EMPLOYMENT TRIBUNALS

Claimant: Mr G Edwards

Respondent: Department for Work and Pensions

Heard at: Manchester **On:** 12 March 2020

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Ms Cunnings, Counsel

JUDGMENT having been sent to the parties on 16 March 2020 and written reasons having been requested in accordance with rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Tribunal this morning has been considering in a Preliminary Hearing the issue of the presentation of the claimant's complaint of unfair dismissal which was presented to the Tribunal on 8 October 2019. That date , it is admitted by the claimant , made the claim out of time and the Tribunal has today therefore been considering whether it can extend the time for presentation of his claim , on the basis that it was not reasonably practicable for him to have presented it within the original time limit and that it was then presented within a reasonable time.

2. Whereas the claimant was previously , at the time the claim form was presented , represented by Ms Howard of QHR Solutions, that representation has ceased. Mr Edwards has appeared in person today , and Ms Cunnings of Counsel has represented the respondent. Each side has produced a bundle, some of which contains documents common to both sides. Mr Edwards has given evidence to me. No witness statement was prepared by Mr Edwards, which is not a criticism, because no one told him that one would be

necessary. Fortunately his previous representative did write to the Tribunal on 17 December 2019, a copy of which letter is in both bundles. In that she set out on his behalf the main points of the evidence that he wanted to give in relation to the extension of time , and consequently this morning Mr Edwards has adopted the bulk of that letter as his evidence in chief .He has then gone on to elaborate , and add further details to it and then has been cross examined , and questioned by the Tribunal. That has formed the evidential basis of the application to extend time that he makes.

3. In terms of the time limit , and how the claims come to be presented out of time, the relevant time limit is , of course , in Section 111(2) of the Employment Rights Act 1996 , which provides that a Tribunal shall not consider a complaint of unfair dismissal unless it was presented within three months of the effective date of termination and that it shall not consider such a claim unless it was presented within that time limit, or, if it was not reasonably practicable to have done so , within a reasonable time thereafter. That is the relevant statutory provision and that is what the Tribunal has had to consider today.

4. In terms of the chronology , and how the claim comes to be out of time , the claimant was dismissed by the respondent on 10 May 2019, that meant that the initial three-month time limit expired on 9 August 2019. There is provision for extension of time limits if the early conciliation procedures are commenced before the expiry of the primary time limit, and that can extend the time considerably. As, however, in this case there was no approach to ACAS for early conciliation within the initial time limit, no such extension of time applies and consequently the time limit did expire on 9 August 2019.

5. That meant that when the claim form was presented on 8 October 2019 it was out of time by one day short of two months. The claimant or rather his representative as it was , did contact ACAS on 2 October 2019 and a certificate was issued on 7 October 2019 . That was, of course, already outside the initial three month time limit, so no extension of time was obtained by that happening. Those then are the relevant dates , and why it is that the claimant has, and always has , in fact since the claim was incepted, accepted that it was presented out of time.

6. His reasons for that are set out partly in the letter of 17 December that I have referred to , which he has adopted as his evidence in chief , and also in the evidence that he gave to the Tribunal today. From that evidence , and from the documents in the case I find the following facts.

   6.1 The claimant was employed by the respondent , and got into some difficulties which resulted in him being off sick in the latter part of 2018. There documents in the bundle about his sickness absence , but thereafter, before he could return from that sickness absence he was suspended, taken through a disciplinary process, the end result of which was his dismissal on 10 May 2018.

   6.2 He had issues with his employers which I need not go into at this stage, suffice it to say that he raised a grievance in relation to his employment before it ended , and consequently there were two processes going on at

the same time, a disciplinary from the respondent's point of view and also the grievance that the claimant had brought himself.

6.3 Having been dismissed the claimant for reasons that he explained , and the Tribunal can well understand, obtained fresh employment on 10 June 2019. One of the reasons that he was very keen to do so was that happily he and his wife had , on 19 April 2019, their second child, the first in fact by , as it were, giving birth , as their first child in fact was adopted. There were some issues that were stressful in relation to pregnancy which are referred to in the letter of 17 December, but the baby was born on 19 April 2019, and consequently as at the date the claimant was obviously keen to secure alternative employment as soon as possible, which is why he took a job that would not have been his first choice.

