for his mother's funeral, but it was not until 5 March 2019 that he received an email from Dave

Roberts to inform him that ACAS had closed the conciliation window and he sent the claimant two certificates (i.e. those issued by ACAS on 15 February 2019).

115. I pause here to note and record that it is not clear when, it at all, Mr Roberts sent the claimant the original ACAS EC certificate issued on 1 February 2019. What is clear, however, going back to the claimant's written statement, is that he says Mr Roberts told him he had to lodge the ET1 by 15 March 2019, and he further advised the claimant that he should proceed with a local solicitor for this.

116. However, on 15 March 2019, the claimant lodged his ET1 online himself, and he has proceeded without any representation, legal or lay, during the course of these Tribunal proceedings.

117. What I drew from the claimant's submissions to me, at this Preliminary Hearing, is that it seemed to me that he was really saying was that it, if I found his claim, in whole or in part, was time-barred, then he was submitting that it was not reasonably practicable for him to submit his Tribunal claim form within the prescribed period, and that he had submitted it within a further, reasonable period.

118. In particular, in his evidence and submissions to me, the claimant was relying, in essence, on two principal factors, being (a) he had left matters with Dave Roberts of Magenta Moon to progress on his behalf, and (b) that was on account of the fact that he was caring for his mother, and latterly dealing with her affairs, leaving it to Mr Roberts to communicate with ACAS and keep him updated whenever possible.

119. By way of my considered comment upon each of the claimant's stated reasons, I have to say that I have not found them to be compelling or convincing as to why it was not reasonably practicable for him to present his ET1 claim in time. In my view, they do not, in isolation, or combination, provide any adequate or proper basis for the Tribunal to find that, in all the

circumstances, it was not reasonably practicable for the claimant to present his Tribunal claim within the statutory 3-month period.

120. Throughout that whole period, it is clear from the evidence before the Tribunal that the claimant, as from 1 November 2018, was aware of there being a 3-month time limit, and that he had instructed Mr Roberts to act on his behalf with ACAS. At this Preliminary Hearing, the claimant appeared on his own behalf, and so I have not heard from Mr Roberts about his recollection of what happened, when, and why. Any emails between Mr Roberts and the claimant have not been produced to the Tribunal.

121. While, in his written statement to this Preliminary Hearing, the claimant refers to time with his mother, following her hospitalisation, and him visiting her in Lerwick, and he further states that that was such that he was "***fully absorbed between my family and caring for my mother",*** he also records that that was a responsibility shared with his brother, so that he and his brother visited Lerwick at different times, with him spending 3 days in rotation between home and Lerwick, and travelling every 4th day.

122. While I do not wish to diminish the impact that his mother's ill-health and passing had on him, or other family members, the fact is the claimant left matters with Mr Roberts, and he did not pursue matters directly with ACAS or the Employment Tribunal on his own behalf at that stage.

123. From the evidence he gave at the Preliminary Hearing, I know that the claimant was unemployed, but not in receipt of any State benefits, and not actively seeking any new job, as he was setting himself up in self-employed consultancy, so on that basis he put forward nothing to me at this Hearing as being a barrier to him presenting his Tribunal claim earlier than when he did it on 15 March 2019.

124. In particular, as I understood it from the claimant's evidence, he was able to consider his position post 29 October 2018, consider other business opportunities, and obtained paid consultancy work, as well as managing to conduct family life with his daughter and his partner in Renfrewshire, and

there was no evidence presented to the Tribunal of any physical or other impediment to him lodging his own ET1 claim form within the statutory period of 3 months, as he ultimately came to do when lodging it on 15 March 2019.

125. it is important to recall that the ET1 only referred to the second ACAS EC certificates issued on 15 February 2019. In his written statement, the claimant refers to 5 March 2019 as being when Dave Roberts emailed him to advise him of the two ACAS certificates, but his timeline, and his statement, are both silent on when, if at all, he first learned of the original, single certificate issued on 1 February 2019. Nor, on the claimant's evidence, is it explained to the Tribunal why the second certificates, issued to Mr Roberts on 15 February 2019, were only brought to the claimant's attention on 5 March 2019.

