



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. S Greeves

**Respondent:** Stamford Products Limited

**Heard at:** Manchester Employment Tribunal and by video link      **On:** 13th July 2021 and 26<sup>th</sup> July (in chambers)

**Before:** Employment Judge R F Powell

**Representation:**

**Claimant:** In person, assisted by Mrs E Curtis

**Respondent:** Ms Kaye, of counsel

## JUDGMENT

The judgment of the employment tribunal is that:

1. From late January 2020 the claimant was a person with the protected characteristic of disability for the purposes of section 6 of the Equality Act 2010.

**2. It was reasonably practicable for the claim of unfair dismissal to have been presented within the statutory time limit. The claim of unfair dismissal was presented outside the prescribed period and is therefore out with the Employment Tribunal's Jurisdiction and is dismissed.**

**3. It is just and equitable to extend the time for presentation of the claims of disability discrimination to the 7<sup>th</sup> August 2020, accordingly the claims of discrimination are within the Employment Tribunal's jurisdiction.**

## REASONS

### Back ground

1. On the 7<sup>th</sup> August 2020 Mr Greeves presented a claim for unfair dismissal and disability discrimination.
2. His claim stated that he had been suspended from his employment on the 12<sup>th</sup> March 2020 following an altercation with a colleague whom Mr Greeves believed was about to physically attack him. Mr Greeves stated that he used a modicum of physical contact to defend himself. His colleague reported the incident to the respondent as an allegation of assault. Mr Greeves did not report his colleague's conduct at that time.
3. Later that same day Mr Greeves was suspended and interviewed. He later attended a disciplinary hearing which concluded that Mr Greeves was the aggressor and the respondent dismissed him without notice on the 6<sup>th</sup> April 2020.
4. Mr Greeves appeal hearing took place on the 4<sup>th</sup> June 2020. The appeal upheld the decision to dismiss.
5. The three-month time limit for the presentation of a claim for unfair dismissal (section 111 of the Employment Rights Act 1996) and disability discrimination (section 123 of the Equality Act 2010) expired on the 5<sup>th</sup> July 2020, a month after the appeal hearing.
6. Mr Greeves made contact with ACAS on the 9<sup>th</sup> July 2020 and the Early Conciliation certificate was issued on the 10<sup>th</sup> July 2020.
7. Mr Greeve's claim was presented on the 7<sup>th</sup> August 2020 and the Respondent's Grounds of resistance on the 10<sup>th</sup> November 2020.

### The Issues

8. On the 25<sup>th</sup> of February 2021 Employment Judge Johnson conducted a preliminary hearing which led to an order that a further, open preliminary hearing, would take place to determine four issues.

**CVP**

- a. Whether it was reasonably practicable for Mr Greeves' claim for unfair dismissal to have been presented within the time limits set by section 111 of the Employment Rights Act 1996, and, if not, had it been presented within a further reasonable period of time.
- b. Whether the time for the presentation of a claim of disability discrimination should be extended in order that such a complaint could be accepted by the tribunal and allowed to proceed in accordance with section 123 with the Equality Act 2010.
- c. Was the claimant was disabled at the relevant times and, if so;
- d. Did the respondent have the requisite knowledge of the claimant's disability for the purpose of sections 13, 15 and 20 of the Equality Act 2010.
- e. Lastly, if either or both of the claims were found to be within the tribunal's jurisdiction to identify the relevant issues in the case and make appropriate case management orders including listing the case for the final hearing.

The parties present today

9. Today the claimant, Mr Stephen Greeves, appears on his own behalf with the assistance of Mrs Curtis who spoke with care and clarity on his behalf. I agreed that the claimant should take a break at such times as he, or Mrs Curtis felt it was needed and they would indicate their best estimate of how long was needed. A similar approach was taken to the opportunity to respond to the closing submissions of the respondent.
10. The respondent is represented by Ms Kaye of counsel.
11. The parties have agreed a joint bundle which has been provided to the tribunal electronically and Mr. Greeves has prepared a statement in relation to his disability and a second statement which sets out the characteristics of the claims of discrimination which he seeks to bring before the tribunal.

Limiting the issues to be determined today

12. At the outset the parties agreed that, given the number of issues that fell to be determined today, the reasonable adjustments necessary for Mr Greeves to have the opportunity to fully partake in this hearing and the need for oral evidence, that the issues of whether or not the

respondent had the requisite knowledge of the claimant's disability, if proven, and case management orders could not realistically be considered and concluded in one day.

13. Mr Greeves gave evidence on all three issues which fell to be determined today and he was cross examined upon his handwritten and signed witness statement and additional matters which were gleaned from the content of correspondence and the medical records as contained within the bundle prepared for this hearing.

14. It is probably helpful for the tribunal to determine the issue of disability first because, without such a finding, the question of the admissibility of the disability discrimination claims would be unnecessary.

