



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102963/2020

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Preliminary Hearing held remotely on 23 November 2020

Employment Judge C McManus

10 **Mr I Roche**

**Claimant
Represented by:
Mr J Lawson -
Solicitor**

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Department for Work and Pensions

**Respondent
Represented by:
Ms M McGrady -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

- The claimant's claim for unfair dismissal is time barred with regard to the provisions of the Employment Rights Act 1996 section 111(2)(b) and is dismissed.

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REASONS

Introduction

1. It is not in dispute that the claimant's only claim is for unfair dismissal; that the ET1 was lodged outwith the normal 3 month time limit from the effective date of termination and that there was no extension to the time period resulting from the ACAS conciliation process. The purpose of this Preliminary Hearing ('PH') is to determine whether or not the claim should be allowed to proceed, i.e. whether the claim was presented within such period as provided for in terms of section 111(2)(b) of the Employment Rights Act 1996 ('ERA'). That is the issue which has been determined.

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2. This PH took place during the Covid 19 pandemic. Proceedings were conducted remotely using the Cloud Video Platform ('CVP') and taking into account the Practice Direction – Fixing and Conduct of Remote Hearings issued by the President Judge Shona Simon on 11 June 2020 and the Remote Hearings Practical Guidance referred to in that Practice Direction.
3. Evidence was heard on oath from the claimant only. Both parties' representatives had helpfully liaised to produce a Joint Inventory, which contained all documents referred to during the PH. The numbers in brackets in this decision refer to the page numbers in that Joint Inventory.

Relevant Law

4. The Employment Rights Act 1996 ('ERA') at section 111 sets out provisions for making a complaint of unfair dismissal to an Employment Tribunal. Section 111(2) states:-

"[Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal –

(a) Before the end of the period of 3 months beginning with the effective date of termination, or

(b) Within such other 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."

5. In this case the claimant was advised by his trade union representative. The leading case law authority on the position where a claim has been submitted outwith the time limit as a result of a claimant following the advice of an adviser is **Dedman v British Building and Engineering Appliances Ltd**. In that case the adviser was a solicitor. The general principle in **Dedman** is that where a claimant puts their case in the hands of a solicitor, that solicitor's failure to present the claim within the relevant time period will not lead to a finding that it was not reasonably practicable for the claim to be lodged in time.

It is not every case where a claimant is bound by the fault of the adviser, as each case depends on its own facts and circumstances (**Riley v Tesco Stores Ltd and anor 1980 ICR 323, CA**). The relevant circumstances may include whether the advisor was a solicitor or other advisor (**London International College Ltd v Sen 1993 IRLR 333, CA**). Lord Phillips' view following his review of the Dedman principle in the Court of Appeal in **Marks and Spencer plc v Williams-Ryan 2005 ICR 1293, CA**, was that the correct proposition of law derived from **Dedman** is that where the employee has retained a solicitor to act for them and that solicitor fails to meet the time limit because of the solicitor's negligence, the solicitor's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to the tribunal. That principle was confirmed in **Northamptonshire County Council v Entwhistle 2010 IRLR 740, EAT**, by Mr Justice Underhill, then President of the EAT. He also emphasised that the question of reasonable practicability is one of fact for the tribunal that falls to be decided on the particular circumstances of the case. Underhill P accepted that there could be exceptions to the Dedman principle, such as where the adviser's failure to give the correct advice was itself reasonable. In a case where a claimant has consulted skilled advisers, the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as he should reasonably in all the circumstances have been given. Following **Remploy Ltd v Brain EAT 0465/10**, the tribunal should look at the wording in section 111 and to what is essentially a question of fact for the tribunal to decide after taking into account the circumstances of the particular case, whether the adviser is a professional or another, such as a CAB adviser.

6. Where a claimant has a debilitating illness or condition, that may usually only constitute a valid reason for extending the time limit if it is supported by medical evidence. Such medical evidence must not only support the claimant's illness; it must also demonstrate that the illness prevented the claimant from submitting the claim on time (e.g. **Pittuck v DST Output (London) Ltd ET Case No.2500963/15**).

7. The fact that the claimant is awaiting the outcome of an internal appeal procedure does not alter the effective date of termination ('EDT') or the applicable time period in section 111. If the appeal fails, the EDT normally remains as at the original date of dismissal. (**J Sainsbury Ltd v Savage 1981 ICR 1, CA**, expressly approved by the House of Lords in **West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL**). The existence of an impending internal appeal is not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit (**Bodha v Hampshire Area Health Authority 1982 ICR 200, EAT**, expressly approved by the Court of Appeal in **Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA**).

