**Case No: 1804421/2020**
**Code V**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Quinn

**Respondent:** Asda Stores Ltd

**Heard at:** Leeds (by CVP) **On:** 8 December 2020

**Before:** Employment Judge Parkin

**Representation**
Claimant: Mr I Steel, Solicitor
Respondent: Mr F Mortin, Solicitor

# RESERVED JUDGMENT ON A PRELIMINARY HEARING

**The Judgment of the Tribunal is that** the claimant's unfair dismissal claim was presented out of time but it was not reasonably practicable for him to present it in time and he presented it within such further period as was reasonable. Accordingly, the claim will proceed to final hearing.

# REASONS

## 1. The Preliminary Hearing

These Reasons are to be read alongside the Case Management Order and Reasons sent out by the Tribunal on 3 December 2020, following its hearing on 25 November 2020. That Order dealt with the claimant's amendment application, applying the relevant legal principles to that determination. The Judge explained to the parties at the outset that although the earlier findings set the context for this hearing the principles to be applied in respect of the out of time issue were different. At this hearing the tribunal was to determine whether it had been reasonably practicable for the claimant to present his unfair dismissal claim in time and, if not, whether he presented it within such further period as the tribunal considered reasonable.

2. The hearing was held by CVP video hearing, as denoted by “Code V” in the title above. The Tribunal again heard oral evidence from the claimant himself, this time based upon a witness statement; the claimant was only able to attend and take part by audio facility since his technology would not support the simultaneous use of video participation. There was a Bundle of documents for this hearing in particular containing additional medical evidence in the form of sick notes (strictly “fit notes”). Both parties made submissions; the respondent had provided a bundle of authorities, the claimant had identified Marks & Spencer PLC v Williams-Ryan (CA) as a further authority and the Tribunal itself referred the parties to the EAT authority of John Lewis Partnership v Charman UKEAT/0079/11/ZT.

3. The key events in the timeline from the incident to presentation of the claim on 30 July 2020 are recorded at paragraph 12 of the Reasons for the Case Management Order, with additional findings of fact at paragraph 11. Whilst the respondent highlighted the Tribunal's finding at paragraph 11 that the claimant was “unaware of the detail of time limits” for bringing a claim as meaning he did know of time limits to some extent, that had not been the intention of the Tribunal. In any event, by the conclusion of the claimant’s evidence at the second hearing, it had more evidence to found its findings of fact for this hearing upon. The matter of time limits and the claimant’s knowledge or lack of knowledge of them was central to this out of time determination but had not been in considering the amendment application. When the respondent’s representative raised the point, the claimant’s representative disputed his account of the evidence at the earlier hearing and the Judge read from his note of evidence from the earlier hearing and checked it against the notes of the various legal representatives.

**4. The claimant’s evidence about his representative’s advice, Internet searches, Unfair Dismissal and Tribunals, time limits and ACAS**

4.1 At the first hearing, in evidence in chief answering the question: “What advice did Glenn Hearn give?” (i.e. after being told of his dismissal on 16 January 2020), he replied that the shop steward said it was Asda policy to have two appeal hearings and we would proceed with that.

4.2 During cross-examination, in relation to the role of Mr Hearn whom he described as a new shop steward, he said: “… He didn't write me a letter, just initiated the appeal process, basically told me what to say and I wrote it.”

4.3 Asked about making an Internet search about unfair dismissal claims he replied: “I could search things but I wasn't aware about the ACAS issue until after the second appeal. I still felt … I would be reinstated. I thought you had to wait until after the second appeal to make a case. I then looked into the unfair dismissal claim when the second appeal was refused. There are no guarantees in this world, but with me being there nearly 18 years I did feel there was a good chance of being reinstated. Losing my job was a big thing. I thought I did know about it but I've not been in this position before. I thought you had to wait until the appeal process was concluded before I could bring a case”.

4.4 When it was put to him that he was mistaken about the process, he replied: “I did not know that wasn't the process and I didn't know what the process was. Why would I put a claim in in March after the first appeal when I could be reinstated in the second appeal?”

4.5 In response: "So you were not advised about time limits?", he replied: "Nothing was mentioned about time limits". When later asked why he thought he had to wait until after the second appeal he replied that once the second appeal had concluded he was under the belief he could then claim for unfair dismissal; if the second appeal had been upheld he could have got his job back.

