Case No: 2307164/2020

EMPLOYMENT TRIBUNALS

Claimant: **A Freeman**

Respondent: **Sainsbury Supermarkets Limited**

Heard at: **London South (Croydon) by CVP On: 19 April 2021**

Before: Employment Judge O'Dempsey

Representation
Claimant: Warley (Solicitor)
Respondent: Liberadzki (Counsel)

JUDGMENT

1. The claimant's claims for unfair dismissal and unlawful deductions from wages were presented to the tribunal outside the time limit under sections 111 and 23 of the Employment Rights Act 1996. However it was not reasonably practicable to present them within those time limits and they were presented within a reasonable time after the expiry of those time limits and the tribunal accordingly has jurisdiction to hear the claim.
2. The claimant's claims for disability discrimination under the Equality Act 2010 were presented within the time limit under section 123 of that Act.

REASONS

1. This case was listed for an open preliminary hearing for just two hours. Both parties expressed reservations prior to the hearing as to whether it could be completed within the time available. I am grateful to the parties for sitting late in order to complete evidence and submissions. I reserved the decision. I heard evidence from the claimant and from Dr Rice, the claimant's father. There were relatively few technical problems in this CVP video hearing. I received submissions from both parties and I am grateful to them for these. I give my findings of fact below.

The effective date of termination

2. I find that the effective date of termination was 13 June 2020. The fact that the claimant was handed a letter giving 13 June 2020 as the date on which employment would end fixes that date. Accordingly there was no real dispute that the effective date of termination was later than this.

The nature of the discrimination claim

3. Paragraph 4.3 of the claim form states "by her appeal hearing it became clear that the employer was including the spells of absences (the ones relating to her ear)…" amongst other matters in the tally of sickness absences for which the claimant was dismissed. At paragraph 4.9 the claim form states "it is clear that Sainsbury's has taken actions to dismiss her which flow directly from lack of attendance caused by her disability and it is clear that Sainsbury's have failed to make sensible adaptations to accommodate her needs, or to apply existing HR policy to her specific situation." The claim form continues "the company could have implemented the decision by national representatives to apply the sickness rules in an adaptable way to (the claimant) because of her disability, but local store management has ignored this decision and placed the company in legal jeopardy".

4. The reference in paragraph 4.32 was a reference to what was being included throughout the disciplinary process including the appeal by the employer. In other words at the appeal, as well as before then, the complaint is that the employer was including the disability related periods of absence. On that basis I conclude that there is a complaint of failure to make reasonable adjustments continuing at the date of the appeal and a claim for breach of section 15 of an unfavourable treatment because of something arising from disability namely the absences.

5. The grounds of resistance did not plead to the document which was attached to the claim form and clearly forms part of it. However the way in which the respondent's grounds of resistance are pleaded simply is to set out the facts of the matter and which pleads in very broad terms of denial to the legal claims that are brought by the claimant as opposed to engaging with the factual claims by way of identified acts of discrimination. It is clear however that the claimant is complaining that throughout the process, including the appeal the respondent took into account these disability related absences.

Conclusion on continuing act

6. On the facts appearing above, I take the view that there is a claim for conduct extending over a period for the purposes of section 123 of the Equality Act 2010. That conduct came to an end on 22 July 2020. In the case therefore of the claims brought under the Equality Act 2010 I consider that the conduct extending over a period includes the dismissal and the appeal against dismissal. These form one continuing act of discrimination on the basis that they constitute the application of a policy by the respondent namely the sickness absence policy and in the alternative that they constitute an ongoing failure to make reasonable adjustments in respect of that policy. It will be for the tribunal hearing the full merits hearing to determine whether any of these acts in reality constitute unlawful acts under the Equality Act 2010.

7. If I am wrong about that, time should be extended for the reasons given below.

Reasons on just and equitable facts

8. There is a clear explanation as to why the claimant was unable to act for the time that she was in the clinic. I do not consider that her inability to present the claim during the short period from the end of the limitation period up to the date on which the claim form was presented on her behalf is a significant period. The respondent did not argue that there was any real prejudice to them. The respondent did seek to argue that I need to consider whether the claimant had brought the hardship that losing her claim for discrimination would represent upon herself.

9. I have no hesitation in rejecting the idea that the claimant's inability to present the claim within the time limit was something for which she can be blamed. This was a submission which was only made in outline.

10. There was clear evidence (in the form of the admission letter to the clinic) that the claimant was suffering from addiction problems which was so severe that they warranted a rapid intervention by her parents. They clearly had severe and overwhelming worries that if she continued drinking as much as she was, as rapidly as she was, then she would die.

11. I think that is an important factor also in considering how much mental space her parents, or indeed the claimant, could devote to presenting the claim. I have set out the details of the evidence which I accept in this respect below.