Findings in Fact

8. The following material facts were not in dispute or were found by the Tribunal to be established.
9. The claimant was dismissed by the respondent. The claimant was notified of that dismissal by letter dated 28 November 2019. That letter was received by the claimant on 29 November 2019. The effective date of termination of employment ('EDT') was then 29 November 2019. The ordinary limitation period to present an unfair dismissal claim expired on 28 February 2020. Notification was given by the claimant to ACAS in terms of the early reconciliation procedure on 30 March 2020. The relevant ACAS Early Conciliation Certificate ('ECC') was issued on 1 April 2020. The ET1 was submitted by the claimant and was received by the Tribunal on 27 May 2020.
10. The claimant has been diagnosed as suffering from anxiety and depression. The letter from the claimant's GP dated 2 November 2020 (43) confirms that the claimant was first diagnosed with anxiety and depression in 2002 and that he has been on continuous anti-depressant medication since 2008. The report on the claimant's mental health from a Clinical Associate in Applied Psychology in 2017 (44 – 46) describes the claimant as then presenting with symptoms consistent with generalised anxiety and panic disorder in conjunction with associated low mood. There is a letter to the claimant's GP in 2015 (47 – 48) in respect of change in the claimant's anti-depressant

medication. The claimant does not rely in these proceedings on being a disabled person in terms of the Equality Act 2010.

11. The claimant's dismissal arose from circumstances where the claimant was charged on a criminal matter and there was a criminal case pending in respect of that charge. Those circumstances led to an exacerbation of the claimant's anxiety and depression symptoms. On 24 March 2020, that criminal case was due to proceed to an Intermediary Diet Hearing. That hearing did not proceed and the claimant was told later that day that that criminal charge was to be dropped and the case against him would not proceed.
12. The claimant's claim to the Employment Tribunal was submitted by the claimant on 27 May 2020. The claim form was submitted on that day because on that day the claimant was told by his trade union representative that, on the union having obtained legal advice, the union would no longer support the claimant in making an unfair dismissal claim to the Employment Tribunal. On 27 May 2020, the claimant prepared and submitted his ET1 claim form, with help from his mother and brother.
13. On 25 June 2020 the claimant wrote a letter to the Tribunal office requesting that his claim be allowed to proceed, 'although presented outside the usual 3 month time limit'. The claimant set out in this letter reasons he was relying on in respect of this, these being:-
- Delay of former employer in hearing internal appeal
 - Trade Union Representative from PCS had 'advised to await the outcome of the trial before proceeding with an employment tribunal'.
 - Delay in the process of that criminal trial.
 - On it being confirmed to the claimant by the solicitor instructed by him in the criminal matter that the Procurator Fiscal was no longer pursuing the criminal case against him, the claimant had sought further advice from his trade union representative, who had advised that the claimant should ensure that all relevant

evidence was obtained before proceeding with the employment tribunal and that the claimant should request documents from his former employer.

- 5 • There was delay in those requested documents being sent to the claimant by the respondent.
- While waiting for the documents, the claimant contacted ACAS and obtained the ECC.
- 10 • Due to the restrictions as a result of the Coronavirus and issues with scanning the documents, the claimant was unable to get these to his trade union rep until 27 May 2020.
- It was the claimant's position that the respondent was not negatively impacted by the delay in submission of the claim
- 15 • The claimant's mental health: in particular that he had a long standing diagnosis of depression and anxiety and that his condition was aggravated by the court case, dismissal and all documents from the employer regarding dismissal

14. In this letter of 25 June 2020, the claimant set out a time line of events. The time line of events set out by the claimant in that letter to the Employment Tribunal of 25 June 2020 is accurate. All of the reasons relied upon by the claimant in his letter to the Employment Tribunal of 25 June 2020 were factors in this unfair dismissal claim being lodged late. In that letter the claimant stated:-

25 *"In conclusion, I submitted the employment tribunal request as soon as circumstances and obtaining the necessary evidence allowed. At all times following the advice of my union rep. I had to await the appeal outcome as a tribunal may not have been necessary. The dismissal was based on the charge, court case and evidence my employer assumed they had; so I had to await the outcome of this. It would then have been impossible to proceed with the employment tribunal without all documents from the employer regarding dismissal."*

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15. Following his dismissal, the claimant had proceeded on the basis that his Trade Union representative was providing him with appropriate advice. In particular, the claimant relied on the advice from his trade union representative to await the outcome of the internal appeal process, to await the outcome of the criminal case and to await receiving all relevant documents from the respondent before lodging a claim with the Employment Tribunal. The claimant was particularly reliant on advice from his trade union representative because of his poor mental health at the time.
16. The claimant's GP reports in his letter to the claimant's representative of 2 November 2020 (43) that he saw the claimant with '*an acute flare of anxiety triggered by recent allegations and arrest.*' In that letter, which was produced by the claimant's GP in response to a letter of instruction from the claimant's representatives ((41 – 42), the claimant's GP also states:-
- "His anxiety gradually settled over the next few months but he described altered thought processes and disassociated thoughts.*
- I saw him in January 2020 when he was still having significantly heightened anxiety. Mr Roache would have struggled to concentrate and may have felt too anxious to face the stress of submitting an unfair dismissal claim."*
17. That report was written in reply to a letter from the claimant's representative (41 - 42). Question four, at page 42 is "*Do you think his ability to understand the process and instruct solicitors would in some way have been impaired by any deterioration in his mental health.*"
18. In the period from 3 September 2019 until 24 March 2020, the claimant concentrated his energy on dealing with the criminal case being brought against him. The claimant had limited social contacts and poor self care. The claimant did not have access to his mobile phone.
19. In the period from 3 September 2019 until 24 March 2020, the claimant was able to instruct a firm of solicitors in respect of the criminal charges brought against him. That same firm of solicitors now represents the claimant in these Tribunal proceedings. The claimant was able to attend court appearances in

respect of the criminal charges brought against him, when accompanied by his mother and brother.