4.6 In his witness statement, he wrote at paragraphs 7 and 8:

> "7. Apart from a minor incident 16 years ago I have never been disciplined or dismissed in my life and had no idea what I was supposed to do. I asked my union representative what I needed to do next and he advised me to go through Asda's 2-stage appeal process which is precisely what I did.
>
> 8. I submitted an appeal against dismissal. The first stage appeal was not successful. I asked my union representative what I should do next and he advised that I should go through the second appeal stage".

4.7 Under cross-examination at this hearing, the claimant acknowledged that his wife knew how to use a web browser and used her computer to communicate with the family, for instance on Facebook using a web browser.

4.8 He confirmed that it had been his understanding that everything to do with the Employment Tribunal was closed during the pandemic, as he had put at paragraph 13 of his witness statement. This was a wrong understanding.

4.9 He said that he was waiting for the appeal and thought the procedure was to wait for the outcome of it. When it was put to him that he and his wife could have researched unfair dismissal or employment tribunal procedures sooner, he said: "At that stage I still didn't feel I needed to do that. I still had my appeal. I hadn't thought about the employment tribunal. I still had my appeal."

4.10 On paragraph 15, it was put to him that he had contacted ACAS because he knew there was a process. He replied that he contacted ACAS after his second appeal was unsuccessful and he then found out about the process.

4.11 He repeated that he had asked his trade union representative after he was dismissed: "What happens now" and had been advised there was a 2-stage appeal process and "we had to go through that". The Tribunal was not mentioned at that stage and he had thought you had to go through the appeal process. He then said: "I wasn't aware at the time of an unfair dismissal claim", (which was not consistent with his earlier evidence).

4.12 He maintained that, had his appeal been heard in March 2020 and the appeal process concluded earlier, he would "have looked for an unfair dismissal claim" sooner and made his claim in time.

## 5. Findings of fact

Accordingly, in addition to its earlier findings and on the basis of fuller evidence at this hearing, the Tribunal made the following findings on the balance of probabilities. Although in cross-examination the claimant did not always listen carefully and answer the question put to him, in his keenness to get over what he

wanted to say about his thinking, understanding and actions, the Tribunal was able to form a very clear impression of him. He was straightforward and his evidence about waiting until the outcome of the second appeal and only researching how to bring a Tribunal claim thereafter was consistent in terms of his own evidence and it was clearly supported by the sequence of events and his delay in bringing a claim.

5.1 The claimant was very ignorant of employment law. By January 2020, he was aged 54 years and he had been continuously employed by the respondent for nearly 18 years, with a clean disciplinary record having never been dismissed in his working life. He had no more than a general awareness of the right to claim unfair dismissal and was wholly ignorant of time limits for bringing an unfair dismissal claim and of the procedure for making an Employment Tribunal claim.

5.2 When notified of his dismissal at the disciplinary hearing on 16 January 2020 he asked his trade union shop steward, who he knew was recently appointed and inexperienced, words to the effect: “What happens now?” or what he should do next. The shop steward told him it was Asda practice to provide two levels of appeal and “…we had to go through that”. There was no discussion of bringing an unfair dismissal claim or how that was done or about the time limits for doing so; these matters were simply not raised or discussed.

5.3 After the first appeal was rejected, notified by letter dated 17 February 2020, the claimant again asked what he should do next and the shop steward said he should go through the second appeal stage. The claimant wrongly believed he must wait for the outcome of his final appeal, before making a claim of unfair dismissal. He remained unrealistically confident about his prospect of being reinstated on appeal.

5.4 The claimant’s wife had multiple medical conditions of arthritis, anxiety and depression, stomach issues and mobility issues. He was her primary carer and she was very upset to learn of his dismissal; she blamed herself because the claimant had not been driving on 29 November 2019 as he was expecting to meet the manager to discuss his flexible hours application (which he sought to be able to give her more assistance).

5.5 The claimant himself was very shocked by his dismissal at the disciplinary hearing, in particular the conclusion that he had committed fraud. He too experienced anxiety and depression and was persuaded by his wife to attend his General Practitioner, which he did in person at the start of March 2020, thereafter being signed off as unfit for work in a series of sick notes (strictly called “fit notes”). Those sick notes ran from 2 March 2020 through the rest of 2020 to 23 December 2020; although there were gaps in July and August, the Tribunal accepted the claimant’s evidence that his sickness had continued and had been certified throughout the period.

