EMPLOYMENT TRIBUNALS

Claimant: **Miss S Dillon**

Respondent: **Crown Prosecution Service**

Heard at: **Midlands West** **On:** **9 July 2020**

Before: **Employment Judge Woffenden**

Representation
Claimant: Mr P Livingstone of Counsel
Respondent: Mr J Feeny of Counsel

RESERVED JUDGMENT

1 The claim was not presented in time despite it being reasonably practicable to do so and it was not presented within a further reasonable period and is dismissed.

REASONS

1 The claimant presented her claim of (constructive) unfair dismissal to the employment tribunal on 14 February 2020.The effective date of termination was 30 August 2019.In the attached Details of Claim (paragraph 48) she contended that it was not reasonably practicable for her to present her claim in time due to her mental condition applying **Schultz v Esso Petroleum Co Ltd [1999] IRLR 488**.The claim was accompanied by an ACAS Early Conciliation Certificate issued on 4 February 2020,the date of ACAS notification being 20 January 2020.

2 In its response the respondent submitted that it was reasonably practicable for the claimant to have presented her claim within time and applied for a preliminary hearing to determine whether the tribunal had jurisdiction to consider the claim.

3 That application came before me today. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was A (fully remote). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

4 Mr Feeny had submitted in the written submissions sent to the tribunal that there was a preliminary issue which I had to address concerning the refusal of the claimant to disclose an attendance note made by her solicitors of a meeting in conference with her on 23 January 2020 ,the claimant apparently relying on the advice given to explain why she did not bring her claim earlier. Mr Feeny

submitted that she had thereby waived legal professional privilege and invited me to reject her evidence on her reasons for the late presentation of her claim or draw an adverse inference in respect of the same. Mr Livingstone did not agree privilege had been waived. Both parties agreed that this matter could be addressed in oral submissions at the end of the hearing. Mr Feeny did not make any such submissions and in those circumstances, I will not address the point.

5 The issue for me to decide was whether I am satisfied it was not reasonably practicable for the claim to be presented before the end of the period of three months and if so whether it was presented within such further period as I consider reasonable.

6 There was an agreed bundle of documents of 95 pages and the claimant gave her evidence by way of a witness statement (12 pages 59 numbered paragraphs).

7 From the evidence I saw and heard I make the following findings of fact:

7.1The claimant is a solicitor. Her date of birth is 17 September 1956. She obtained a law degree in the 70s and began work at the respondent in 1982.By 2000 she had qualified as a solicitor, having been sponsored to do so by the respondent. She completed an LPC and undertook part of her traineeship with Russell Jones and Walker('RJW'). Having initially returned to work at the respondent after qualification, she then worked for 2 years in RJW's personal injury team but then successfully reapplied to work for the respondent.

7.2 The claimant resigned from her employment with the respondent in a letter dated 4 August 2019, having been absent from work due to ill health (because of the condition described in the statements of fitness for work provided by her doctor as 'stress at work') since 28 January 2019. Her job title at that time was Specialist Prosecutor, a role which she has held since 2003.Her employment ended on 30 August 2019.

7.3 The claimant reported to Occupational Health on 20 February 2020 that she was experiencing symptoms of stress which she described to as reduced emotional resilience disturbed sleep tiredness nausea dry throat occasional stiffness in her neck upset stomach and reduced cognitive function impacting on her ability to concentrate and focus. She raised her first grievance with the respondent on 23 April 2019. She instructed a firm of solicitors to draft it for her. She did not feel well enough to do it herself. The firm had been recommended to her by her cousin.

7.4 The claimant was initially prescribed an anti-depressant at a dose of 50mg ,increased to 100 mg on 9 May 2019 .She remained on this dose until 30 January 2020 when her doctor increased it to 150 mg because her anxiety levels were increasing. Her doctor prepared a report for the purpose of this hearing dated 16 June 2020 which ,after recording her attendance at the surgery on 30 January 2020 and the increase in dosage, states that she had continued to experience anxiety ,the effects of which impacted on her concentration memory and ability to problem solve and organize herself which would impact on her ability to instruct a solicitor to present a claim to the employment tribunal.

7.5 On the basis of advice given by her counselor that she should get out more and distract herself the claimant visited her son in Barcelona on 15 to 22

September 2019. He had invited her to stay for her birthday. She booked her flight and flew from Birmingham Airport travelling alone. She suffered an increase in anxiety while travelling back to her home in Birmingham.