12. The claimant in her witness statement says that she began drinking in the period after the appeal, drinking too much, and during this time she found it more and more difficult to reply to texts and messages. She said that she did not want to answer the phone. She said that she could not face replying to people at this time. She describes a situation in which her sleep was very disrupted and that she was drinking from the time that she awoke, and sleeping when she was not drinking. She was sleeping most of the day. The claimant was asked questions about what she had said in her witness statement about the amount she was drinking and I accept that her account of her drinking too much and sleeping all the time is accurate. Her reply was that this was something she was doing from about August 2020 every day but that the quantity that she was drinking increased and that she would start drinking as soon she woke up. When challenged as to whether she would continue drinking into the evening or whether her drinking would stop she clarified that what she was doing was drinking while she was awake because her sleep pattern was as she put it "all over the place". She was she said drinking whilst she was awake. I found her evidence to be credible on this point.

13. I accept Dr Rice's evidence that it became apparent to him in September 2020 that the process of drinking and sleeping would go on indefinitely and that an intervention was necessary. He describes that the claimant self referred to the Manor clinic in Southampton. However during his oral evidence it became apparent that he was very instrumental in that process. Although it was a self referral, there was clear evidence of considerable parental involvement and discussion.

14. The claimant's father also described the practical consequences of the accelerating alcohol consumption in September and October. The claimant would not answer the phone and was not in a fit state to discuss options or the content

of the submission to the employment tribunal. Dr Rice makes the point that the claimant had all the relevant paperwork relating to her dismissal in her possession (and some paper work was with the union) but she was not well enough organised to deal with it.

15. I accept that the rules of the Manor clinic prevented progress being made as visitors were discouraged. Dr Rice, very fairly, says that this was the case for the first two weeks of the claimant staying there. He explains that during the four-week stay she did not have access to computer facilities but was permitted to answer texts. She was however, as part of the therapy, discouraged from active interaction with the family and with friends. The claimant said that her texts were confined to very brief reports that she was alright and progressing.

16. Dr Rice stated that the claimant could not during this time communicate effectively to give instructions or to initiate actions in respect of the tribunal case. In oral evidence he explained however that there came a point after the claimant had been admitted to the clinic that she effectively gave him instructions to proceed and submit the claim.

17. In his witness statement he stated that he completed the claim form on behalf of the claimant and as soon as he was able to obtain proper details from her. In oral evidence he explained that in fact most of the missing information was at the claimant's mother's house in her mother's possession. However the claimant explained that this consisted of the documents being kept in plastic bags, which needed sorting through. Dr Rice explained that he was unable to visit the house because of shielding from the start of March in the pandemic.

18. Dr Rice explained that the focus of the family's attention was, completely understandably, trying to get the claimant into a place where she could break the addiction into which she had fallen and to try to stop the process which they feared would result in the claimant's death.

19. Dr Rice accepts that he presented the claim eight days outside the normal limitation period for the purposes of unfair dismissal. It is clear to me, on the basis of his and claimant's evidence that she was not *able* to undertake actions herself or instruct others to act on her behalf. I accept that this is clearly the case while she was in the clinic. I also accept that for some time prior to going into the clinic it was not feasible for the claimant to present the claim if her description of her alcohol consumption and her pattern of behaviour (which was not challenged) is accurate. This is described in more detail at paragraphs 4-6 of Dr Rice's witness statement.

20. The ACAS early conciliation period started on 2 August 2020 and ended on 12 September 2020. At the start of that time it is clear that the claimant, or somebody on her behalf, was capable of making decisions and acting upon them. However the information required for the Acas form is minimal and it is also clear that it was around that time that the claimant's drinking was becoming unmanageable and having impacts on her ability to function.

21. The claim form was submitted on 21 October 2020 by Dr Rice and it was only on 3 November 2020 that the claimant left the clinic.

22. The respondent submitted that the claim form and attachment do not appear to contain any complaint about the appeal decision as distinct from the original

decision itself as an alleged act of discrimination. I set out above why I consider that on a reasonable reading the claim form does contain an allegation that there was a failure to make reasonable adjustments and or unfavourable treatment arising from something in consequence of disability at the appeal.

23. I therefore conclude that the appeal decision does form part of the claim and the respondent in those circumstances accepts that it is in time and likely to form part of conduct extending over a period with the dismissal itself.

24. However I have gone on to consider the question of whether if I am wrong about that matter the limitation period should be extended because it is just and equitable to do so.

Reasoning on just and equitable

25. The respondent's counsel made brief submissions on this question. Sensibly the respondent does not argue that there is significant prejudice to the respondent in the eight days by which the claim for discrimination was presented outside the time limit. The respondent posed the question as to whether the prejudice was is the claimant's own making. Whilst excessive drinking may appear to be a choice, it is plain from the amount of time that treatment was required in the clinic, that the claimant's state of addiction went beyond that. She was being treated for an addiction, and not simply for having decided to take drink on even several occasions.

26. The respondent was also not saying that any one fulfilled the role of an adviser to the claimant in the context of considering whether it was just and equitable to extend time under the Equality Act 2010 limitation period. That again seemed to me a very sensible position for the respondent to adopt. I have set out throughout my findings on Dr Rice's status in this process.

27. It was submitted to me that I had no medical evidence and therefore needed to consider what the claimant was saying in terms of her claiming to be suffering from depression without the benefit of that medical evidence so that I could not safely conclude that she was suffering from any of those conditions.

28. However it is equally clear to me that I must consider this case on the basis of all the evidence in front of me. On that basis it is absolutely clear that the claimant was in a situation in which she was drinking very large amounts of spirits and was effectively unable to function. I accept that at times she may have been able to talk to her father about matters relating to the case. However her father, although he has a PhD, is not a professional representative or anything like that.