20. After 7 January 2020, when the claimant was informed of the date of the appeal hearing in respect of his dismissal, the claimant communicated with his trade union representative by email and phone and was able to do so, using his brother's device. The claimant appealed against his dismissal and attended the appeal hearing on 27 January 2020. The claimant attended that appeal hearing with his trade union representative from PCS. The claimant attended that hearing, although he was unsure if he was fit to do so, because he had not been fit to attend the disciplinary hearing and so the disciplinary process had proceeded by way of correspondence and he did not want that to be the case at the appeal stage. The claimant was advised on 6 February that his appeal was unsuccessful and his dismissal was upheld. The claimant believed from discussion with his trade union representative that he should await the outcome of his criminal trial before submitting a claim to the Employment Tribunal.
21. In the period from the effective date of termination ('EDT') until the expiry of the limitation period on 28 February 2020, the claimant was able to prepare, submit and progress a Universal Credit application. The claimant was able to make that application himself. The claimant knew how to make this application because in his previous job he had provided assistance to people making such applications. As a result of making that application, the claimant underwent a Work Capability Assessment. The claimant was advised by Universal Credit on 9 March 2020 that the outcome of that assessment was that he was considered to have limited capability for work and work related activity and that it would be 21 months before any reassessment.
22. On 24 March 2020 the claimant was informed that the criminal charges against him were dropped and the case was not being pursued. On 30 March 2020 the claimant, with the help of his brother, made an online submission to ACAS in respect of his claim of unfair dismissal. The claimant's brother is not legally qualified. Someone from ACAS phoned the claimant as a result of that application. The claimant understood from his discussion with ACAS that

there *'may be a problem with the time limit but that (he) would be advised when (he) heard back from the Employment Tribunal.'* The claimant dealt with that phone call alone. The claimant believed that any issue with the time period which had elapsed since dismissal would be dealt with by the Employment Tribunal once the claim was lodged. The claimant was asked if he wanted *'to go through the conciliation process or to get the form to go to Tribunal'*. The claimant asked for the form. The ACAS Early Conciliation Certificate was issued on 1 April 2020.

23. The claimant was unable to meet his trade union representative in person due to the lockdown restrictions in place as a result of the COVID 19 pandemic. The claimant understood from his trade union representative that he should obtain all documents in respect of his dismissal from the respondent. The claimant believed that he should obtain those documents before submitting the unfair dismissal claim. There was a delay in those documents being received by the claimant. They were requested at the end of March 2020 and received by him on 13 May 2020. The claimant was helped by his brother in accessing technology to forward the obtained documents to the trade union, including scanning some paper document before emailing them. There was a delay in the claimant gaining access to scanning facilities because of the lockdown. The documents were scanned and submitted to the trade union representative by the claimant.

24. On 27 May 2020 the claimant was informed by his trade union representative that the documents had been submitted to their legal team and that their response was *'that they were not prepared to take on my case and if I want to continue I should seek my own legal advice'*.

25. On 27 May 2020 the claimant was also informed by his trade union representative that his unfair dismissal claim ought to have been submitted to the Employment Tribunal within 3 months of his dismissal. As a result of being told that, the claimant acted on that day to prepare and submit his claim to the Employment Tribunal. The claimant's mother and brother assisted him in preparing and submitting his claim to the Employment Tribunal on 27 May

2020. This took '*the best part of a day*' to prepare and submit. The claimant found it difficult to concentrate and to organise his thoughts.

26. The claimant did not submit the claim to the Employment Tribunal before 27 May 2020 because until that date he was relying on advice from his trade union representative in respect of pursuing that claim.

Claimant's Representative's Submissions

27. It was accepted by the claimant's representative that the unfair dismissal claim was not presented within the relevant time limit. The claimant's representative asked the tribunal to accept the claim, although late. The claimant's representative asked the Tribunal to accept that in the circumstances of this case, it was not reasonably practicable for the claimant to have lodged his claim within three months from the effective date of termination of employment and the application was presented within a reasonable time following the expiry of that time limit.

28. The claimant's representative asked the Tribunal to find that the claimant was clear and candid in his evidence, aimed to assist the Tribunal and was not deflective in answering questions. It was submitted that the claimant answered the questions to the best of his ability and was clear and concise, especially when discussing difficult topics such as his mental health. He asked the Tribunal to make the following findings in fact: that the claimant suffers from anxiety and depression; that the claimant was charged with a criminal offence and his anxiety and depression flared up following that; that the claimant suffers from symptoms of disassociation; that the claimant was confirmed not fit for work or work related activities; that the claimant was dismissed on 28 November 2019 and found out this decision by letter on 29 November 2019; that at that time the claimant had no legal advice on the consequences of his dismissal; that he appealed his dismissal on 8 December 2019; that the claimant attended the appeal hearing on 27 January 2020, although he felt not fit to do so; that the claimant was informed on 6 February 2020 that his appeal was unsuccessful; that the claimant was advised by his trade union to await the outcome of the criminal case before submitting a claim to the Employment Tribunal; that the criminal case was dropped on 24

March 2020; that the claimant contacted ACAS on 1 April 2020 and an ACAS early conciliation certificate was issued on that day; that the claimant contacted the respondent for paperwork at the end of March 2020 and received this on 13 May 202; that because of the restrictions caused by the pandemic, the claimant couldn't meet his trade union representative and had difficulty scanning documents to him because of lack of access to a scanner; that on 27 May 2020 the claimant was informed by his trade union representative that the trade union would not take on his Employment Tribunal claim and that it was out of time; that on that day the claimant lodged his claim, with the help of his family.

