Case Number: 2303126/2019

EMPLOYMENT TRIBUNALS

Claimant. **Miss Rowena Savillo**

Respondent. **Guy's and St Thomas' NHS Foundation Trust**

Before **Employment Judge Hargrove sitting at Croydon remotely by CVP on 17 July 2020.**

Appearances: For the claimant: **Mr Walker of Counsel.**
For the respondent: Mr Young of Counsel.

RESERVED JUDGMENT AND REASONS ON PRELIMINARY ISSUE.

The judgement of the tribunal is that the claimants' claim of unfair dismissal be struck out under Section 111(2) of Employment Rights Act 1996 as having been presented outside the time limit of 3 months from the effective date of termination, and the Tribunal not being satisfied that it was not reasonably practicable for the claimant to have presented it within time.

REASONS

1. This hearing considers a time point in relation to the claimant's complaint of unfair dismissal submitted to the tribunal on the 5th of August 2019, she having entered early conciliation on the 3rd of July 2019, and received the certificate on the 3rd of August 2019.
2. Section 111 (2) provides that "an employment tribunal shall not consider a complaint under the section unless it is presented to the tribunal –
   (a) before the end of the period of three months beginning with the effective date of termination or
   (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months".
   Section 97 (1) (b) identifies the "effective date of termination" in relation to an employee whose contract of employment is terminated without notice, as in the present case, as meaning the date on which the termination takes effect. It is agreed

that the relevant date starting time running is the date when she was first notified of summary dismissal, 11 February 2019, and not the date upon which she was notified that her appeal had failed, 7 May 2019.

3. **The material history**: –

3.1. The claimant was born in the Philippines on 26 February 1980. She came to the United Kingdom, having lived for 1 to 2 years in Spain, in August 2013 when she was 33.

3.2. On the 6th of February 2018 she commenced employment with the respondent as a housekeeper.

3.3. On 28th of November 2017 she was convicted of assault upon her then partner and received a conditional discharge for 24 months. Following her conviction, she claims that she notified her managers. She was placed on special leave and later on unpaid leave. During this period her mother, who lived in Spain, died and the claimant accompanied the body back to the Philippines for her funeral.

3.4. The claimant has suffered from depression in the past. In February 2018 she consulted her GP in the UK and was treated with medication and therapy. Sick-notes were issued on her behalf by her GP and she continued to receive sick pay until the outcome of her appeal against her dismissal in May 2019. She did not return to work in the meantime. The reasons for her absence including that her ex partner worked in the same Department and there were difficulties in finding her work in another department such that it was considered that for her to return in the same Department would aggravate her depression.

3.5. Sometime in May 2018 the claimant consulted Unison when first subjected to proceedings in respect of her long-term sickness absence.

3.6. In October 2018 an investigation was also commenced by the respondent into the circumstances of the conviction and her alleged failure to disclose it to the respondent. (The latter is denied by the claimant). By letter of the 23rd of January 2019 she was invited to a disciplinary hearing, following the investigation, to take place on the 31st January 2019.She was notified of her summary dismissal, allegedly for gross misconduct, by letter dated the 11th of February 2019. She appealed the dismissal and the appeal hearing took place on the 25th of April 2019. On 7 May 2019 she was notified that the outcome was unsuccessful.

3.7. Throughout the disciplinary process she was represented by Unison, in the person of someone called Dino, whose job title is unidentified but who I accept was not a legal professional.

3.8. I will deal with the claimant's communications with the trade union concerning a possible tribunal claim in more detail later in these reasons, but I accept that in late June she was told by Managers at the respondent that there was a 3 month time limit for bringing a Tribunal claim. The Claimant then made her own enquiries online via a gov.uk website in late June or early July 2019, and contacted ACAS on the 3rd of July to commence early conciliation. She commenced her claim to the employment tribunal by presenting her own claim of unfair dismissal on 5 August 2019. A response was entered which took the point that the claim had been presented out of time. There was an application for a public preliminary hearing, which resulted in the hearing today being converted from a full hearing.

4. At this hearing, which took place via CVP, the claimant gave evidence on affirmation via a witness statement, and presented a bundle of 11 pages of documents relevant to the issues for this hearing. The claimant was cross examined. The respondent did not rely upon any oral evidence, but written submissions were provided and both Counsel made oral closing submissions.