126. The claimant's actions throughout the period from 28 October 2018 onwards to 15 March 2019 appear to the Tribunal to have been somewhat *laissez faire* and evidencing an informal approach to the pursuit of what he clearly seems to have felt then, and still now, was an injustice perpetrated upon him by his former employers.

127. By his failure to raise proceedings against the respondents timeously, the claimant has not shown himself to have properly and diligently attended to prosecution of his unfair dismissal or other monetary complaints, and his redundancy claim is in time because it has a 6-month period.

128. In my opinion, the claimant here is, very much, the author of his own misfortune, for throughout the 3-month statutory period to make a claim timeously, he was aware of both the existence of the Employment Tribunal, and the three month period for lodging a claim, as also ACAS early conciliation, yet he took no steps to proactively protect his own interests, but very much left things with Mr Roberts. It was not until mid-January 2019 that he asked Mr Roberts to make notification to ACAS for him. Even then, after 5 March 2019, it was still a further 10 days before the claimant lodged his own ET1.

129. His attempts in evidence to this Tribunal to suggest that it was not reasonably practicable to do so within the original time period was disingenuous and unconvincing. The claimant only presented his ET1 to the Tribunal on 15 March 2019. As such, when presented, it was two weeks later after 1 March 2019, being once month after issue of the first ACAS EC certificate, and so his ET1 claim form must be regarded as lodged out of time, except for the claim for redundancy payment.

130. As regards the claimant approaching Mr Roberts at Magenta Moon, as his representative to deal with ACAS, nothing has been led in evidence before this Tribunal about the precise nature of Mr Roberts' role, and exactly what he did, or did not do, during the period of his involvement over several months assisting the claimant.

131. Mr Roberts has not acted as the claimant's representative in these Tribunal proceedings, and the claimant did not lead him as a witness on his behalf. The claimant simply advised me that Mr Roberts was an employment law adviser, down south. It appears Mr Roberts maybe a HR or employment law consultant, rather than a legal representative. The claimant advised me that while Mr Roberts had appeared in other cases at the Glasgow ET, it is a long distance from Cheshire for him to come to Glasgow.

132. As regards the claimant's evidence about his mother's illness, hospitalisation, and subsequent death, I note and record that her death, on 22 February 2019, according to the claimant's evidence, was after all of the ACAS EC certificates had been issued.

133. The Tribunal appreciates the impact that all of that must have had on the claimant, but it is of note that he was sharing some responsibilities with his brother, and he had some time at home with his own daughter and his partner, so his absences from home were on a rota basis.

134. His evidence about no Wi-Fi / broadband in his mother's house in Lerwick is noted and accepted, but the claimant was not always there, and even when

he was, it is within judicial knowledge that the telephone is a normal method of communication. His ET1 claim form shows that he had a mobile telephone.

135. The matter of his mother, and its impact on his ability to do things, was not foreshadowed in his ET1 claim form, as a reason for any delay in making timeous application to the Tribunal, but that needs to be viewed against the claimant's understanding that he was in time.

136. Further, the claimant did not put forward any medical, or stress related ground, as is sometimes advanced to this Tribunal in other cases, as being a reason for his delay in presenting his ET1 claim form.

137. It was stated in **Asda Stores Limited v Kauser [2007] UKEAT/0165/07,** that it was not enough for a claimant to ignore the statutory time limits on account of being "***stressed***" or even "***very stressed***" in order to demonstrate that it was not reasonably practicable to submit the claim within the requisite timescale. The EAT overturned the ET's decision to allow the late presentation of the Mrs Kauser's claim in circumstances where she submitted that she was very stressed.

138. Lady Smith, the EAT Judge, stated, at paragraph 24 of her judgment in **Kauser**: - ***"It cannot be sufficient for a Claimant to elide the statutory time limit that he or she points to having been "stressed" or even "very stressed". There would need to be more."***

139. In the present case, while I have paid attention to the closing stages of the 3-month time limit period, I have done so against a review of the whole period.