29. It was noted that the legal test to be applied is in respect of reasonably practicable, and the burden of proof is on the claimant to show that it was not reasonably practicable for him to have lodged the claim within the relevant time period. It was submitted that there is not a singular reason for the delay. It was submitted that it is not simply because the claimant was not aware of the relevant time limits. The Tribunal was asked to consider all of the facts, including the unusual circumstances in relation to restrictions due to the pandemic. It was accepted that those restrictions were not in full force when the original time period for submission ended. It was submitted that those restrictions impacted on how quickly thereafter the claimant could act.

30. The claimant's representative did not accept that the claimant had changed his position in his oral evidence before the Tribunal from that set out in his letter at to the Tribunal of 25 June. It was not accepted that the claimant now relies on different reasons. It was submitted that the claimant has suffered severely throughout this period. It was submitted that in that letter of 25 June, the claimant does mention his mental health and asks for that to be taken into account. It was submitted that although detail on that has been given by the claimant today, his mental health is highlighted in that letter. It was submitted that the respondent could have requested further information in preparation of the case, but did not do so. It was noted that the claimant lodged the Tribunal application himself, without legal advice and that if he had legal advice at the time then he would have set out his position more clearly and accurately.

31. It was submitted that there is no dispute that the claimant suffers from a serious mental health impairment. Reliance was placed on the report from his GP (43). in particular in respect of the claimant struggling to concentrate. Reliance was placed on the GP highlighting that the claimant's mental health could have been a barrier to him lodging the claim. The GP's use of the word 'may' was noted. The claimant's representative asked the Tribunal to accept the claimant's evidence that his mental health was a barrier to submitting his application to the Employment Tribunal and find that it was not reasonably practicable for him to have done so earlier. Reliance was placed on the claimant's evidence of disassociation symptoms and the referral to a specialist in respect of this (50). It was submitted that in these circumstances, it is not reasonable to suggest that the claimant could have lodged his application earlier. The claimant's representative submitted that the claimant had given extensive evidence about his struggle to deal with the criminal matter. It was submitted that that had a significant effect on his ability to lodge his claim to the Employment Tribunal and that that claim was lodged as soon as reasonable after the expiry of the time limit, given the claimant's health and other mitigating factors.
32. The claimant's representative relied on the claimant's evidence that he didn't receive any advice about time bar until 27 May 2020. It was accepted that his evidence was that time limits had briefly been mentioned by ACAS when he contacted them. It was submitted that at that time the claimant did not know that time bar could be a barrier to his claim. The claimant's representative accepted that ignorance of the rules does not satisfy the test of being not reasonably practicable, he asked the Tribunal to consider the circumstances as a whole, and in particular the claimant's serious mental health problems, and in all the circumstances to find that it was not reasonable to expect the claimant to try to find out about the relevant time limits himself.
33. Reliance was placed on the claimant having been advised by his trade union representative to wait to lodge a claim to the Employment Tribunal after the criminal matter had ended. The claimant's representative submission was that he accepted that the claimant should not have waited and that in these circumstances there is possibly a negligence claim against the trade union.

He submitted that following **Birmingham University v Norton 1991 ICR 488** there are no hard and fast rules in respect of the effect of having received advice and that all must be taken on the circumstances and facts. The claimant's representative's position was that the claimant had received negligent advice and that he was hindered by his mental health to such an extent that it was not reasonably practicable for him to have lodge the claim within the relevant time period. It was submitted that the claimant's mental health is the key and this is not solely a case of negligent advice from an adviser because of the impact on the claimant's health. It was submitted that because of his mental health, the claimant had left the dealings in respect of his Employment Tribunal claim in someone else's hands.

34. The claimant's representative confirmed that he was not arguing before this Tribunal that the claimant is a disabled person in terms of the Equality Act 2010. He confirmed that the only claim is for unfair dismissal and that the appropriate test is one of reasonable practicability and not whether it would be just and equitable to allow the claim, although late.

35. In respect of the impact of restrictions caused by the COVID-19 pandemic, the claimant's representative accepted that the lockdown restrictions did not come into effect until late in March (23 March 2020). He submitted that if the Tribunal accepts that it was not reasonable for the claim to have been lodged in time, then the pandemic is a factor in the delay in the claim being lodged after the expiry of that period. It was submitted that the claimant was trying to send papers onto his trade union representative, had difficulty accessing a scanner because he did not have his mobile phone and public facilities such as libraries were closed, and that there was not much else the claimant could have done.