5. There are essentially two core factual issues in this case: – First, Mr Walker for the claimant asserts that it was not reasonably practicable for her to present her claim to a tribunal in time because, while she accepts that she was told by the trade union at an early stage, that she could present a claim, (although I accept that she was also told that it was not relevant at the time because the representative was confident that she would win her case internally), she was not aware of any time limit of three months or otherwise; and was not aware that the time-limit ran from her original summary dismissal notified on the 11th of February 2019. She had made attempts after her dismissal, evidenced in her bundle of documents, to communicate with the trade union, which ended in August 2019, when she was notified that it would not represent her because she had not been a member for long enough. She had been notified by two managers of the respondent in late June that there was a three month time limit, and had then looked at the website and contacted ACAS on 3 July 2019. She had then acted promptly immediately she became aware of what she had to do. She also relied to support her contention that her earlier lack of knowledge or action was reasonable that she had not lived in the UK before 2013; that English was not her first language; and that she was not earlier aware of the right to make a claim at all , at least until told by her Trade Union in 2018.
6. Secondly, she also asserted in her oral evidence at least that her depression made the decision-making process more difficult. Mr Walker on her behalf relied upon: – **Norbert Detressangle Logistics Limited v Hutton UKEAT/S0011/,** and **DHL Supply Chain Ltd v Fazakerley UKEAT0019/**
7. In his original written submissions Mr Young submitted that, given that she was represented by the trade union throughout the disciplinary proceedings, the fact of the internal appeal (which does not in any event alter the effective date of termination) did not render it not reasonably practicable to present a claim in time. In addition neither the failure to give advice, or the giving of bad advice, by a skilled adviser, were reasons making it not reasonably practicable. In that respect he cited passages from **Dedman v British Building and Engineering Appliances Ltd 1974 ICR page 53** Court of Appeal, and **Times Newspapers Ltd v O' Regan 1977 IRLR page 101**. He also challenged the reasonableness of her claimed lack of knowledge of time limits, but submitted that this was scarcely relevant because she was in receipt of advice from her trade union. Finally, as to the claimant's depression, he observed that she had not mentioned this as a factor in her witness statement, but it had only been raised by her in response to additional questions in Tribunal, from Mr Walker; but that in any event it had not prevented her from acting with alacrity in July 2019 in instituting her claim.
8. Going back to basic principles, it is for the claimant to satisfy the tribunal on the balance of probabilities that it was not reasonably practicable to have presented her claim within time, and if she does so, that it was presented within such further time as was reasonable. No burden lies on the respondent. "Reasonably practicable" means reasonably feasible, or as Lady Smith stated in **Asda stores Ltd v Kauser EAT** 0165/07: "The relevant test is not simply a matter of looking at what was possible but whether, on the facts of the case as found, it was reasonable to expect that which was possible was done". The burden imposes a duty upon the claimant to show precisely why it was that she did not present her complaint within time – See **Porter** v **Bandridge Limited 1978 ICR page 943.**

   "It is not sufficient for a claimant merely to say that he or she was ignorant of his or her rights. The ignorance must itself be reasonable. The tribunal must ask itself such questions as, What were her opportunities finding out that she had rights? Did she

take them? If not why not? Was she misled or deceived?" – See **Dedman** per Lord Justice Scarman, approved in **Porter v Bandridge**.

Broadly speaking, I accepted the claimant as a witness of truth on matters of detail. I accept that she has a history of depression and that it was being actively treated in 2013 when she came to the United Kingdom. The treatment resumed in 2018 following her conviction and the death of her mother. Sick-notes were issued from February 2018 right up to May 2019 during which period she received sick pay, up to the dismissal of her appeal. The medical notes of an occupational health doctor corroborated her evidence at least up to the date of the report on the 18th of April 2018, which noted "E(quality) A(ct) applies." I also accept that she was, at least up to the time of notification by the trade union that she could apply to a tribunal, reasonably unaware of her right to make a claim to a tribunal, and of any time limits, taking into account her foreign nationality, that English was her second language and the relatively short time she had spent In the UK. I am not satisfied however that any of these factors demonstrated that it was not reasonably practicable to have presented her claim to the employment tribunal within three months of her dismissal on 11 February 2019. The Tribunal is required to concentrate on the circumstances pertaining during that period in particular. I accept Mr Young's submission that the passage in Lord Denning's judgement in **Dedman** at page 61 D- G remains good law. It is to be noted that at that time, 1974, the time limit for bringing an unfair dismissal claim was only four weeks from the effective date of termination: –

"It is difficult to find a set of words in which to express the liberal interpretation which the English court has given to the escape clause. The principal thing is to emphasise, as the statute does, the circumstances. What is practicable in the circumstances? If in the circumstances the man was put on enquiry as to his rights, and as to the time limit, then it was practicable for him to have presented his complaint within the four weeks, and he walked to have done so. But if he did not know, and there was nothing to put him on enquiry, then it was not practicable, and he should be excused.

" But what is the position if he goes to skilled advisors and they make a mistake? The English court has taken the view that the man must abide by their mistake. There was a case where a man was dismissed and went to his trade association for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was practicable for it to have been posted in time. He was not entitled to the benefit of the escape clause: – see **Hammond v Haigh Castle and Co Ltd 1973 ICR** page 148. If a man engages skilled advisors to act for him – and they mistake the time limit and present it too late – he is out. His remedy is against them."