140. The claimant's evidence to the Tribunal, at this Preliminary Hearing, did not really explain, other than that the claimant took the decision to wait until after the Christmas period to contact ACAS, why in the initial period between 1 November 2018, when he was introduced to Mr Roberts at Magenta Moon, and mid-January 2019, when he asked Mr Roberts to notify ACAS, he did not do so sooner than 25 January 2019, and why an ET1 claim form was not lodged in that earlier window of opportunity, after issue of the first ACAS EC certificate on 1 February 2019.

141. In all the circumstances, I am not satisfied that it was not reasonably practicable for the claimant to present his Tribunal claim within the statutory 3-month period. Time limits are jurisdictional rather than procedural. They cannot be waived by the parties or by the Tribunal.

142. As the Court of Appeal held, in **Porter v Bandridge Ltd** [**1978] IRLR 271,** the onus of proving that presentation in time was not reasonably practicable rests on the claimant, and that imposes a duty on him to show precisely why it was that he did not present his complaint within the statutory time limit.

143. It is important to recall that the relevant statutory provisions found in **Section 111(2) of the Employment Rights Act 1996,** as quoted above, are a well tried and tested statutory formula applied within the Employment Tribunal system for many types of employment complaints, including complaints of unfair dismissal.

144. As was stated by the former President of the Employment Appeal Tribunal, Mr Justice Burton, in **Royal Mail –v- Smith** (**EATS/0078/04**), at paragraphs 6 to 9: ***"The test for an extension of time for the presentation of an unfair dismissal application, which is out of time, is not a straightforward one… An extension of time for a delayed application for unfair dismissal requires proof by the applicant that it was not reasonably practicable for him or her to present the application within the 3-month period."***

145. I would also wish to refer to the judgment from Lady Smith handed down on 10 January 2007 in the unreported case of **The Royal Bank of Scotland plc v Theobald** (**EAT/0444/06/RN**). The facts and circumstances in that case, and the present, are different.

146. What is relevant, however, for present purposes, is Lady Smith's comment (at paragraph 17 of that judgment) that: "***The reasonable practicability requirement has to be given some meaningful content. It would appear to import an objective standard and it is certainly not to be seen as a synonym for the conferring of a wide unfettered discretion to allow a late claim".***

147. Against this background, the claimant here has not fulfilled the onus of proof on him to explain to this Tribunal why it was not reasonably practicable to present his unfair dismissal claim by 28 January 2019 at latest, being the expiry of the 3-month time limit (on the basis of 29 October 2018 being the EDT).

148. 29 October 2018 to 15 March 2019 is a period of **138 days**, being 4 months, 16 days (or 19 weeks, and 5 days), viewed against the normal statutory period of 3 months (subject to ACAS extension for EC).

149. Taking account of the first ACAS EC certificate issued on 1 February 2019, the period from then to 15 March 2019, when the ET1 was presented, is **43 days** (being 1 month, 15 days, or 6 weeks, and 1 day), when the ET1 should have been presented within one month, i.e. at latest by 1 March 2019.It was not presented, however, until 15 March 2019.

150. The inevitable outcome is that this claim, other than for redundancy pay, must be dismissed as time-barred. In all the circumstances, I am satisfied that the claimant's unfair dismissal and other monetary claims are all out of time, and as such they cannot proceed any further.

Was the complaint presented within such further time as the Tribunal considers reasonable*?*

151. Even if I had been satisfied that it was not reasonably practicable to have presented his claim by 28 January 2019, I would have had to go on and consider whether it was then presented within such further period as the Tribunal considers reasonable.

152. While, in light of my finding that it was reasonably practicable to present timeously, that follow on question does not strictly speaking arise for determination, for the sake of completeness, I think it right to record that a delay of a further period of **47 days**, being one month, 16 days (or 6 weeks, and 5 days) to 15 March 2019 is excessive, and that further period cannot be regarded as reasonable, particularly in circumstances where the claimant told me at the Preliminary Hearing that the online presentation process was

straightforward, in the sense of being "***simple to do online***". As such, I would still have dismissed those parts of his claim as time-barred.

Employment Judge: I McPherson
Date of Judgment: 23 August 2019
Date sent to parties: 27 August 2019