36. The claimant's representative submitted that given the claimant's mental state between November 2019 and May 2020, it was not reasonably practicable for him to have lodged his claim with the Employment Tribunal within the relevant time period and that it was lodged within a reasonable time thereafter due to reasons of the claimant's mental health, his reliance in those circumstances

on advice from his trade union representative and the effects of the restrictions caused by the pandemic.

Respondent's Representative's Submissions

- 5 37. The respondent's representative relied on the EDT being 28 November 2019 and the terms of sections 111(2) and 111(2)(a) of the ERA 1996. She submitted that in these circumstances and where the ET1 was submitted on 27 May 2020, the Tribunal could not properly find that it was not reasonably practicable for the claim to be submitted in time or that the claim was nevertheless presented within such further period as the Tribunal considers 10 reasonable. She relied on the ACAS ECC being issued on 30 March 2020 and there being no extension to the deadline because of early conciliation.
3. 38. The respondent's representative submitted that following **Northamptonshire County Council v Entwhistle 2010 IRLR 740, EAT**, the 5. question is one of the fact, and the Tribunal should play close attention to the 15 particular circumstances of the case. Reliance was placed on the position of the EAT at paragraph 204 in **Bodha v Hampshire Area Health Authority 1982 ICR 200, EAT**. It was submitted that the Tribunal should start with the 6. words of section 111 and consider what could have been done in the common sense way: what was reasonably capable of being done. Reliance was 20 placed on this being a high test and the burden of proof being on the claimant.
39. In respect of the claimant's reasons for the application having been submitted late, a number of authorities were relied upon.
- 25 40. In respect of the claimant's reliance on having been ignorant of the relevant time limits, the respondent's representative relied on **Walls Meat Co Ltd v Khan 1979 ICR 72** as authority against the claimant. The respondent's representative submitted that the claimant knew from when he contacted ACAS that there was a time limit problem. Reliance was placed on him then waiting until 27 May to submit the claim. The respondent's representative's position was that the claimant had chosen to do so. Reliance was placed on 30 the claimant having had access to his trade union representative from January 2020 and to the claimant's acceptance under cross examination that it would

have been possible for him to do a Google search to find out the relevant time limits. Reliance was also placed on the claimant having been in communication with regard to his criminal case with the same legal firm which represented the claimant at this hearing. It was submitted that the claimant could have sought legal advice from that firm about the relevant time limit, particularly once he had been made aware by ACAS that there may be an issue. Reliance was also placed on the claimant's evidence that he had received assistance from his family. It was submitted that the claimant could have had family assistance to do a Google search and find out the relevant time period for submitting a claim to the Employment Tribunal. It was submitted that for all these reasons, ignorance of the time limit was not reasonable in these circumstances.

41. The respondent's representative relied on the terms of the claimant's letter to the Employment Tribunal of 25 June 2020. the respondent's representative again relied on **Walls Meat Co Ltd v Khan 1979 ICR 72**, as also being authority that an employee charged with a criminal offence who delays until the criminal case is disposed of cannot rely on that as a reason why it was not practicable to present the claim in time.

42. It was submitted that following **Dedman v British Building and Engineering Appliances Ltd**, where a skilled adviser is at fault, the Tribunal may consider that it was reasonably practicable for the claim to have been lodged within the relevant time period and the remedy is then against the adviser who provided the advice. **Riley v Tesco Stores Ltd and anor 1980 ICR 323, CA** was relied on as authority for the Dedman principle applying even where that advisor is not a solicitor.

43. The respondent's representative submission was that the claimant was aware from discussions with ACAS that there might be an issue with time bar; that he knew there was no guarantee that the trade union would take on his claim and that he chose to wait for the trade union to review the documents from his former employer. It was submitted that the claimant cannot rely on incorrect advice from his trade union adviser to overcome the barrier that it

was not reasonably practicable for him to have submitted his claim within the relevant period.

44. The respondent's representative submitted that issues arising from the restrictions caused by the COVID- 19 pandemic did not prevent the claimant from submitting the claim in time. She submitted that even if there were issues with him being required to scan documents, it was within the claimant's power to submit the claim at an earlier stage than when he did.
45. In respect of the claimant's position on the effect of his mental health. The respondent's representative relied upon the terms of the letter that the claimant had written to the Employment Tribunal on 25 June 2020. Reliance was placed on the claimant having provided in that letter many detailed reasons why he had not submitted the claim in time. The respondent's representative submitted that none of those reasons prevented the claimant from submitting the claim in time and none were connected to his mental health. The respondent's representative accepted that in that letter the claimant had asked for his health to be taken into account. Reliance was placed on the letter not stating in terms that the claimant's mental health prevented him from submitting the claim in time. The respondent's representative submitted that the reasons set out in that letter of 25 June are the reasons why the claim was not submitted before 27 May 2020. She asked that in those circumstances, the Tribunal should not find that it was not reasonably practicable for the claim to have been submitted in time.
46. The respondent's representative submitted that it would be a significant departure from what the claimant's position is in his letter of 25th of June, to find that the claimant could not submit his claim earlier because of his health. It was submitted that such a finding would contradict what is set out in detail in that letter.
47. It was accepted that the report from the claimant's GP dated 20 November 2020 confirms that the claimant suffers from mental health issues. The respondent's representative submitted that the claimant has not established that it was not reasonably practicable for him to submit his claim in time because of his mental health issues. The respondent's representative's