29. There is, in any event, evidence from which the only sensible conclusion to draw is that the claimant's addiction was at such a level that it required a period of time sequestered in a clinic to break it. I have no hesitation in concluding that the claimant during this time was unable to function without considerable difficulty and could not function to the level that would enable her to think sufficiently clearly about her tribunal case so as to act on it.

30. I must be convinced that it is just and equitable to extend the time limit (see **Bexley community Centre (T/A leisure link) -v- Robertson** [2003] EWCA Civ 576). The exercise of the discretion is the exception and not the rule. However

this does not have the consequence that the claimant must put forward a good reason for the delay or that time cannot be extended in the absence of an explanation for the delay from the claimant (see **British Coal Corporation -v- Keeble** [1997] ICR 336 and also **DPP -v- Marshall** [1998] IRLR 494).

31. The discretion is a wide one. I must consider the factors relevant to the prejudice that each party would suffer if the extension were refused. I have to consider the length of and reasons for the delay. Here the delay was eight days whilst the claimant was still in the clinic and her father was coming to the point at which he took matters into his own hands. I am also to have regard to the extent to which the cogency of the evidence is likely to be affected by the delay and here the respondent accepts rightly that the cogency of the evidence will not be affected by this eight day delay. Other factors such as the extent to which the respondent had cooperated with requests for information are not as relevant in this case. I have to consider the promptness with which the claimant acted once she knew of the possibility of taking action. Here the question is not whether she knew whether she had the possibility of taking action but her ability during this time practically to take action. I have made my findings about that above. Lastly the cases suggest as a factor to be taken into account the steps taken by the claimant to obtain appropriate professional advice once she knew about the possibility of taking action. Here I think it is relevant that the claimant was in some confusion as to whether the union was taking the case forward for her or not. The question of what steps she took to obtain professional advice therefore is slightly more complicated because the claimant was in this state of doubt as to whether the union was taking care of matters.

32. I remind myself that that list is simply a useful checklist. The main emphasis of my consideration should be on whether the delay affected the ability of this tribunal to conduct a fair hearing. In that regard I have no hesitation in saying that the delay does not in any way affect the ability of the tribunal to conduct fair hearing. The Court of Appeal very recently revisited this question in the case of Adedeji -v- University Hospitals Birmingham NHS foundation Trust [2021] EWCA Civ 23. The Court of Appeal has now cautioned tribunal's against rigidly adhering to this checklist of potentially relevant factors, in particular those under section 33 of the Limitation Act 1980. We are now advised to avoid a mechanistic approach like this. So when I consider my discretion under section 123 (1) (b) of the Equality Act 2010 I have to consider all relevant factors in the case including the length of and reasons for the delay. In other words it is a discretion that has to be exercised judicially and having regard to all the circumstances

33. On the facts of this case as I understand them in relation to the delay I have no hesitation in saying that there is an adequate explanation for the delay and that the balance of prejudice is firmly in favour of the claimant. The delay is a very short one and there were very good reasons for it.

34. I have of course to be careful that I am not making an assumption about the reason for the delay. I have had regard to Dr Rice's evidence and that of the claimant (as tested in cross examination) in reaching my conclusion as to the explanation for the delay from 13 October until the date that the claim form was presented to the tribunal and I think it is most likely that the situation described by them both during that time is the explanation for the delay.

Reasoning on "reasonably practicable"

35. I must consider the legal tests in relation to the unfair dismissal claim and the unlawful deductions from wages claims. In this context the test for extending the limitation period is whether it was reasonably practicable to present the claim to the tribunal within the original three months time limit. As extended by the ACAS early conciliation period. The respondent submits that as the effective date of termination was 13 June 2020 the primary time limit was 12 September and this is to be extended by the ACAS conciliation period so that the extended time limit expired on 13 October 2020. This means that because the claim form was presented on 21 October 2020 it is eight days outside the primary limitation period. The claimant bears the burden of proof under section 111 (2) (B) of the Employment Rights Act 1996 to show that it was not reasonably practicable for her to present her claim in time and that she presented the claim within such further period as was reasonable.

The respondent's submissions on reasonable practicability

36. The respondent states that the claimant was aware of the three month time limit at the relevant time and the respondent says that the claimant's case is essentially that her mental health was so poor that she could not go about presenting the claim to the tribunal. The respondent seeks to challenge this by referring to the absence of medical evidence. The respondent does refer to the letter confirming admission to the Manor clinic between 6 October and 3 November.

37. The respondent referred to the case of **Midland Bank plc -v- Samuels** (UKEAT 672/92).

38. The respondent says that the fact that the claim form was submitted during the stay at the clinic contradicts the assertion that she was unable to do this during that period or before it. The respondent also says that I must take into account the behaviour of the claimant's father on her behalf.

39. The respondent says that the claimant cannot explain why her claim with the attachment that was already drafted could not have been submitted earlier than 21 October.