7.6 The claimant had made arrangements to meet with Tony Swabe (the grievance investigator) on 1 October 2019. She travelled to central Birmingham by taxi, participating in a meeting of approximately 2 hours at a hotel on that day and providing him with documentation she considered relevant.

7.7 On 20 November 2019 the claimant received the outcome of her grievance from Mr Price. She was very dissatisfied with the outcome and wanted to have sight of Mr Swabe's report. She asked Mr Price for this thereafter on several occasions by email. She was upset by the non-disclosure of the report and experienced symptoms of insomnia forgetfulness difficulties in concentration and reluctance to socialise.

7.8 In the absence of the report the claimant drafted a long email to the respondent on 9 December 2019 setting out the history to date and repeating her request for its disclosure, the contents of which email were reviewed by her son. The final version was sent to the respondent by her on 11 December 2019.

7.9 The claimant did not contemplate bringing a claim against the respondent until she received Mr Swabe's report on 18 January 2020, the contents of which also made her very upset. She decided it would be futile to pursue an appeal against the outcome of the grievance and sought her brother's advice. He had instructed IBB solicitors about 18 months /2 years previously in connection with a claim for compensation for his redundancy, which was settled. He recommended IBB solicitors to her. Hitherto she had naively believed that notwithstanding her resignation the grievance process would result in the respondent offering to reinstate her because she was a good prosecutor. This was a view she had formed on her own and not because of any legal or other advice she had received. There is no evidence to support the claimant's assertion that the respondent's reluctance to give her a copy of Mr Swabe's report was deliberate to thwart her opportunity to bring a claim within the relevant time limit. Such a serious allegation would require cogent evidence to support it.

7.10 The claimant contacted IBB solicitors on 20 January 2020 and spoke by telephone with a solicitor who told her she would need to complete an ACAS notification form which she did that same day. She had not hitherto been aware that she needed to do so in order to get an ACAS Early Conciliation Certificate which she would need to bring an Employment Tribunal claim. She also arranged to see the solicitor who she met on 23 January 2020. It was at that point she became aware that there was a three-month time limit for bringing claims in the employment tribunal. She had thought that the time limit for such a claim would be 6 years although under cross examination she recalled (which hitherto she had forgotten) the limitation period for personal injury claims was 3 years.

7.11 On 4 February 2020 the claimant contacted ACAS to get the ACAS EC certificate issued which occurred that day. Between that date and 14 February 2020, she could not think straight became anxious and could not concentrate. She did not know if she should pursue her claim against the respondent as she was concerned about the absence of current medical evidence.

7.12 On 14 February 2020 the claimant's doctor prepared a medical report on the claimant which said she had been seen by a doctor on 9 August 2019 ,6 September 2019, 4 October 2019 ,4 November 2019 and in January 2020. It also said she continued to experience symptoms of stress anxiety and memory issues despite being compliant with medication. On her instructions given that day, the claimant's claim was presented to the tribunal by IBB solicitors on 14 February 2020.I infer that the claimant did not present her claim until that date (despite the ACAS EC certificate having been issued) because she was waiting (with understandable trepidation) for the provision of the medical report to support the contention that it had not been reasonably practicable to have presented the claim in time because of her health.

8 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. Again where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable. Time limits in the employment tribunal are strictly enforced as a matter of public policy.

9 Section 207B Employment Rights Act 1996 ('ERA') extends the above time limits by not counting the period beginning with Day A (the day on which the prospective claimants contact ACAS to request Early Conciliation) and ending with Day B (the day they get the Early Conciliation Certificate) and if the relevant time limit would (if not extended by subsection 207B (4) ERA) 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.

10 However that extension does not apply if by the time the prospective claimant contacts ACAS to request early conciliation the above three-month period has already expired. It is too late. In **Pearce v Bank of America Merill Lynch and others UKEAT/0067/19/LA** it was held that although time may be extended to allow for ACAS Early Conciliation that is only possible where the reference to ACAS takes place during the primary limitation period.

11 What is '*reasonably practicable* 'is a question of fact for the tribunal. The burden of proof lies on the claimant.

12 The word' *practicable* 'is to be given a liberal interpretation in favour of the employee **(Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520).** May LJ described the relevant test in this way: '*We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories compare Marshall v Gotham Co Ltd[1954]AC 360,HL. In the context in which the words are used in the1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973],CR437 NIRC] and to ask colloquially and untrammelled by too much legal logic-"was it reasonably feasible to present the complaint to the employment tribunal within the relevant 3 months?"-is the best approach to the correct application of the relevant*

subsection.**"(Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR at 384,385).** He said the factors could not be described exhaustively but listed a number of considerations which might be investigated including the manner of, and reason for the dismissal, whether the employer's conciliatory appeals machinery have been used, the substantive cause of the claimant's failure to comply with the time limit whether there was any physical impediment preventing compliance, such as illness, or a postal strike, whether, and if so when, the claimant knew of his rights, whether the employer had misrepresented any relevant matter to the employee, whether the claimant had been advised by anyone, and the nature of any advice given, and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