5 submission was that that the key question in the letter of instruction to the GP was question four at page 42, and that the doctor does not provide a clear answer to that. Her submission was that the use of the word '*may*' does not confirm that the claimant was not able to submit his claim in time due to his mental health. It was submitted that the GP is only saying that there is a possibility that the claimant's mental health was a factor. The respondent's representative submitted that an individual's mental health can always affect their ability to make a claim, but that there is not enough evidence before the Tribunal to find that the claimant was unable to make a claim because of his mental health. She submitted that the reports from 2017 and 2015 do not explain why the claimant could not submit his claim any earlier than he did. It was submitted that there was no medical evidence to suggest why the claimant could submit his claim on 27 May 2020, and not earlier. It was submitted that the claimant was not prevented from submitting his claim due to his mental health.

10 48. The respondent's representative sought to distinguish this case from the position in **University of Bristol NHS Foundation Trust v Williams UKEAT/0291/21** on the basis that in these circumstances, the claimant had been able to communicate with a solicitor about the criminal matter and had discussed the employment matter with his trade union representative. Reliance was placed on the claimant having submitted an appeal to the decision to dismiss; having engaged a solicitor in the criminal matter; having attended the appeal of his dismissal; having made a Universal Credit application (it being recognised that the claimant used his experience from his previous employment in doing this). Reliance was placed on the claimant having confirmed that he was able to do these things. The Tribunal was asked to find that in these circumstances, the claimant would have been able to instruct a solicitor and ask that solicitor about the time limit point. He could have asked the solicitor instructed in respect of the criminal matter. The claimant's mental health did not prevent him from instructing a solicitor. Reliance was placed on the claimant having submitted his claim on 27 May 2020, and his mental health having not prevented him from doing so on that date

49. The respondent's representative relied on the claimant's evidence that what prompted him to lodge his claim was that the trade union informed that they wouldn't take his case. It was submitted that the claimant has failed to establish that it was not reasonably practicable on the grounds of his mental health. for him to have submitted the claim within the limitation period the respondent's representative further submitted that the claim was not lodged within a reasonable time after the expiry of the limitation period. The respondent sought that the claim be struck out under rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") on the basis that it has no reasonable prospects of success due to the Tribunal having no jurisdiction to hear the claim.

Comments on evidence

50. The claimant was found to be a generally credible witness. He was open in his answers to all questions put to him. He did not seek to avoid any questions. He was candid in his explanations, e.g. when asked what was it about 27 May 2020 which led him to prepare and submit his ET1 on that day, and not before, he freely admitted that it was on that day that he was told that his Trade Union would not be taking on his claim and he had previously relied on his Trade Union representative to deal with any claim arising from the termination of his employment by the respondent. The claimant's explanation in that regard was entirely plausible in the other circumstances relied upon him and with regard to his mental health at the time.

51. I accepted the claimant's evidence that his mental health conditions had affected him from the time of his dismissal in November until the time of his submission of the ET1 (and beyond). I did not however accept that the claimant was so affected that he could not have submitted his claim. It was not the claimant's evidence that he was able to submit his claim on 27 May 2020, with assistance from his mother and brother, because his health had improved. It was clear that he obtained the help of his mother and brother and managed to submit the claim on 27 May 2020 because he was told on that day that his union would not be assisting him in submitting that claim. It was not suggested that there was any reason why his mother and / or brother

could not have helped him to submit his unfair dismissal claim before 27 May. The claimant's brother had previously helped him access technology to obtain the documents from the respondent.

52. The claimant reasonably relied on advice from his Trade Union (PSC) in respect of making an Employment Tribunal claim. There was no evidence from the trade union representative before the Tribunal. There was no explanation why the claimant was not earlier aware from the trade union about the relevant time limits for lodging an unfair dismissal claim to the Employment Tribunal or why the trade union had not progressed the submission of the unfair dismissal claim within the normal three month period, in order to protect the claimant's position with regard to such a claim. The claimant's evidence was that on 27 May 2020 the ET1 *'was submitted whether I was fit or not as I had no choice after being abandoned by the union'*.

53. In the period from September 2019 until the expiry of the limitation period on 28 February 2020 the claimant was able to instruct solicitors in respect of the criminal case then being brought against him. He did not at that time instruct those solicitors in respect of his unfair dismissal claim. It would have been reasonably practicable for him to do so. The claimant did not instruct solicitors in respect of the unfair dismissal claim because he was relying on the advice of his trade union, he was unaware of the relevant time limits at the time and he was focused on dealing with the criminal matter. The claimant's mental health condition at that time was that in all those circumstances he reasonably followed the advice of his trade union.

54. In the period from the effective date of termination ('EDT') until the expiry of the limitation period on 28 February 2020, the claimant was able to submit and progress a Universal Credit application. I took into account that the claimant had prior experience of such applications from his former employment.

55. In the period from the EDT until the expiry of the limitation period on 28 February 2020 the claimant attended the appeal hearing with his trade union representative.

56. I considered all these facts to be significant in my assessment of whether it was reasonably practicable for the claimant to have lodged the claim to the Employment Tribunal before the expiry of the limitation period.