40. In relation to the claimant's abilities during this time she was asked about page 15 in the bundle which is a passage from the claim form. She explained that she wrote it but asked her father to read it through for her. This was given the date of 26 September 2020. Dr Rice's evidence on this point was that he had some input into this. When I asked him what that input was he said that the claimant had drafted the first draft of that part of the document based on material in her possession about absences and he then systematised it

41. When asked what other information he needed at 26 September Dr Rice explained that he felt he needed four items after that point in time. The first was the early conciliation number. The second was the employment details which he did not have. He also lacked the earnings hours and benefits and did not have the trade union representative's details. He explained that he knew that the union was supposed to be involved and he felt he needed aspects of information. He obtained these, on a date which was not clarified, but after the claimant was in the clinic. He contacted the claimant's mother who found the information stored

in bags in the claimant's room. Dr Rice explained that he could not go round to get the information because he has been shielding since March. He explained that rather than becoming clear at any particular point in time that the information needed to be retrieved, it became obvious when the claimant was in the clinic. The picture is one of an emerging need in circumstances where the claimant's attention and the family's attention was rightly focussed on getting the claimant's addictive and self destructive drinking under control.

42. Dr Rice agreed that it would have been apparent that the information was going to be needed some time before the claimant went into the clinic. However he stated that the claimant was in serious mental and physical jeopardy. The main focus was to get her into treatment and that they did not have time to do anything else.

43. Dr Rice explained that he did have doubts as to what the actual date of termination was. He accepted that on the most cautious view the date that the claim form needed to be submitted was 13th October. He explained however that his wife had to wade through what he described as masses of paper at the same time as their daughter was in jeopardy at the National addiction clinic to find the material.

44. He explained that it became clear from the end of September that he and the claimant's mother would need to "take over from her" (as it was put in the question to Dr Rice). He stated that this became clear from the end of September but that it also was clear that he had to spend days getting her into a clinic. It was put to Dr Rice that it must been clear to him that the claim was going to be out of time. He stated that he wanted to talk to the claimant about further details about the dismissal and the records of absence so that all those could go on to the claim form. He explained that those details never went in because he did not have the opportunity to talk to her.

45. It was put to Dr Rice that he had the detailed attachment which was already drafted and that it must have been clear to him that it was better to put in an incomplete document than to wait. He explained that he was hoping that the claimant would quickly recover and he would be able to talk to her but it proved not to be the case.

46. He could not talk to her due to her condition but also due to the rules of the clinic. It was on this basis that he decided that an incomplete version would be better to be submitted rather than a Rolls-Royce claim but it is clear to me that his understanding was that he still had some time to obtain the details from his daughter. When it became clear to him that he was not going to be able to do that he took what action he could his daughter having given him permission to act. The confusion (reasonable or not) of the claimant over what the proper date of termination should be played a role. Dr Rice believed, incorrectly, that the notice would run from the date on which the official letter was handed to the claimant. That would have been 26 May when the claimant was handed the official letter of dismissal. That would have yielded a dismissal date of 26 June, rather than 13 June. The limitation period would have expired on 25 October. The claimant appears genuinely to have believed that the official letter was the trigger for the notice period.

47. Unusually I permitted the respondent's counsel to reopen cross-examination on a point, with the agreement of the claimant's solicitor. It was put to Dr Rice

that he had said that he was not able to proceed on the online form but had to have all of the information but that it is only the parts of the form marked with an asterisk that do not permit you to continue in the online form. Dr Rice is not a professional in this area and he stated in reply to this question that he was simply trying to do a good job and answer the claim form. So whilst I accept that it would have been possible for him to complete the claim form without some of the information (but not the ACAS early conciliation number) without the other pieces of information, this was the first time that he had ever filled out one of these forms and I can quite understand why he felt he needed to fill in all of the boxes before proceeding to complete the form. As Dr Rice said he was simply trying to do a good job and answer the form. I also take into account that he was doing this under considerable pressure in terms of the situation confronting him, his daughter, and his family. I take into account that in accessing the information that was necessary for the form Dr Rice was having to liaise with a different household in a situation in which he was shielding and I take into account the fact that it would not have been apparent to lay people where the information was or how easily it could be obtained.

The claimant's submissions

48. The claimant's submissions on the question of whether it was reasonably practicable for the claim to have been presented within the true time limit were as follows. First of all the claimant properly accepted that the effective date of termination was 13 June.

49. The claimant argues that the claimant was not able to present the claim within the time limit because it was not reasonably practicable to do this.

50. The claimant relies on the case of **Shultz -v- Esso petroleum Co Ltd** [1999] ICR 1202. This was a case concerning somebody who suffered from depression and who was absent for about two years until dismissal following a disciplinary hearing which he was too ill to attend. He did not pursue an appeal against that dismissal (again due to being depressed). The dismissal took effect from 25 July 1996 and he was not certified fit for work until 16 February 1997. In March 1997 the claimant's solicitors asked for the reinstatement of the disciplinary proceedings which the employer refused. The three month time limit had expired on 24 October 1996 and the claim form in that case was presented on 17 April 1997. The tribunal chairman held that the claims were time-barred although the claimant had been too ill to instruct his solicitors in relation to the proceedings in the latter part of the limitation period running from 11 September 1996 until February 1997. This was on the basis that he had been sufficiently well to instruct his solicitors during the 7 to 8 weeks immediately following his dismissal. The chairman concluded that it had been reasonably practicable for him to have presented his complaints.