6.4 It was one that he was successful in applying for , and was in fact one that then took him away from home , because it involved him in an element of training, a rather different role than that which he had had before. That employment was at that stage probationary, and meant that he not only had to travel , but to stay away from home for quite some time. He was not available therefore for meetings, also during that time, whilst he was working through his probationary period which he did successfully in the end . During that time he was only in receipt of half pay , so he was under a degree of pressure in terms of finance , and indeed , in terms of stress, having a young baby, and the rest of his family at home. He was having to go, as it were "on the road", spending time in hotels, and on that basis he says (and the Tribunal accepts) that bringing a Tribunal claim against his former employers was not a priority. Indeed it was something he did not really want to do, and was not seeking to do at that stage.

6.5 He had , however, by then and it would seem some time shortly before or around the time of the dismissal, referred to or sought from advice from Ms Howard . The basis upon which he did so is that he was aware of her through other contacts. He did not, as it were, approach her purely commercially, and professionally, in terms of being a formal professional representative, she was someone he knew of , and wanted to seek some advice from. She provided this to him, and indeed, he accepts, she was aware of his dismissal on 10 May 2019. She then was also aware of the subsequent appeal that he launched , and its outcome.

6.6 In terms of that appeal, the outcome letter was dated 22 August 2019 . The claimant clearly was unsuccessful in that appeal, his dismissal was confirmed , and although the hard copy of the appeal outcome letter was sent to his home, he was away and he got an electronic copy of it, he tells me, and I accept on 27 August 2019. So, clearly by that time the claimant knew that his appeal had been unsuccessful.

6.7 Thereafter, around about the beginning of September 2019, and probably on 3 September he had further contact with Ms Howard . He began then to consider bringing an Employment Tribunal claim , and that was discussed again on 10 September. He said in his evidence that it was said at that time, in that discussion, that the time frame "was going to be tight". Indeed it was, it was so tight that it had already expired , and at the time of that

conversation the claimant would have been already out of time. Regardless of that fact , there was certainly discussion between the claimant and Ms Howard about time limits at that time.

6.8 The claimant being away a lot , and having also to spend his evenings preparing for his new role, having to spend time learning how to deliver training which was his new role , having to spend his evenings in hotels doing that sort of thing , did not feel able to deal with these matters and to do the necessary preparation until around about this time. He then says he effectively took two weeks for him to go through the paperwork, and the documents he had received, and all that sort of thing. He wanted to discuss the letter with Ms Howard , and then subsequently it was she who on 2 October 2019 contacted ACAS.

6.9 When she did so , (although Mr Edwards did not say this, and may not have been aware of it) it must have been the case that being given , as she would have been, two options at that time, the first being simply to obtain a certificate without contacting the respondent to see if they would negotiate, she opted for the second option, which would mean that the respondents were notified to see if they wanted to enter discussions. That is the likely explanation for the fact that a certificate was not issued the same day or the day after , but was in fact some five days later. In any event , reference is made that the respondents did not want to negotiate in the fourth paragraph on the second page of the letter of 17 December. Ms Howard actually says “after being told there was no appetite for settlement” which must indeed be consistent with the respondents having been contacted. Some five days were taken up clearly with that process, rather than the obtaining of a certificate immediately, as could have been done.

6.10 The claim was then issued on 8 October 2019 , and indeed in the actual body of the claim form reference was made to it having been presented out of time. The claimant having been off work with the respondents at the end of 2018, and having issues in relation to stress and anxiety has not subsequently sought medical advice or treatment for that condition, pointing out that he did not need a further sick note during the rest of his employment, because he was suspended. He has subsequently been able to obtain, hold down and progress through the probationary period of his new employment. He does still have , or did have at that time, symptoms of that condition. He is however an ex-serviceman who has served in Afghanistan and, as he puts it, he is fairly robust and does not run off to the doctor at the drop of a hat . He is clearly of some considerable fortitude in terms of matters that many people would find very stressing and anxiety creating , and against that background he has no medical evidence of his condition in the Summer through to Autumn of last year .

6.11 He does say that he was still suffering to some extent from those symptoms , and in overall terms he invites the Tribunal in deciding whether or not it was reasonably practicable to present the claims in time not to focus on mainly individual items or aspect and indeed he doesn’t rely on one single factor, but he does invite the Tribunal to take into account the

totality of his position at that time in deciding whether it was or was not reasonably practicable to have presented the claims sooner.

6.12 He contends that having effectively decided to bring the claims and taking some two weeks or so to prepare to do them, that that was a reasonable period , and that the Tribunal should extend time to when they were actually presented on 8 October 2019.