57. The report from the claimant's GP shows that the claimant attended his GP in January 2020. That report states:-

"I saw him in January 2020 when he was still having significantly heightened anxiety. Mr Roche would have struggled to concentrate and may have felt too anxious to face the stress of submitting an unfair dismissal claim"

58. After the expiry of the limitation period on 28 February 2020, the claimant was able to discuss matters with his trade union representative, attend the appeal hearing, make an application for Universal Credit (using his work experience); contact ACAS; discuss with his trade union representative that documents should be obtained from his former employer; make an application to his former employer for those documents and, with the assistance of his mother and brother, prepare and submit his claim to the Employment Tribunal. It was clear from the evidence before me that the claimant believed that he was acting on advice from his Trade Union representative that he should first await the outcome of the criminal trial and then await obtaining documents from his former employer before submitting the unfair dismissal claim. There was no evidence before me of what the advice from the trade union advice had been, other than the oral evidence from the claimant, which was consistent with the claimant's position in correspondence to the Employment Tribunal.

59. During cross examination, the claimant's evidence was that he was not aware of the three month time limit for lodging his unfair dismissal claim until receiving correspondence from the Employment Tribunal. His evidence was that ACAS had informed him that there were time limits, but not what those time limits were. His evidence was *'they said that if it was an issue the Tribunal would advise in their response'*. It was put to the claimant in cross examination that ACAS had told him on 1 April 2020 that his claim might be out of time but he had chosen to wait a further two months before submitting the claim. The claimant's evidence was *'I understand there was a gap but*

given my mental state I consulted with the union rep and taking their advice and on my part I was relying on them cos of the stress and anxiety down to my mental state – that’s why there was this gap.” I found that evidence to be largely consistent with the claimant’s later position in cross examination that

5 ‘Having the Early Conciliation Certificate allows someone to submit the Employment Tribunal claim but as I explained the reason was my poor mental health. My anxiety and depression. I had relied on my union rep. In hindsight that was not the best thing to do but then I thought that it was the best thing to do.’ And later ‘My thought process at the time was that I was dealing with

10 my union. There were physical barriers to getting information to them.’ (in respect of lockdown restrictions and scanning documents). I accepted that evidence as credible and plausible.

60. In cross examination it was put to the claimant that he could have obtained assistance from his family to submit the claim sooner. His evidence was “In

15 my thoughts at the time I was dealing with someone who was not a solicitor but was trained in employment matters better than my family.” I accepted that evidence as credible and plausible.

61. There was one important area where the claimant was inconsistent in his evidence. The claimant’s initial position had been that he first knew of the

20 normal three month time limit when he received correspondence from the Employment Tribunal. That changed when he was asked (by me) what he was told by his trade union representative in the phone call on 27 May 2020. I made a finding in fact that the claimant was told about the 3 month time period when he spoke to his trade union representative on 27 May. This

25 finding was based on the following parts of the claimant’s evidence:-

“He informed me about the usual time scale of 3 months and that my claim could be considered out of time and their (the legal team’s) decision was not to take it on.”

And

30 *“I wasn’t happy because I was acting on his advice and had submitted the documents to the union. I couldn’t understand why they were not prepared*

to take forward the case or if not why I wasn't given the correct information. He said he thought it would be a good case for the legal team continuing outside the 3 months and didn't have an explanation for his advice to wait for the conclusion of the court case and wait for documents when it was already out of time."

And

"The whole reason I went to the union rep was that I was not dealing with this on my own. I was relying on them. I was sadly mistaken."

62. I accepted that later explanation as explaining why the claimant then took steps, with the assistance of his mother and brother, to prepare and submit the claim to the Employment Tribunal on that day (27 May 2020). I accepted the claimant's evidence in that regard to be entirely credible, plausible and reliable.

63. I took into account the claimant's evidence that he '*certainly*' would not have been able to proceed with a Tribunal hearing, which was distinct from his less definitive position on being able to submit the application earlier.

64. I took into account the claimant's evidence that he has been suffering from symptoms of disassociation, that there has been no diagnosis as yet of the claimant having such a condition and that he is awaiting a specialist referral appointment in that regard, that having been previously postponed until the conclusion of the criminal case against him.

65. The burden of proof is on the claimant. I did not have sight of any correspondence confirming the claimant's position that he had been certified as unfit for work and all work related activities, either from the respondent's Occupational Health advisors or following the claimant's application for Universal Credit.

Decision

66. Both representative's position was that the EDT was 27 November 2019, being the date of the letter sent to the claimant informing him of the decision to dismiss. That letter was not produced before me. The claimant's evidence

was that letter was received by him on 29 November 2019. On that basis, the EDT was 29 February 2019 and the limitation period expired on 28 February 2020. That point does not make a material difference to the representatives' position in their submissions.

5 67. Following **Walls Meat Co Ltd v Khan**, neither ignorance of the applicable time limits nor waiting until linked criminal proceedings are completed satisfy the reasonably practicable test.