51. The Court of Appeal held that because the tribunal had proceeded on the basis that the complaints could have been presented during the first weeks of the limitation period therefore that automatically meant that it was reasonably practicable to present the claim within the limitation period. The tribunal had adopted too restrictive the construction of section 111. Determining whether it was reasonably practicable for an applicant to present the complaint within that limitation period, the tribunal had to consider the surrounding circumstances and

in particular the aim to be achieved by the limitation provision. It was legitimate to take into account whether the claimant was hoping to avoid litigation by pursuing other remedies. In those circumstances attention would focus on the closing rather than the early stages of the limitation period. Where illness is relied on, although its effects needed 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 crucial weeks leading up to the experience limitation period. The Court of Appeal held that the tribunal had misdirected itself in relation to the question of reasonable practicability.

52. The Court was clear that the question before them was the correct interpretation of section 111 (2) (b). So the court was explicitly considering the interpretation of the provision, and was not simply giving guidance to tribunals on the approach to the question of when it is not reasonably practicable to present the claim outside the time limit. The basis of the appeal was that the decision of the tribunal was perverse or wrong in law. The Court of Appeal reminded itself of **Palmer -v- Southend on Sea BC** and **Bodha -v- Hampshire area Health Authority** 1982 ICR 200 at 204.

53. The statutory words require the tribunal to have regard to what "could" be done albeit approaching what is practicable in a commonsense way. “Reasonably practicable” has been given the meaning of "reasonably capable of being done" and not “reasonable”. The phrase "reasonably practicable" should not be construed too restrictively to that which is reasonably capable physically of being done. However construing the words as being the equivalent of "reasonable" was to take too favourable view to the employee.

54. "Reasonably practicable" the Court noted "means more than merely what is reasonably capable physically of being done – different, for instance, from its construction the contents of legislation relating to factories…. In the context in which the words are used in the” [forerunner of the Employment Rights Act 1996] “however …as we think, they mean something between these two."

55. At page 1207A the Court noted "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 to the industrial tribunal within the relevant three months?" – is the best approach to the correct application of the relevant subsection.”

56. The Court of Appeal advised that a tribunal "will no doubt investigate what was the **substantial cause”** (emphasis added) “of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or **something similar** (emphasis added)". It was in that context that in **Palmer** the Court of Appeal stated "it will frequently be necessary for it to know whether the employee was being advised that any material time and if so by whom; of the extent of the adviser’s knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the industrial tribunal to ask itself whether there has been any substantial fault on the part of the employee or his adviser which has led to the failure to comply with the statutory time limit."

57. The Court of Appeal also considered **Walls Meat -v- Khan** [1979] ICR 52 at 60 F and the proposition that the performance of an act 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…" The Court of Appeal noted that in the submissions the employee's counsel acknowledged that is very much a matter for the tribunal applying principles of "practicable common sense" rather than "lawyers complications".

When considering whether the tribunal in the particular case had erred in law the Court of Appeal in that case stated that the decision was flawed firstly because it runs counter to the principles to which I have already referred. In particular the tribunal's decision was wrong in law because it failed to have regard to the fact that "whenever 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 the case of this kind the surrounding circumstances will always include whether or not, as here, the claimant was hoping to avoid litigation by pursuing alternative remedies. In that context the end to be achieved is not so much the immediate issue of proceedings as issue of proceedings with some time to spare before the end of the limitation period. That being so, in assessing whether or not something could or should have been done within the limitation period, while looking for while looking at the period as a whole, potential will in the ordinary way focus upon closing rather than the early stages. This seems to me to be so whether the test to be applied is that of simple reasonableness or, as here reasonable practicability."

58. The Court of Appeal also considered the submission that an illness should be assessed in its relation to the overall limitation period of three months. However it rejected the submission that a period of disabling illness should be given similar weight in whatever part of the period of limitation it occurred. "Plainly the approach should vary according to whether it falls in the early weeks or the far more critical later weeks leading up to the expiry of the period of limitation. But in terms of the test to be applied, it may make all the difference between practicability and *reasonable* practicability in relation to the period as a whole. In my view that is the position in this unusual case." (Emphasis in the original).

59. As against that the respondent relies on **Midland Bank plc -v- Samuels** (UKEAT/672/92). The first thing that is to be said about this case is that it does not appear that the **Shultz** case was referred to in it. Secondly it appears that the problem in the case was the claimant's representative had made assertions about the nature of the illness suffered which were not borne out by an alleged medical report from a general practitioner as to the nature of the applicant's illness. Third, looking at the medical report which was involved in that case it is clear why there were misgivings about whether it did anything like what the claimant's representative had claimed it did. The medical report gave a very tentative conclusion that the combination of the medical mental state and sedative treatment prescribed may have affected, albeit temporarily the claimant's memory at the time of her suffering anxiety and depression. It was pointed out that the submissions had gone well beyond that as the medical report

said nothing about the material time (her dismissal and the dates which followed it) and in particular in relation to an appeal which took place.