**The issue of disability.**

*Section 6 of the Equality Act 2010 states as follows:*

*Disability*

*(1) A person (P) has a disability if—*

*(a) P has a physical or mental impairment, and*

*(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

*(2) A reference to a disabled person is a reference to a person who has a disability.*

*(3) In relation to the protected characteristic of disability—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*

*(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*

*(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*

*(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

*(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

*(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*

*(6) Schedule 1 (disability: supplementary provision) has effect.*

The Evidence

15. In this case, at page 125 of the bundle, is a letter from Dr R Williams, dated the 6<sup>th</sup> March 2021. The Doctor records that the claimant had first approached his former GP on the 8<sup>th</sup> April 2020 (two days after his dismissal). The claimant's medical record for that date states:

"Problem: Depressed Mood. And records that an eMED3 new statement was issued; not fit for work. The medical records provided to the tribunal show no earlier diagnosis of poor mental health.

16. The claimant was initially prescribed citalopram the dosage of which was later increased and a prescription of Propranolol was later given to assist with the claimant's anxiety.
17. The claimant attended his GP for his depression and anxiety monthly until July and then again in October /November 2020. Dr Williams reports that two days before the previous preliminary hearing the claimant attended his GP and described being agitated, unable to sleep and unable to eat.
18. She concludes:

"To summarise, Stephen has been struggling with depression and anxiety triggered by Multiple significant life events which had led to a recent deterioration in his mental health"

19. Dr Williams also set out a summary of the "triggers" the claimant had reported:

"He had been suspended from his employment pending a disciplinary hearing, he had lost his child at 16 weeks. Following this, his partner had severe difficulties with her own mental health, including a suicide attempt. Stephen was required to do the majority of caring responsibilities for the family, including their child who was 16 months old at the time".

20. She also records that, as of the 8<sup>th</sup> April 2020, the claimant described the presence of his symptoms over six months prior to the 8<sup>th</sup> April 2020; circa early November 2019.

21. I note that section 8.7 of the ET1 states that the incident at work which led to the claimant's suspension was an act that:

"was out of character as a symptom of my mental health is being on high alert and defensive more than normal due to my depression and anxiety".

The date stated is the 13<sup>th</sup> March 2020, however the correct date for the incident is the 12<sup>th</sup> March 2020.

22. It goes on to state:

"Current mental health has deteriorated since the suspension from my employment and subsequent dismissal. I have been administered with a number of medication tablets that I have to take daily due to my mental health condition."

23. I take "current" to refer to the claimant's state of health around the date of the presentation of the claim on 7<sup>th</sup> August 2020.

24. That statement is confirmed by the claimant's document, sent to the Employment Tribunal on the 3<sup>rd</sup> December 2020 [62-64] at point 3:

“Unfortunately, my mental health has continued to deteriorate due to my dismissal from Stamford Products”

25. In the claimant’s document titled “List of Issues for consideration at the preliminary hearing” [65], under the title “Claimant’s Mental Health Condition.” The claimant explains that his mental impairment caused the following disadvantages to him; lack of concentration, memory loss and forgetfulness which had the effect of impairing his ability to meet deadlines or remember to attend scheduled appointments.
26. The claimant was cross examined. He described his family circumstances following the sad events summarised in the above quotation from Dr Williams’ letter. I have my contemporaneous notes of his evidence but it is proportionate here to record that the care for his partner and two children; 5 years and 16 months old respectively fell to the claimant. Such care included all the domestic responsibilities for his partner and the children and, after his return to work on the 5<sup>th</sup> October 2019 he still had to maintain his care for his family.
27. From that time, until late January 2020 when his partner and the children went to live with her parents, the claimant was working full time in the day and caring for all the needs of his family in what remained of his waking hours. It was an arduous task. In this period the claimant describes incidents of “nodding off” at work when on duty in his security cabin.
28. The claimant also described his current circumstances. He has lost all motivation to care for himself, he has a significant inability to concentrate, to assimilate information or recall facts. He has difficulty sleeping and suffers from side effects of his medication.
29. I note that it is evident from the content of the ET1, the initial diagnosis in April 2020, the increase in the levels of medication and Dr Williams letter that the claimant’s circumstances have become steadily worse. The degree to which the claimant was impaired today, compared to the description of his former achievements in World Championship Thai Boxing, is evident and persuasive.

The parties’ submissions

30. The respondent referred me to the case of Herry v Dudley Metropolitan Borough Council [2017] WLR(D) 205, a case where a claimant’s stress, on the particular findings of fact, was found not to amount to a disability. The respondent emphasised the degree to which the claimant, on his own description was functioning, almost heroically, in his consistent care for his family and his attendance at work.
31. The respondent asserted that, up to the date of the claimant’s dismissal, the symptoms the claimant associated with depression and anxiety were minor or trivial in their adverse effect upon normal day to day activities. It relied on the letter of Dr Williams which recounted the claimant’s description of his symptoms in April 2020: “poor sleep, reduced appetite and headaches” a narrower set of symptoms to those the claimant now suffers.