7. That in summary is the basis of the application, it is elaborated upon obviously more fully in the evidence and the letter of 17 December 2019 sets out the main points that the claimant wishes to rely upon. Reference is also made in a document the claimant has produced which is a response to the respondent's response , which is a document which goes into the merits of the claims as a whole, and answers many of the points made in the respondent's response. In paragraphs of that document from paragraph 6 through to paragraph 11 onwards , again much of the points made in the letter of 17 December 2019, and in the evidence before me are made. There is a reference also to a case in the Employment Appeal Tribunal case in fact ***Norbert Dentressangle Logistics Limited -v- Graham Hutton UKEAT S/0011/13***, a decision of the then President Mr Justice Langstaff. That reference apparently has been provided by Ms Howard , and I was invited to consider it and I have done so.

8. It is right that that is a case in which a Tribunal did grant an extension of time for presentation of a claim in circumstances where the claimant was unable to function properly , and simply could not bring himself to present the claim within time. That was the finding of fact made by the Employment Judge and although there was challenge to it , the Employment Appeal Tribunal upheld the Employment Judge's reasoning and findings, saying that it was open to her to make that finding , and did not disturb the extension of time that she granted . The factual basis , I have to observe, was slightly different in that the only basis upon which that claimant was seeking the extension of time was in effect his medical condition , which amounted in effect to him being totally unable to function at all, and simply not being able to bring himself to present the claim. This claimant does not seek to say that in this case, he does not say he simply could not bring himself to present the claim, he puts his stress as one of the issues, as part of the reasons , but clearly, he does not put himself in quite the same category as the appellant did in the ***Hutton*** case.

Discussion and Findings.

9. I have considered that authority as well, and now must come to the test to be applied . It may well be difficult for non-lawyers to understand how the Tribunals apply in the case of unfair dismissal (and many other similar claims) a different test to that which they apply in most discrimination cases, because, whereas in discrimination cases the Tribunal has a discretion to extend the time for presentation of a claim, if it is just and equitable to do so, it does not have that discretion in this case of unfair dismissal , where the more difficult and harder test of reasonable practicability remains (certainly for the time being - there are moves perhaps to change it one day but it remains the test). "Reasonable practicability" is a phrase which has been considered on a

number of occasions by the Employment Appeal Tribunal, and indeed the Court of Appeal because obviously it is not the same as having a just and equitable discretion, and indeed in the ***Hutton*** case itself a convenient summary of the law is made by Mr Justice Langstaff, as he then was, as to what this means .

10. In paragraph 15 of the judgment he sets out a number of cases in which the meaning of this phrase is considered and he says this:

"There is no dispute before me as to general principles of law that are applicable, first though I should emphasise that every case in this area of all areas must necessarily depend upon its own particular facts. The question of what is reasonably practicable is explained in a number of authorities of which it is necessary only here to refer to paragraph 34 of ***Palmer and Saunders against Southend on Sea Borough Council 1984 IRLR****, a decision of the Court of Appeal [and he cites the composition of the Court of Appeal and then goes on to refer to paragraphs 34 and 35 of the judgment where Lord Justice May said this]*

"in the end much of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words reasonably practicable as the equivalent of reasonable is to take too favourable a view to the employee. On the other hand, reasonably practicable means than merely what is more than reasonably capably physically of being done. Perhaps to read the word practicable as the equivalent of feasible [as indeed Sir John Brightman did in a case called **Singh]** *and to ask colloquially at untramelled by too much logic was it reasonably feasible to present the claim to the Industrial Tribunal within the relevant three months is the best approach to the correct application of the relevant subsection."*

What however is abundantly clear on all the authorities is that the answer to the relevant question is predominantly an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie,.."

and he goes on to deal with the test to be applied on appeal. Lord Justice Langstaff then goes on at paragraph 16 to cite Lady Smith's judgment in a c ***Asda Stores v Kauser UKEAT/0165/07*** where she said it was perhaps hard to discern how :

".. 'reasonably feasible' adds anything to 'reasonably practicable', since the word practicable means possible , and possible is a synonym for feasible. The short point seems to be that the Court has to be astute to underline the need to be aware that the relevant test is not simply a matter of what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to be done to have been done"

and that , said Mr Justice Langstaff, is a useful insight.