60. It is in that context that the UKEAT made the remark "first of all if a person asserts that they were unwell, then it is up to them to produce medical evidence of the extent and effect of the illness, and secondly, if the party is represented by a trade union, it is perfectly obvious that they must keep in touch with their representative. The same applies if they are represented by a solicitor or another type of expert, it may be a surveyor, or an accountant on a tax appeal or anything of that sort: it is fatal not to keep in touch with your representative because your representative is expected to take steps at various times on your behalf and needs your instructions now to deal with these matters. If you do not reply to letters, you move without giving your address to your representative, then that is not something that you can count in your favour. It is not a matter which you can rely on if you fail to take steps in time. The whole situation alters if it is alleged that you were unable to take these steps; that you were so affected by illness that you were not able to address your mind to your business affairs and were quite unable to take the steps which commonsense suggests." (Emphasis in original).

61. However the EAT made it clear that the problem was that what the trade union representative had said on the claimant's behalf was not supported by any evidence apart from the letter which was very weak and it was therefore incumbent on the face of it for the trade union representative to call the evidence.

62. The Samuels case however makes it clear that there was no evidence from the claimant: "the applicant's evidence in particular would have been very important on this. It may will be that what she had to say about her mental state at various times in her reasons for behaving as she did would have thrown a flood of light on it. It might have completely destroyed her case or it might have supported it to the hilt. We do not know".

63. It is clear from the remainder of that judgement that the proceedings below had been predicated upon an acceptance by the respondent's representative of the facts as stated, and no evidence was heard. The respondent in that case had been prepared to accept that the claimant was suffering from illness following her dismissal and so on and that it was not possible for the union to communicate with her. That was a case based on the fact that this concession should not have been made.

64. The appeal tribunal seems to have allowed the respondent to argue that there was never any intention by the respondent to concede everything that the trade union representative had said on the back of the weakly worded letter. So there was a mixup. Evidence was not called. It was only at the appeal tribunal that the respondent said that the concession was intended to go no further than the letter. The appeal tribunal decided that the respondent was at fault in making the concession rather than the tribunal being at fault. Interestingly, in the light of making that remark, the appeal tribunal considered that the right thing to do was to remit the case to the tribunal. This appears to have been done on the basis that the tribunal proceeded on a false basis and had therefore been prevented from doing its duty which is to do justice to both parties.

65. The general remark concerning the need to produce medical evidence therefore does not appear to be part of the ratio of the EAT's decision in that case. In any event the remark concerning the need to produce medical evidence where a medical condition is asserted appears to have been made without reference to Court of Appeal authorities which require a broader consideration of the evidence. I am bound by the Court of Appeal's approach to the interpretation of section 111.

66. Whilst of course it is correct that if a person asserts that they are unwell they should produce medical evidence of the extent and effect of the illness, that does not mean that the tribunal must ignore other evidence which can indicate the extent of the inability of the claimant. Indeed reading the judgement as a whole that does not appear to have been the intention of the UKEAT in the **Samuels** case. That is why it remarked that the claimant's own evidence was very important on the question of the degree of her illness and what she had to say about her mental state at the various times and her reasons for behaving as she did was capable of throwing a flood of light on this question of the degree and extent of her illness.

67. In considering the totality of the evidence in this case it seems to me that it is not correct to say that the claimant's case is essentially that her mental health was so poor that she could not go about submitting a claim. First the claimant has given evidence. Her father has also given evidence. She has given clear evidence as to the extent of her drinking. The claimant gave evidence that she was drinking bottles of spirits in a day and that her mental health had deteriorated because she had started drinking. She stated she was not answering the phone and just could not face anything. She stated that she wanted to be dead and was just drinking and hiding from everyone including, as she told me, herself. She explained that she felt that she had post-traumatic stress disorder and depression. Whilst that may be an assertion of a medical condition, and I do not take it to be medical evidence, what is not disputed is that the claimant's alcohol intake started spiralling to the degree that her parents were in genuine fear for her life and well-being. It was clear that she could not make necessary decisions as a result of her addictive drinking.

68. In those circumstances and applying ordinary commonsense I accept that the claimant's mental health will have deteriorated rapidly on consumption of so much alcohol over a prolonged period. I accept that the claimant barely managed to fill out the certification form and I accept that she was not mentally able to do anything at almost all times from shortly after the rejection of her appeal until shortly after her stay in the clinic started.

69. Because of the regime of the clinic to which she agreed to go after parental intervention she could not have proper contact. She explained that although she had her smart phone which let her access the internet the connection was patchy "to say the least" and it would not connect always. In any event she was not using her phone. She was in a situation where she was trying to listen to music in the evenings when not attending the therapies that the clinic provided. I also accept that there was a strong suggestion from the clinic, no doubt made for therapeutic reasons, that people attending the clinic should not be receiving or making phone calls. I accept, as the claimant told me, that she was responding to texts from her family that the information exchange was very limited: the claimant indicating that she was alright and it did not go beyond that in most instances.

70. The claimant's account of how the claim form came to be submitted differs slightly from that of her father and in a perhaps relevant way. She was asked in cross-examination whether during her time at the clinic she exchanged text messages about the matters referred to in the claim form and she replied that that was not the case. "He said I am going to take over. I did not want to think about it. I was focusing on what I was doing in the clinic" to get better."