The essential issues in this case are whether or not the trade union, in the circumstances of this case are to be treated as within the category of skilled legal advisers, and whether the claimant relied upon them to advise her as to what steps to take with regard to a claim to the Tribunal. **Hammond** – see above – indicates that a trade association may be considered to be a skilled adviser. So may a CAB. It is well-known that Trade Union's have expert knowledge of Employment law, and access to specialist legal advice, although Mr Young was not able to direct me to an authority directly in point. In **Marks and Spencer's v Williams-Ryan 2005 ICR page 1293** the claimant was dismissed on grounds of gross misconduct. She instructed a CAB who advised her to exhaust the internal appeals procedure but did not inform her of her right to make a claim to an employment tribunal. Nor, however, did they advise her to delay before making any claim to an employment Tribunal. Separately however the employer had written to advise the claimant of the internal appeal procedure and also referred to her right to apply to the employment tribunal but

significantly not to the existence of any time limit. She then awaited the outcome of her appeal before presenting a claim out of time. It is to be noted that the Court of Appeal reviewed all of the authorities including and since **Dedman**, which it accepted as correctly decided on the skilled adviser point. It did not conclude that in the Williams-Ryan case the claimant had been wrongly misled by the CAB, and it is noteworthy that no mention was made of the Employment Tribunal. It found it significant that the employer's internal appeal procedure did not refer to time limits. In those circumstances the Court of Appeal held that the ET was entitled to conclude that it was not reasonably practicable for the claimant to present her claim within time.The clear implication of the judgement particularly that of Lord Justice Keane was that if the CAB had misled her as to her rights to bring a claim she would have been bound by such advice as being that of a skilled legal advisor. Mr Walker argued that the actions of the Trade Union in the present case should treated as akin to ACAS in **.Fazackerley.**

In her evidence to the tribunal the claimant said that in her discussion with Dino before the disciplinary hearing he said that if she did not succeed he would raise a case to the employment tribunal and did not mention time limits. The claimant said that she told him that she wish to pursue the matter to the tribunal if necessary. She said: "After my appeal outcome I expected Dino to take a case to the ET as I have already told him my intentions if the outcome was that my appeal not considered".

The reference to "already told him" was a reference to a conversation back in February 2019, after the dismissal was notified. I conclude that she was relying upon the Trade Union to take matters forward to the Tribunal, was unaware of time limits, and that they ran from the date of dismissal not from the outcome of the appeal, and was relying upon the Trade Union in this respect. It is clear from the claimant's conduct after the dismissal that she was thereafter in contact with the trade union on the 1st and 25th of March, still within time, but got no response. She then contacted the senior trade union official at the respondents on 19th of June 2019: "Hi Edina hope you are well, just wondering if you can have Dino to contact me. He is not getting back on my emails and messages. Or if you have somebody who can assist me to escalate my case to ET." The response was that they were away at a conference and would contact her on Monday (24th of June). The claimant texted on that date. At sometime after that date she was required to fill in a form for the trade union, which she says was similar to the information in the employment tribunal form. Dino stated that the form had been sent for a legal opinion. There was a meeting scheduled for the 5th of August with the trade union which never took place. The last she heard, around 5 August was a call from the trade union to say that they could not take her case because she had not been a member for long enough. By that stage she had found out from the respondent's managers that there was a time limit for claim, and acted promptly thereafter.

In **Fazakerley** the claimant on the day after his dismissal contacted ACAS who, the tribunal accepted, advised the claimant that he should exhaust the appeal process before any claim to the employment tribunal. There was a delay by the employer in dealing with the appeal during which the three month time limit expired. The EAT found that the ET was entitled to conclude that it was not reasonably practicable for the claimant to have brought the claim within time. Mr Walker invite me to conclude that the position of the trade union in the instant case is the same as that of ACAS in **Fazakerley**. I do not accept that submission. I find that, unlike ACAS, the trade union was in this case at all material times acting as the claimant's skilled legal advisor in a different position from ACAS. Furthermore the Claimant clearly (from the correspondence and the claimant's evidence) relied upon the trade union to take the

case to the tribunal if the claimant was dismissed, but the Union failed to do so. I have not heard any evidence from the Union, but I have to deal with the case on the available evidence. If, contrary to the claimant's case, the Union did advise the claimant properly and at the right time about time limits and had told her that she should bring her own claim, the result would be the same. It was, on the claimant's case, reasonably practicable for the Trade Union to bring the claim in time. She requested them to do so, and they did not. On that basis, the claimant is bound by the actions of the Trade Union as a skilled adviser on the **Dedman** principle. The claim was presented out of time and it was reasonably practicable for it to be presented in time. I deal briefly with the claimant's depression, which I accept existed and was significant. However, she had the Union acting for her; it was not so serious as to prevent her from acting very promptly in July. It would not have prevented her from acting promptly in February if she had known of her rights. Her ignorance of her rights was not connected to the depression , but the Union's failure properly to advise her.

Employment Judge Hargrove

17 July 2020

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and written reasons since February 2017 are now available online and therefore accessible to the public at: https://www.gov.uk/employment-tribunal-decisions

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.