5.6 His second stage appeal hearing was arranged to take place on 19 March 2020, just as the effects of the COVID-19 pandemic were taking hold upon the whole UK. His appeal hearing that day was cancelled and he was given the opportunity to reschedule for a face-to-face appeal hearing (which he was told might be a number of weeks later), to take part in an appeal conducted via telephone or have his appeal dealt with on paper. The Tribunal inferred that he

elected for a rescheduled in person hearing. In the event, regrettably but perhaps inevitably, that hearing did not take place until 21 July 2020.

5.7 The claimant himself did not use a computer, although his wife did; he had a smartphone which he used for phone calls and social media but did not himself engage in research on search engines. His wife used a computer, in particular to communicate with their family on Facebook via a web browser; because of her conditions, it was an important means of communication for her.

5.8 Despite the passage of time to July 2020, to the extent that the claimant considered any claim against his employer, it did not make sense to him to consider issuing a claim to the tribunal when he still felt he was likely to be reinstated on appeal.

5.9 Once notified of the rejection of his second appeal, by letter dated 23 July 2020, he and his wife researched the position online in relation to making an unfair dismissal claim and quickly ascertained the procedure including ACAS Early Conciliation notification and the procedure for presenting a claim online.

5.10 He had been unaware of the role of ACAS and the need for Early Conciliation notification before commencing proceedings and of the procedure for making a claim and the time limit for doing so, although had he made the research earlier he would have readily discovered this.

5.11 Upon learning of these matters, he acted swiftly. The Early Conciliation Certificate records notification as 28 July 2020, with issue of the certificate as 30 July 2020, the same day as the claimant presented his claim online.

5.12 Despite the earlier attendance and representation by Mr Hearn at the disciplinary and appeal hearings, the claimant was not advised about making his claim to the Tribunal or the time limits for doing so or assisted in making his claim by the shop steward or the trade union. There was no evidence that Mr Hearn had full awareness of unfair dismissal rights, still less that he knew about unfair dismissal time limits.

5.13 The claimant’s first contact with the solicitor was about 21 August 2020, some weeks after he presented his unfair dismissal claim.

## 6. The respondent’s submissions

6.1 The respondent relied upon the Court of Appeal authorities of <u>Palmer v Southend on Sea Borough Council</u>, <u>Walls Meat Co v Khan</u>, <u>Apelogun-Gabriels v London Borough of Lambeth</u> and the EAT authorities of <u>Sodexo Health Care Services v Harmer</u>, <u>John Lewis Partnership v Charman</u> and <u>Cullinane v Balfour Beatty</u>. Since there was no dispute the claim was presented out of time and the Early Conciliation provisions provided no extension, the two questions were whether it was reasonably practicable to present it in time and, if not, whether it was presented in such further period as the tribunal considered reasonable. <u>Palmer</u> showed that reasonable practicability meant whether it was reasonably feasible to present it in time.

6.2 The claimant had never suggested before today that he had no awareness of unfair dismissal and he had quickly found out about unfair dismissal and ACAS procedures. Was he reasonably ignorant of time limits? His case consistently was that the sole reason for the delay was waiting for the appeal process to be concluded; he had never previously suggested he was ignorant of the right to claim. The respondent relied on the finding at paragraph 11 of the Reasons to the earlier Case Management Order, contending there was a significant difference between being unaware of the detail of time limits and not knowing of a right to claim unfair dismissal. Unlike some authorities, this was not a defective advice case: the claimant was not relying on the GMB representative's advice but was waiting for his appeal process to conclude. His case was like Sodexo; not a claimant who was totally ignorant of time limits but ignorance based on the assumption he had to go through the appeal first, which was unreasonable. John Lewis Partnership following Walls Meat v Khan further showed the principal question was whether the claimant's ignorance was reasonable.

6.3 The respondent relied on five points: i) nothing prevented the claimant inquiring about statutory time limits; his wife had computer skills, it would have been reasonable to get her to search on so important a matter; there was even the period before the first sick note to do so; ii) he was represented by the trade union throughout the disciplinary and appeals process but never asked for advice on time limits and was never given incorrect advice either; he thought he would be reinstated but accepted there was no guarantee of this; iii) he unreasonably took no steps to inquire about his options despite knowing there was a time limit; iv) the onus was on him to show it was not reasonably practicable to present his claim in time but he failed to show it was not feasible or some impediment prevented him claiming earlier; v) Apelogun-Gabriels v Lambeth showed that waiting for the outcome of an internal procedure was not in itself an acceptable reason for granting an extension of time to bring a claim.