13 If ill health is given as a reason although its effects have to be assessed in relation to the overall period of limitation ,the weight to be attached to a period of disabling illness varies according to whether it occurred in the earlier weeks or the far more critical weeks leading up to the expiry of the limitation period (**Schultz**).It was also held in that case that :' *when 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 .In a case of this kind ,surrounding circumstances will always include whether or not the claimant is hoping to avoid litigation by pursuing alternative remedies*.'

14 If ignorance is given as a reason Brandon LJ said "*The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike, or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of 3 months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not to be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.*" **(Walls' Meat Co Ltd v Khan [1978] IRLR 499).** He went on:' *With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of 3 months from the date of dismissal, an [employment] is tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.*

For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see it can justly be said to be reasonably practicable for a person to comply with the time limit of which he is reasonably ignorant.

While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the 3 cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making enquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an [employment] tribunal that he behaved reasonably in not making such enquiries.

To that extent, therefore, it may, in general, be easier for a complainant to avail himself of the "escape clause" on the ground that he was reasonably ignorant of his having a right at all, than on the ground that, knowing of the right, he was reasonably ignorant of the method by which, or the time limit within which, he ought to exercise it."

15 In **John Lewis Partnership v Charman [2011] EAT 0079/11** Underhill J held that

a. Para. 9: "*The starting-point is that if an employee is reasonably ignorant of the relevant time limits it cannot be said to be reasonably practicable for him to comply with them…. In the present case the Claimant was unquestionably ignorant of the time limits, whether one considers his own knowledge or that of himself and his father. The question is whether that ignorance was reasonable. I accept that it would not be reasonable if he ought reasonably to have made inquiries about how to bring an employment tribunal claim, which would inevitably have put him on notice of the time limits. The question thus comes down to whether the Claimant should have made such inquiries immediately following his dismissal".*

b. Para. 11: "…*There is an obvious good sense in a party awaiting the outcome of an internal appeal before resorting to legal proceedings*."

c. Para. 12: The case of *Bodha v Hampshire Area Health Authority* [2012] ICR 200, in which the EAT had decided that the mere fact of a pending internal appeal is not in itself enough to justify a finding that it was not reasonably practicable to present a complaint to the ET, was not a case about ignorance of time limits – "*the issue was whether the pursuit of an internal appeal in itself made it not reasonably practicable to present a claim in the industrial tribunal. It was not whether it was reasonable for the applicants not to be aware of the time limits, which is the question on the facts here*".

16 In **Northumberland County Council v Thompson [2007] UKEAT/0209/07**, the EAT held, per Silber J, that:

a. Para. 13: The tests of 'reasonably practicable' and 'reasonable' are different, but "*both embrace, although in different ways, the concept of reasonableness and both tests appear in the same sentence of the same sub-section although the "reasonably practicable" test has the additional requirement of practicability. In my opinion, matters of crucial importance in determining the reasonableness aspect (rather than the "practicable" aspect) of the test of "reasonably practicable" are likely to be of at least substantial importance in ascertaining if a Claimant has after the end of the three-month period launched proceedings "within such period as the tribunal considers reasonable". Indeed I am not aware of any reason why this should not be so."*

b. Para 14: In relation to the 'further reasonable period' question, an ET should follow the guidance in *Marks & Spencer v Williams-Ryan* [2005] IRLR 562, and therefore consider "*what the employee knew and what knowledge the employee should have had if he or she had acted reasonably in all the circumstances while ignoring the practicability aspect of that definition*".

c. Para.15: the decided cases require an ET, when considering the 'reasonably practicable' question, to "*focus on and then reach conclusions on the state of mind*

of the employee".

17 I have considered and thank both Counsel for their succinct oral and written submissions.

18 I am concerned with the primary three-month time limit.

19 The time limit for presenting a claim of unfair dismissal expired on midnight on 29 November 2019.

20 It was submitted today on behalf of the claimant that it was not reasonably practicable for the claim to be presented in time and that it was presented within a further reasonable period not just because of the claimant's health at the relevant time but also her reasonable ignorance of time limits and the fact that she was awaiting the outcome and supporting documentation from her grievances.