71. Dr Rice's account in reply to a question from me was that at some point when the claimant was in the clinic she gave him permission to submit the claim form. I suspect that the truth lies somewhere in between these two accounts and I think it is most likely that the claimant's account is correct. At some point Dr Rice told the claimant that he was simply going to take over the process and she assented to that. However I do accept Dr Rice's account that this was after the claimant had been at the clinic for a few days.

72. I accept that the claimant was not really engaged with the process of writing the text for herself. She and her father in different ways both said that she stated what she had on the paperwork and then the father took that material and turned it into something which, as he put it, was more systematised.

73. I accept that between the beginning of September and the admission to the clinic the claimant did not have contact with her union representative and as far as she was aware her father did not have contact with the union representative. I accept the claimant's evidence that during the period of August to September 2020 she did see a GP and that she did have medical attention in that she received antidepressants. She described to me that she saw a GP about two weeks before 2 October and she was prescribed Sertraline a well known antidepressant.

74. There is evidence from the Manor clinic, an addiction centre, that the claimant was admitted as an inpatient for the period that the clinic mentions. I have heard and accept the evidence of the claimant that she was prescribed medication for depression. I do not accept that that tells me anything about the degree of the depression. However I do accept the claimant's evidence of the amount she was drinking and the pattern of her drinking and applying common sense to that excessive level of addicted drinking I have no hesitation in finding that the claimant was very seriously ill (whether or not a formal diagnosis of depression would be applied to this or whether it was simply some form of excessive addiction makes no difference for this analysis). She was plainly ill enough to warrant admission to the Manor clinic.

75. As far as the claimant was concerned I have no hesitation in finding that it was not reasonably practicable for her to present the claim for unfair dismissal within the limitation period.

76. I accept that the claimant's confusion over what the effective date of termination was not reasonable, I accept her evidence that she was genuinely confused as to what the correct date of termination should have been. This is because she had been told by managers and by her union that normally the process was that the notice period would run from the letter being delivered to the person who was the subject of the disciplinary proceedings. I also accept that the dismissing manager had repeatedly told her that this was not the case. However, the claimant appears to have remained confused. In the absence of the excessive addictive drinking I would have concluded that her confusion did not

assist in deciding whether it was reasonably practicable. On the facts of this particular case however it seems to me that whatever was being communicated to Dr Rice by the claimant, this confusion was being transmitted.

77. Having regard to Dr Rice's position in the light of the information which he was receiving from the claimant I consider that it was not reasonably practicable for the claimant to present the claim in time. Dr Rice is not a legal representative of any kind but a concerned father trying to do the best for his daughter in a situation in which he considered that her life was under threat because of her addiction. His intervention does not alter the fact that it was not reasonably practicable.

78. It is correct that he had an idea that the most cautious approach would be to treat the date of dismissal as 13 June. It is also true that he thought he needed to complete the claim form in as full a manner as possible before it was issued. I find that that belief was a reasonable belief on his part and I do not think that the fact that he might be criticised with the benefit of hindsight for not acting (essentially without his daughter's consent) before the point in time at which he obtained permission to act makes any difference. He acted as quickly as he could after he had effectively obtained permission to do so. I was not told the exact date on which he obtained the early conciliation certificate but I conclude that it is most likely that it occurred after the claimant was there in the clinic and after he had permission to proceed in issuing the claim form.

79. The difficulty of the situation in which the claimant and her family found themselves is illustrated by the fact that the question of the claimant's drinking was only discussed first with her and her mother at the end of September. It had been an escalating problem but it became clear that the claimant was drinking so much that she would be dead shortly, as Dr Rice put it, if she carried on. So this was a family that was trying to find a place for the claimant to go to break her addiction in these extreme circumstances. Dr Rice gave evidence that it took several days to find a place with a bed that could take the claimant.

80. I accept Dr Rice's evidence that it was not clear to him when the clock had started to tick for the three month time limit. This was because of the evident confusion in the mind of the claimant (which is likely to have been exacerbated if she was drinking as heavily as the evidence suggests). Dr Rice emphasised the difficulty he had in getting information from the claimant at the relevant time.

81. I accept also that the matter that was focusing his mind, apart from the immediate addiction difficulties that his daughter had, was the question of the paperwork and trying to get instructions about the paperwork and this was what was causing the real difficulty in making progress.

82. The respondent cross-examined Dr Rice on the fact that he had given 13 June as the effective date of termination on the ET 1 form. He said that he was unsure what to put and it was in this context that he said that it does not allow you to proceed to the next page until you had answered all the questions so he felt he had something there. I consider that Dr Rice was most likely reflecting on the claim form generally and misremembering the way in which the claim form actually works. I accept that what he told me does reflect what he believed he needed to do at the time. Dr Rice told me that he had proceeded on the basis

that 13 June was the only date that he had but that he was not sure when the dismissal had taken place due to the question of whether the dismissal needed to be confirmed by letter and the dates confirmed by human resources. It was put to him that once he had the ACAS conciliation he must have appreciated that 13 October was the limitation date. Dr Rice explained, and I accept, that he could not remember what he thought at the time because he was focused on his daughter. I accept entirely that in the circumstances of this case Dr Rice and his wife's attention would have been almost overwhelmingly focused on the life-threatening (as they perceived it) condition arising from their daughters drinking. Dr Rice explained that there was information that he did not have at the point in time when the claimant was admitted to the clinic. He could not therefore have submitted the claim form before that point in time.