32. The Respondent went further to assert, that if the claimant was disabled, the duration of his disability, at the time of the last pleaded act of discrimination had not lasted 12 months and was not likely to do so; Patel v Metropolitan Borough Council [2010] IRLR 280.
33. For the claimant, Mrs Curtis pressed upon me the current level of impairment which was imposed upon the claimant by his depression and anxiety, the degree to which his medication was alleviating those substantial disadvantages and invited me to conclude that the claimant had been so impaired from the outset; in particular since September 2019 and thus it was proper to conclude that at the material times, in particular September 2019 onwards, I should find that the degree of impairment was substantial and likely to last at least 12 months.

#### Discussion

34. I remind myself that it is for the claimant to establish that he has the protected characteristic of disability.
35. The definition under the Equality Act is simply that a person has a disability if:
- "(a) he has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."

#### *Impairment*

36. In this case the asserted disability is a mental impairment, and one which for the period from the 8<sup>th</sup> April 2020 onwards has been diagnosed by a doctor whose opinion has not be subject to criticism for the period between 8<sup>th</sup> April 2020 and the date of this hearing.
37. In the period prior to the 8<sup>th</sup> April 2020 there is a dispute of substance. The essence of my task is reflected in the judgment in the case of J v DLA Piper UK [2010] ICR 1052. Wherein Underhill P (as he then was) said:
- “42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as “clinical depression” and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or - if the jargon may be forgiven - “adverse life events”. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be

recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as “depression” (“clinical” or otherwise), “anxiety” and “stress”. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant’s ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering “clinical depression” rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.”

38. My first conclusion is that I must consider and analyse two distinct periods of time; before and after the 8<sup>th</sup> April 2020. The later period is better evidenced in the claimant’s oral evidence and is corroborated by medical opinion. The antecedent period is without a clear medical opinion, less well evidenced by the claimant and must be carefully considered so as to exclude factors which are likely to have exacerbated the claimant’s impairment but which occurred only after 12<sup>th</sup> March 2020

*8<sup>th</sup> April 2020 Onwards*

39. I accept the diagnosis of Dr Williams; the claimant had a clinically well recognised condition; depression, with anxiety, by the 8<sup>th</sup> April 2020.
40. Secondly, I find that the evidence before me demonstrates that the claimant’s impairment was exacerbated by external factors, which in my judgment, had a cumulative adverse effect; as described by Doctor William’s in her letter of the 21<sup>st</sup> March 2021.
- 41.
42. The exacerbating factors which occurred in 2020 /21 and which were in evidence before me and, in part, are referenced in Dr William’s opinion are:
- a. The claimant’s partner returning to her parents' home at the end of January 2020,
  - b. the 12<sup>th</sup> March 2020 suspension of the claimant<sup>1</sup>,
  - c. the 6<sup>th</sup> April 2020 dismissal of the claimant<sup>2</sup>, and
  - d. the 25<sup>th</sup> February 2021 Preliminary Hearing<sup>3</sup>

---

<sup>1</sup> Page 8 of the bundle; penultimate paragraph.

<sup>2</sup> see page 61 of the bundle where the claimant states: “My mental health has severely deteriorated due to the dismissal caused by Stamford Products”.

<sup>3</sup> see page 126 of the bundle.



43. The claimant's own comment in his appeal hearing of the 4<sup>th</sup> June 2020 [188, third paragraph] largely corroborates my view that the claimant's suspension and dismissal were the more significant causes of the claimant's depression. Based on the above I find that the claimant had the impairment of Depression and Anxiety at the 8<sup>th</sup> April 2020.

*Prior to 8<sup>th</sup> April 2020*

44. This period must be considered in two parts which reflect the way the claimant's case is pleaded:

- a. That the claimant had been suffering from depression for a number of years through work issues. This assertion is made in the claimant's proposed further particulars of claim<sup>4</sup>, and
- b. Beginning with the distressing experiences of September 2019.

45. With regard to the period of "several years". I have noted that there is no reference to any mental health issue in the claimant's medical records prior to April 2020.

46. There is no reference to any history of low mood or anxiety prior to October 2019 in Dr Williams' report.

47. The claimant's written statement [ page 88] provides no evidence of depression or anxiety for several years prior to October 2019 and the claimant's oral evidence did not set out any facts on this issue.

48. I must determine this issue on the available evidence and, it is for the claimant to establish his case on this issue. In my judgment there is insufficient evidence for me to accept that the claimant had the mental impairment of depression and anxiety for "several years" before his dismissal.