21 I conclude that at the later stages of the limitation period the claimant was continuing to suffer from a longstanding mental health condition (stress) which had rendered her unfit to work as a senior prosecutor since 28 January 2019. There is no evidence of any significant variation during the primary limitation period. At a time when she was certified as unfit for work she was able in April 2019 (notwithstanding her ill health) to instruct lawyers so that they could draft a grievance on her behalf, in September 2019 to make travel arrangements to and visit her son in Spain , in October 2019 to make arrangements to attend and participate in a grievance hearing of two hours , in November 2019 to pursue the disclosure of Mr Swabe's report and in December 2019 to prepare a lengthy email of the history to date in draft .The evidence before me indicates that despite the longstanding symptoms of her condition which prevented her from being able to work she was nonetheless able to manage her affairs when circumstances required. There is no evidence of any deterioration in the period 30 August 2019 to 29 November 2019.Her condition did deteriorate in January 2020, but she was notwithstanding able then to contact meet with and instruct solicitors. I conclude that, although she was undoubtedly unwell and had been unwell for a long time, her ill health was not such that it was not reasonably practicable for her to present her claim within time.

22 I accept the claimant was ignorant of the proper time limit within which to exercise her right to present a claim to the employment tribunal; she knew of the existence of time limits in relation to other jurisdictions and erroneously assumed they would pertain in the employment tribunal also. She is however educated to degree level in law. She is a solicitor with about 20 years' experience, albeit for the most part (but not entirely) spent in the prosecution of crime. She had close family members who were able to make appropriate recommendations of lawyers. Against that background why did she make no enquiries whatsoever either personally or of others immediately after her employment ended or indeed until after 18 January 2020 following the receipt of Mr Swabe's report? It was because it was only then that she turned her mind to taking proceedings against the respondent and sought advice. It was submitted that she had been awaiting the outcome of the grievance and supporting documentation. She had however received the grievance outcome on 20 November 2019. She had resigned in the belief (which she accepted in her witness evidence was 'naïve') that it would engender a change of heart by the respondent as far as her grievances were concerned; the scales (as it were) would fall from the respondent's eyes and she

would be able to return to work despite her resignation. Having received the adverse outcome however she then waited for the respondent to provide a copy of Mr Swabe's report to her. In my judgment these circumstances are distinguishable from a claimant sensibly waiting for the outcome of a pending internal appeal. There was no appeal outstanding in this case. The grievance and the way the respondent dealt with them had no relevance to a claim of constructive unfair dismissal which would concern what did or did not happen prior to 4 August 2019. She was not hoping to avoid litigation by pursuing alternative remedies; she had not given litigation any thought.

23 I am not satisfied that it was not reasonably practicable for the claim of unfair dismissal to have been presented in time because of her health ignorance of time limits or the fact that she was awaiting the outcome and supporting documentation from her grievances whether considered individually or collectively. She left it over 5 months after her resignation to make any enquiries about her legal position, too late to present her claim in time.

24 In relation to whether the claim was presented within such further time as the tribunal considers reasonable, by 23 January 2020, she was both aware of the necessity to inform ACAS and of the relevant time limits. Despite her deteriorating ill health at that time she was able to act on advice given by her solicitor on 20 January 2020 and contact ACAS that day. Mr Livingstone submitted that once she got Mr Swabe's report she acted quickly despite her continued and worsening health and I should take into account that during the period of ACAS conciliation (20 January 2020 to 4 February 2020) she was unable to present a claim because she had not been issued with the ACAS EC certificate. It was not a 'stop the clock 'point. As far as the latter was concerned Mr Feeny submitted that this was 'cherry picking' and the claimant herself could have begun and ended conciliation on the same day. I have no evidence about and am unable to reach any conclusions about why the ACAS EC certificate was issued on 4 February 2020 or why it was not issued before then. Thereafter she waited until 14 February 2020 pending receipt of a current medical report, but the absence of that report was no barrier to the presentation of a claim, and I had no evidence that she believed this to be the case. Mr Livingstone submitted there was no prejudice to the respondent if the claim was allowed to proceed out of time. She had made her complaints known to the respondent at an early stage and it was aware of her ill health. and the public policy considerations behind the strict enforcement of time limits pertained when hearings took place quickly which was not currently the case and unlikely to be so for some time given the pandemic. These were, he submitted in his oral submissions, factors to which I should have regard in relation to reasonableness. I find myself unable to agree with him. I am unable to conclude that the claim was presented within such further time as I consider reasonable.

25 The claim is therefore dismissed.

Employment Judge Woffenden
Date : 19/08/2020