68. I had regard to the relevant law, and the case law authorities reviewing the **Dedman** principle, as set out above.

10 69. The reason why the claim was not submitted until 27 May 2020 was because, in circumstances where the claimant was suffering from poor mental health and had been diagnosed with the conditions of anxiety and depression, the claimant had relied on the advice of his PCS trade union representative. The claim was submitted on 27 May 2020 because on that day the claimant was
15 told by his union representative that the claim ought to have been submitted within 3 months of his dismissal and that the union would not be supporting him in making his application to the Employment Tribunal. The claimant then acted on that day to ensure that the application was submitted to the Employment Tribunal. In the circumstances of this case, the claimant's
20 reliance on advice from his trade union representative was a significant relevant factor in the in whether it was reasonably practicable for the claimant to present the claim within the prescribed time limit. I took the circumstances and the fact that the advisor involved was a trade union representative into account.

25 70. Following **Remploy Ltd v Brain EAT 0465/10**, I looked at the wording in section 111 and to what is essentially a question of fact for the tribunal to decide after taking into account the circumstances of the particular case. I noted that the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as he should reasonably
30 in all the circumstances have been given.

71. On the facts, although the claimant was suffering from the effects of his mental health conditions, he could have submitted the application to the Employment Tribunal within the relevant time period, with assistance from his mother and brother. I considered the various things which the claimant was able to do before the expiry of the limitation period, as set out in the findings in fact and relied on by the respondent's representative, to be significant. I considered it to be significant that the claimant did in fact submit the application himself on 27 May 2020, with the assistance of his mother and brother. The reason he did not do so previously was because he was relying on the advice of his PCS trade union representative. There was no significant difference in his mental health so that on the claimant could submit his application on 27 May because he was then fit to do so, when he hadn't been before then. There was no suggestion that the claimant's mother and brother could not have assisted the claimant to submit the application before 27 May, had the claimant not been relying on his trade union representative. The claimant's brother assisted him prior to 27 May with accessing emails.

72. On the evidence before me, I concluded that had the claimant not been following what he believed to be the advice from his trade union representative to first await the outcome of the criminal case and then to await receipt of documents from the respondent before submitting the unfair dismissal claim to the Employment Tribunal, then it would have been reasonably practicable for the claimant to have obtained assistance from his mother and / or brother and to have submitted the unfair dismissal claim to the Employment Tribunal before the expiry of the limitation period. I took into account the evidence before me on what the claimant had been able to do before the expiry of the limitation period, as set out in the findings in fact. There was no evidence before me to conclude that the claimant's mental health had improved on 27 May so that he could then do what he had not been able to do earlier. I took into account the claimant's position in cross examination of *'I don't believe it was a choice. Even if I had been fully aware of time bar I don't know if I was in the mental state to pick up the phone. I wasn't going out, not eating, sleeping. I don't think I was in a fit state to deal with anything at that time.'*

73. Where a claimant is relying on medical evidence at a time bar hearing, such medical evidence should not only support the claimant's illness but also demonstrate that the illness prevented the claimant from submitting the claim on time. I considered the Employment Tribunal's decision in **Pittuck v DST Output (London) Ltd ET Case No.2500963/15**. In the circumstances of this case, the claimant has not demonstrated that his mental health prevented him from submitting the claim on time.
74. The real reason why the claim was not lodged with the ordinary three month time limit was because the claimant was relying on advice from his trade union representative. I did not accept the respondent's representative submission that the claimant had chosen to wait until his trade union's legal team had revised the documents. In all the circumstances, including where the claimant suffers from a mental health condition, it was reasonable for him to rely on advice from his trade union.
75. Difficulties arising from the restrictions caused by the COVID- 19 pandemic did not apply to the 3 month period from the EDT. It is within judicial knowledge that the first lockdown in the UK began on 23 March 2020.
76. In all the circumstances I did not accept that it was not reasonably practicable for the unfair dismissal claim to be presented before the end of the period of three months from the EDT i.e. by 28 February 2020. The claimant may seek to pursue a claim against the union in respect of the loss of opportunity to proceed with this claim of unfair dismissal before the Employment Tribunal claim
77. The claimant's representative was clear that it was not his position that the claimant was a disabled person in terms of the Equality Act 20-10 and to no extent was the claimant seeking to rely on any reasonable adjustment being required to be made. The test I required to apply with regard to the late application of the unfair dismissal claim was one of 'reasonable practicability' and not that of whether it is 'just and equitable to allow the claim although late.
78. In these circumstances, where the only claim is of unfair dismissal, the test to be applied is that set out in section 111(2) of the ERA. The claimant's claim

for unfair dismissal was not presented to the Employment Tribunal before the end of the period of 3 months beginning with the effective date of termination, which is the relevant period set out in the Employment Rights Act 1996 at section 111(2)(a). In all the circumstances of this case and in terms of section 111(2)(b), I was not satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

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79. In these circumstances and in terms of section 111(2)(b) I did not then require to consider whether the claim was lodged within a reasonable period after the expiry of the time limit on application of section 111(2)(a). Had I required to do so, I would have found that in all the circumstances and on the basis of the findings in fact, the period from the expiry of the limitation period to 27 May 2020 was not reasonable.

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80. The Employment Tribunal does not have jurisdiction to hear this unfair dismissal claim on the grounds of time bar and the claim is dismissed.

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Employment Judge:
Date of Judgment:
Date sent to parties:

25

Clair McManus
01 December 2020
04 December 2020