6.4 In summary, the respondent contended the claimant was not reasonably ignorant. It accepted that the Tribunal's decision was likely to turn on whether it was reasonable to wait for the outcome of the second appeal. It did not contend that the further delay from knowing the second appeal outcome to presenting his claim was in itself unreasonable.

7. **The claimant's submissions**

7.1 Referring to the earlier hearing, it was disputed that the claimant had acknowledged knowing about unfair dismissal time limits; he had said only that he thought he had to wait until the appeal was concluded. His representative's note of evidence suggested the claimant was unaware of time limits and he challenged the respondent contending the claimant had admitted knowledge previously. It was agreed that this was a case concerning reasonable or unreasonable ignorance but it was not reasonably practicable for the claimant to issue within three months here because i) he was reasonably ignorant of the deadline, ii) he was suffering anxiety and depression in accordance with the sick notes (and paragraph 10 of his statement which was not challenged), iii) of the delay caused by Covid-19, and iv) the manner of and reason for his dismissal.

7.2 The claimant's evidence was clear throughout: he thought he had to wait for the outcome of his second appeal, having asked his representative what he should do next and been advised to go through the 2-stage appeal process. That was what he understood he had to do and what he did; it was reasonable to follow that advice. He was not a sophisticated computer user and it was therefore not reasonable to expect him to do the research and find out earlier. The second appeal was set for 19 March 2020 and would have taken place much more quickly but for Covid-19, with the likelihood that he would have put his claim in in time. The Tribunal must consider his mental state with sick notes covering from 2 March onwards, but he did not only become ill on 2 March: his wife persuaded him he was not well and should go to the Doctor, see paragraph 10 of his witness statement. Finally, the reason for the dismissal was given as fraud, a serious allegation of a criminal offence and he would suffer significant injustice if not allowed to proceed with his claim.

7.3 There were many authorities and the John Lewis Partnership case helpfully summarised the principles, but each case turned on its own facts. There was no hard and fast rule, for instance Marks & Spencer v Williams-Ryan was a situation where the employer potentially misled the claimant. This claimant was reasonably ignorant and he was suffering mental ill-health with anxiety and depression; in those circumstances, it was not reasonably practicable to present his claim in time but he did so within a reasonable further period, once the second appeal was refused.

8. **The Law**

8.1 Section 111 of the Employment Rights Act states:

> "(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (2) 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 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…"

8.2 Section 207B provides for the extension of the time limits to facilitate conciliation before institution of proceedings. These provisions do not apply since the claimant did not notify ACAS under Early Conciliation before the 3 month primary time limit expired.

8.3 The parties cited case law and the Tribunal directed them towards the further EAT authority in John Lewis Partnership v Charman. Of course, the purpose of relying upon previous higher authorities is that, where applicable, the ratio

decidendi or legal principle established by them is binding upon the lower Tribunal in respect of the particular determination it must make. The Tribunal was not assisted by the Court of Appeal judgment in Apelogun-Gabriels, which dealt with extensions of time in discrimination legislation, now in the Equality Act 2010. Accordingly, the principles established by the relevant authorities must be identified and summarised.

8.4 In the first place, the time limits in employment protection provisions have been fixed by Parliament alongside those protections. So, when an unfair dismissal claim is presented out of time, the burden of proof is on the claimant to show on the balance of probabilities that it was not reasonably practicable to present it in time and then also that it was presented within such further period as the tribunal considers reasonable. Where the claimant cannot prove that the claim was in time or those two matters at Section 111(2)(b), the claim will be dismissed for want of jurisdiction. In Palmer v Southend on Sea Borough Council, May LJ suggested: “Perhaps to read the word "practicable" as the equivalent of "feasible" … and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint … within the relevant three months? is the best approach to the correct application of the relevant subsection". Marks & Spencer v Williams-Ryan [2005] ICR 56 established that the subsection should be given a liberal interpretation in favour of the employee, having regard to the employee’s state of knowledge about the right to complain to the tribunal and the time limit for making a complaint, with ignorance of either of these not necessarily rendering it not reasonably practicable to bring a complaint in time. The Tribunal must consider not just what the employee knew but what knowledge the employee should have had, had he or she acted reasonably in all the circumstances, see Paragraphs 20 to 21.