11. So that is the test to be applied, and in this context the Tribunal of course has to take into account all the relevant facts, in this case all the matters put forward by Mr Edwards in terms of what the problem was. Another way it has

been put , in other authorities, is to ask the question was there any impediment preventing the claims from being presented in time? What was it that stopped them being presented in time ? When one asks that in this case, of course, as Mr Edwards says one gets a number of reasons, there is no one single reason , and all those reasons obviously worked together to produce the delay that occurred. I totally accept that it was a mixture of these factors that led to the delay in the claim being presented when it was, and I take into account Mr Edwards' obvious focus in obtaining, and then working hard in, his new job . Added to that were the pressures that that put him under, not least of all in terms of time, travel and the background of his new baby and things of that nature.

12. Ultimately, however, it seems to me that there is one factor which is predominant in the explanation for the delay in this claim being presented within time, and that is the involvement and advice of Ms Howard. That seems to me to be the root cause of the fact that this claim was not presented until 8 October 2019. Whilst she was not engaged in a professional or commercial capacity, Mr Edwards , quite reasonably it may be said, went to her for assistance and advice . She was involved in this matter certainly around about the time of the dismissal, and certainly by the time of the appeal. She knew, or ought to have known, of the relevant time limit which of course is three months from the date of the dismissal , and not the date of the appeal. In relation to that latter point that is something that has been well established for many years, and a potential claimant will not be able to say that it was not reasonably practicable to have presented a claim in time merely because they were awaiting the outcome of an appeal. That was the finding of a number of authorities including ***Boda -v- Hampshire Area Health Authority*** which was cited with approval in the ***Palmer*** case which I referred to previously , when referred to by Mr Justice Langstaff .

13. The Court of Appeal in ***Palmer*** said this:

" there may be cases where the special facts additional to the bare fact that there is an internal appeal pending may persuade an Employment Tribunal as a question of fact that it was not reasonably practicable to complain to the Tribunal within the time limit but we do not think that the mere fact of a pending internal appeal by itself is sufficient to justify a finding of fact that it was not reasonably practicable to present a complaint to the Tribunal"

So that , and other cases have held the instigation and waiting for the outcome of an internal appeal is not of itself sufficient to rely upon as a want of reasonable practicability . Any practitioner in employment law either knows that , or ought reasonably to know that. One does not know if there was a misapprehension on Ms Howard's part about that , but clearly that was the position.

14. Be that as it may, that perhaps may not have been fatal, because, of course, the appeal outcome was on 22 August 2019, at least in terms of its delivery to the claimant. Even if he did not see it directly himself, he was aware of it. That would have been , had the claim been put in very shortly after that, only a week or two because the actual primary limitation expired on 9 August 2019. So if the claim had been put in immediately after the appeal we would only be

a matter of two or three weeks, at most , after the appeal had been disposed of. Of course, had ACAS been consulted before the end of the appeal period that might have stopped the clock running , and that too will have extended time, but the position would have been rather better for the claimant had, as soon as the appeal had been resolved , at that point at the very latest the claim been submitted. But it was not, and it was not submitted at the beginning of September either , which was the time at which the claimant was discussing with Ms Howard actually bringing such a claim. Any employment practitioner in those circumstances , as she appears to have realised because reference was made to "the timeframe being tight", which was perhaps something of an understatement knowing the dismissal had been in May 2019, would have got the claim in as soon as possible.

15. That did not happen, and in fact the ACAS early conciliation approach was not made until almost a month later on 2 October 2019. Then for reasons that, frankly, rather escape the Tribunal, rather than simply getting a certificate immediately , the view was taken instead to seek to conciliate and therefore to delay the obtaining of a certificate. That lost a further five days , because the respondents (thankfully perhaps in this instance) did not want to negotiate, and consequently no further time was wasted , the certificate could then be issued on 7 October 2019. But the position is that from the first week of September onwards when at the very latest the claim should have been presented , it was not and further time was lost.

16. I have no doubt that the most significant reason for the delay in this case notwithstanding the claimant's other difficulties which I take into account,, but the most important reasons are indeed the advice , or the reliance upon the advice and the representation of Ms Howard.

17. So that gives rise to this question, what in those circumstances is the effect of that advice and the claimant's reliance upon it in terms of reasonable practicability in terms of his own position personally and that brings us to a discussion which has been before the Courts and Tribunals on previous occasions as to the degree to which the advice of solicitors or other advisors is then, as it were, to be attributed to the claimant personally.