83. I conclude applying common sense to the situation which has been described it seems to me that although it might have been practicable for the claimant and her family to submit the claim form (if that is even the right way of looking at this) it simply was not reasonably practicable for them to do so. First I have already found that the claimant herself could not and secondly in the circumstances of the difficulties of obtaining information and instructions from the claimant in her condition it was not reasonably practicable for Dr Rice to take independent action.

84. I accept of course that the claimant and her father had already drafted a letter for the appeal. Nonetheless Dr Rice explained that he felt he needed more information. He was not familiar with employment tribunal proceedings. I consider that his ignorance of them was reasonable. It is also clear that both he and the claimant were not aware of whether the union was going to be in touch with them, was taking care of the claim or what their involvement was likely to be for either all or most of the limitation period.

85. When asked why the information could not have been retrieved from the plastic bags in the claimant's bedroom at her mother's Dr Rice explained that he had been shielding since March and could not go round to get them. He also explained that it was a process and that it was not clear at any point. However it became obvious when the claimant was in the clinic and it was at that point that he asked the claimant’s mother to try and obtain the information.

86. I accept that in commonsense terms before getting the claimant into the clinic there was realistically no time to do anything else but concentrate on what the family perceived as the necessary and life-saving intervention. Dr Rice was clearly trying to get the claimant to get information and other matters together to present the claim, but I accept that the opportunities to do this were very intermittent given the claimant’s state. It was also the claimant’s case, and at that stage Dr Rice had no permission to submit it.

87. The admission to the clinic was on 6 October which left a week before the claim needed to be submitted on the "most cautious view". I accept what Dr Rice told me that at the time the claimant was admitted to the clinic both he and she had a doubt as to what the correct date of termination actually was. Also once he had obtained permission to take over the submission of the claim, his wife (without Dr Rice being present) needed to "wade through masses of paper at the same time as Rosa was in jeopardy in the national addiction clinic". Once again it seems to me that although it might have been practicable it was not reasonably

practicable in those circumstances for the information to have been obtained during that first week that the claimant was in the clinic.

88. Dr Rice readily accepted that it had become clear from about the end of October that he and the claimant's mother would need to "take over" from her. However he explained that he had to spend days getting the claimant into the clinic so once again the importance of the intervention that was taking place and the difficulty of ensuring that that intervention did take place rendered it not reasonably practicable for the claim to have been presented during this time.

89. In the end Dr Rice explained that he did simply put in what he regarded as an incomplete claim form. This was another factor which delayed his action. He had thought he needed to put in further details about the dismissal and of the sickness record in order to get those into the claim form. He explained those details never went in because he simply did not have the opportunity to talk to the claimant.

90. When he was asked whether he agreed that because he had the detailed attachment with his input by the point in time when he took over he must have taken the view that it was better to put in a slightly defective claim form, Dr Rice replied that he was hoping that the claimant would recover quickly and be able to talk but that this proved not to be the case as a result of her care condition but also as a result of the rules of the clinic.

91. Once again I apply my commonsense to that set of circumstances and I consider that Dr Rice's evidence is the correct explanation for why he did not act and in the circumstances was an entirely understandable reaction. He was trying to act in the best interests of his daughter who was plainly not reasonably capable of acting on her own behalf in any practical sense (whether she had legal capacity although she is likely to have had some). Eventually Dr Rice decided to put in an incomplete version rather than the perfected version of the claim that he had been hoping to achieve and which he had thought he needed to complete. It was put to Dr Rice that he could and should have done all this work by 13th of October and that it could feasibly have been done. He robustly the rejected that idea. In the circumstances that he described then I am very happy to accept that he is right.

92. Although I rejected the idea that it could not practically have been done, I agree that it could not reasonably practicable be done, or to put it another way I rejected the idea that it was reasonably feasible.

Further reasonable period

93. In considering whether the claim form was put into the tribunal by Dr Rice within a further reasonable period I accept in the circumstances that it was presented to the tribunal within a further reasonable period. It is not clear to me when exactly the claimant told Dr Rice to proceed without her. I have given my conclusions as to roughly when this must have been (or is most likely to have been). The explanation for the period of delay beyond the limitation period remains the same as the explanation for the delay prior to it. The claimant was unable to act, and it was not reasonably practicable for Dr Rice in the circumstances I have found to present the claim earlier (albeit that it might have been practicable).

94. I accept that Dr Rice was attempting in these difficult circumstances to proceed with as much haste as he could given his understanding of the situation. I therefore conclude that the 8 days after the limitation period had run out was a reasonable time within which the claimant presented the claim form.

95. Therefore the unfair dismissal claim and the claims for unlawful deductions are not presented outside the relevant time limits.

Conclusion

96. For those reasons the claimant's claims will now proceed to a full hearing and should be listed for a further case management hearing. Listing letters should be sent out for that purpose.

Employment Judge O'Dempsey

Date 26 May 2021