8.5 Time for making a claim starts to run when the employee is dismissed and not when any internal appeal procedure has been exhausted. The fact of waiting for the outcome of an internal appeal is not in itself grounds for the tribunal extending the time limit.

8.6 Next, it is essentially a matter of fact for the tribunal at first instance to determine whether it was or was not reasonably practicable to present the claim in time and, if not reasonably practicable, whether the claimant nonetheless did present it within a reasonable further period beyond the expiration of the time limit. That decision will be made having regard to all relevant factors within the general context of the case, in accordance with the Tribunal's preliminary fact-finding. In some cases, the position regarding the extent and quality of any legal advice about the right to claim and time limits will be relevant. Often the main issue for the tribunal is whether the claimant shows both ignorance of the time limit for bringing that claim and that such ignorance was reasonable since, if the claimant is “reasonably ignorant” of the relevant time limit it cannot be said to be reasonably practicable for him or her to comply with it. The Tribunal was particularly assisted by the judgment of Underhill J. (then the President of the EAT) in John Lewis Partnership at paragraph 9 onwards.

9. **Conclusion**

9.1 The Tribunal made brief findings of fact for the purposes of the amendment application with significant attention upon the delay in making the amendment application and particularly the passage of time between presentation in late July and the application in late November 2020. For this hearing on the out of time issue, the Tribunal has considered the evidence and made fuller fact-finding in relation to the time between the dismissal and presentation of the claim.

9.2 As explained at paragraph 3 above, the Tribunal considered that the respondent had over-stressed the terminology at paragraph 11 in the Reasons for the Case Management Order that the claimant was “unaware of the detail of time limits”. As set out in its findings of fact above, on the basis of the whole evidence at both hearings, in his witness statement and oral evidence including under cross-examination and Tribunal questioning, it concluded that he had no awareness at all of time limits for making an unfair dismissal claim to the Tribunal. Looking at the whole course of events, his actions betrayed significant ignorance, naivety and lack of awareness of his employment rights and tribunal procedure, no doubt resulting from his long continuous employment without disciplinary record with the respondent and never previously having been dismissed. Instead of being aware of a 3-month time limit but misapplying it, as was the factual context in Sodexo, the claimant here was wholly ignorant of that time limit.

9.3 Accordingly, the key decision for the Tribunal was whether he was reasonably or unreasonably ignorant in this way, when it was very easy for him with the assistance of his wife to carry out the research about unfair dismissal, including ACAS Early Conciliation and presenting a claim online. The decision was set always in the context that he knew of his right to two stages of internal appeal, which his shop steward was urging him to pursue. Of course, with the wisdom of hindsight, the claimant should have acted sooner in researching the position about an unfair dismissal claim or should have asked a more appropriate question of the shop steward, not: “What should I do next?” but perhaps: “How do I claim unfair dismissal (if I am not reinstated on appeal)?”. Not only did he not do so, he did not receive any advice about a Tribunal claim or time limits from the shop steward or trade union.

9.4 Ultimately, the Tribunal concluded that the claimant was so lacking in awareness of his employment rights and also shocked, almost shell-shocked by his dismissal and the impact upon his wife and then suffered anxiety and depression, all the while naively hoping that the appeal process would result in his reinstatement. Although he could indeed have made inquiries about making an Employment Tribunal claim, which would have alerted him to the time limits much sooner after his dismissal, the Tribunal concluded that it was not unreasonable for him here to defer investigating the position about a possible unfair dismissal claim until he knew the outcome of his final stage of appeal. Furthermore, he did not delay unreasonably thereafter, giving notification to ACAS under the early conciliation provisions on 28 July 2020 and presenting his claim on 30 July 2020.

9.5 In these circumstances, the claimant has proved on the balance of probabilities that it was not reasonably practicable to present his claim and that he did present it within such further period as was reasonable. His claim will now proceed to a final hearing.

9.6 A separate Case Management Order Is made re-listing the final hearing with a timetable of orders to be complied with.

Employment Judge Parkin

Date: 14 December 2020

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