18. In other words, is the claimant stuck with the advice , or failure to advise, of any adviser or can he say, well that was down to them, I should not be prejudiced by that. We therefore get to what is there known as the ***Dedman*** principle , and it is so known after a case decided by the famous Lord Denning (***Dedman v British Building and Engineering Applicances Ltd [1974] ICR 53***). In terms of whether or not advice from solicitors (in that case) would, if given negligently, prevent a case being brought within a reasonable practicable time , the principle, established in 1974 is that where there has been negligent advice in relation to time limits , the claimant is stuck with the consequences of that advice, his advisers effectively act on his behalf , and consequently if the claim should have been presented within time but was not, then that is a matter that he cannot rely upon.

19. The principle is this: where a primary time limit has been missed due to ignorance or mistake , consideration must be given to the involvement of any adviser. If there is no adviser the Tribunal may enquire whether it was

reasonable or unreasonable for the litigant to have failed to seek advice. Where , on the other hand a claimant has, in advance of the primary time limit, instructed a professional adviser to act for him or her , and the reason for the failure to lodge the originating application within that time limit is reliance on erroneous advice or conduct by that adviser , the general rule is that it will be held that it was reasonably practicable to present the claim in time. That may seem a hard doctrine , but it remains the position after many years.

20. That is the case in respect of solicitors and professional advisors, but the question has arisen as to whether or not someone not in that position is to be treated the same way , and whether a claimant who has advice from someone other than a qualified and commercially instructed solicitor is to be treated in the same way. The issue has arisen in the context of legal executives, trade union officials, ACAS Conciliation Officers, Tribunal staff, CAB Advisors, the Free Representation Unit and virtually every type of adviser one could imagine . There is basically a sliding scale, from solicitor , as it were “down” to ACAS Conciliators or members of Tribunal staff or CAB Advisers.

21. The position in relation to CAB Advisers, however, has been held to be the same as with solicitors , and the general rule is that where a person has instructed a skilled adviser, then they are in the same position as the ***Dedman*** principle in terms of solicitors. Whether that adviser is paid or not is not relevant, that was clear from the cases involving the Citizens Advice Bureau because clearly, they are unpaid. One crucial question, however, is has there been engagement of any such adviser , and are they to be regarded as skilled advisers. I accept that , in terms of “engagement”, there is no formal financial engagement and Mr Edwards told me he has not paid anything, nor has he been asked to pay anything. But in terms of engagement it seems to me there must be a degree of engagement, not least of all because it was Ms Howard who originally advised him , and did so throughout this process . More importantly it was she, and not the claimant , who contacted ACAS on 2 October, it was she who submitted the claim form to the Tribunal, and went down as his representative on that claim form. It was she that wrote the letter of 17 December 2019, so in terms of engagement, whether it be for financial reward or not, I have to regard her as being engaged as his adviser.

22. I also have therefore to find that he is in the same unfortunate position as if he had engaged a professional solicitor , and obtained the same advice. The ***Dedman*** principle I am afraid will have to apply in these circumstances as it would as if he had instructed a professional solicitor.

23. As I say, the prime cause of this claim being presented out of time it seems to me is , either the lack of advice , or the lack of appreciation of the imminence of the time on the part of Ms Howard with the result the claim wase presented when it was.

24. If, in fact, it was the case that it was not reasonably practicable to have presented the claim in time within the primary time limit, which would have been by 9 August 2019, then I do take the respondent’s point that it would still not have been within a reasonable time to have presented the claim on the 8 October 2019 in any event. Part of the reason for that would be the point I have already made in relation to the ACAS early conciliation, and for reasons

that completely elude me, rather than immediately getting a Conciliation Certificate a further five days were wasted. That comes on top of the initial consultation , in early September when Mr Edwards made it clear that he was then contemplating a Tribunal claim. So even if would not have been reasonably practicable to have presented the claim within the original time limit , I would conclude it was still not presented within a reasonable time.

25. So, for all those reasons and with considerable sympathy for Mr Edwards whose predicament I appreciate and who has clearly done nothing wrong personally, but by operation of the law and particularly the case law in this matter , given it is a matter of jurisdiction which even if the respondents did not want to raise is the Tribunal still has to consider, I do find that the claims were not presented in time, it was reasonably practicable to have presented them within time , and certainly before the time that they were presented. Consequently I have no jurisdiction to entertain them and they must be dismissed.

Employment Judge Holmes

Date: 8 April 2020

REASONS SENT TO THE PARTIES ON
14 April 2020

FOR THE TRIBUNAL OFFICE

[JE]