49. The period from September 2019 to the claimant's suspension is less clear; there is neither medical record or medical opinion for this period beyond Dr Williams' statement (referring to the claimant's 8<sup>th</sup> April 2020 consultation);

"At that point he reported experiencing low mood and anxiety for six months"

50. I do not find that this statement is a diagnosis, rather it is a reported summation of a patient's own description of their symptoms.

---

<sup>4</sup> The statement of Alan Oldham [ pages 110 -112 of the bundle] at paragraphs 1 -4, asserts incidences of disability discrimination in 2013, 2015 and 2017.

51. In light of the claimant's pleaded case; that his suspension and dismissal had caused a severe deterioration in his mental health by the 8<sup>th</sup> April 2020, I have concluded that his mental health symptoms were less severe in the period before his suspension. For instance, from September 2019 to February 2020 the claimant's mental health did not make him too ill to attend work as it did in April 2020.<sup>5</sup>
52. I find that, in the period from early September 2019 the claimant was met with a series of difficult events, none of which was resolved and each of which added to his emotional burden.
53. The distressing events in September and October 2019, the additional practical stresses on the claimant's return to work (whilst also looking after his partner and their family,) would, more likely than not, have had a gradual and cumulative adverse effect upon his mental health.
54. I note that the claimant remained able to attend work. He gave evidence of occasions of falling asleep at work; which he associated with his mental health but I am not confident of that direct association in the absence of a medical opinion and the presence of a physical cause for his tiredness; the burden of caring for his family as well as his full-time work.
55. He further gave evidence of seeking help, for example compassionate leave which, on his case, fell upon deaf ears.
56. There is no "bright line" event, or evidence of substantial disadvantage in 2019 which, by its nature, identifies a point in time where the claimant's distress would fulfill the statutory elements of an impairment which caused a substantial disadvantage in the claimant's ability to perform normal day to day activities.
57. However, in early 2020 his partner's decision to live with her parents, and to take the children with her, was clearly a further emotional weight upon the claimant which he had to bear alone. On the balance of probabilities (and taking into account my decision on "substantial disadvantage as set out below), I find that the claimant was more likely than not to have had the impairment of depression and anxiety by the end of January 2020.

*Substantial disadvantage*

58. It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what I have to consider is the adverse effect upon the claimant's ability to carry out normal day-to-day

---

<sup>5</sup> page 140: Med3 certificate issued on the 8<sup>th</sup> April. Its duration is not stated but the subsequent Med3 was issued on the 20<sup>th</sup> May 2020 which suggests the duration was approximately 5 to 6 weeks.

activities. My focus must necessarily be upon that which the claimant says he cannot do as a result of his mental impairment.

59. Once he has established that there is an adverse effect upon his ability to carry out normal day-to-day activities, I must then assess whether that effect is substantial.
60. Section 212(1) of the Act states that Substantial means more than minor or trivial. In other words, if I find the adverse effect is not minor or insubstantial it must be treated as substantial.
61. In light of the claimant's medical advice that, as of the 8<sup>th</sup> April 2020 he was unfit to attend work in any capacity (he was no longer an employee of the respondent at that date) I find that his impairment had a substantial adverse effect on his day-to-day activities from that date.
62. I also accept his evidence that, prior to his dismissal his anxiety headaches debilitated him from any activity until they passed or were sufficiently relieved by medication<sup>6</sup>. I also accept that the claimant's inability to sleep at night left him exhausted during parts of the day and that by the end of January 2020 the only cause for such exhaustion was his impairment. His depression had reduced and altered his social interaction. I note, and accept, the statement in the claimant's ET1 that the incident for which he was suspended was "an act out of character as a symptom of my mental health is being on high alert and defensive more normal". I find that the adverse impact on each of these effects was substantial. I also find that the cumulative effect of the above amounted to a substantial adverse effect on the claimant's normal day to day activities.

Had the disability lasted for, or was it likely to, last 12 months?

63. The adverse effect is long term if it has lasted for at least 12 months or it is likely to last for at least 12 months; Equality Act 2010, Sch1 Part 1. The test of likelihood is that set out in Boyle v SCA Packaging Ltd [2009] ICR 1056, HL, namely that the substantial adverse effect 'could well happen' i.e. a real possibility. The likelihood test involves an objective assessment. In particular I note paragraphs 69 and 70 of the Judgment wherein Baroness Hale stated:

“69 There are very good reasons for concluding that, in this case too, Parliament did not intend that “likely” should mean “more likely than not”. We are used, in civil proceedings, to deciding whether or not something has happened in the past “on the balance of probabilities”. We ask ourselves whether it is more likely than not that something happened. We usually have a good deal of evidence to help us decide what went on. Once we have done so the event is treated as a fact: it was probable, therefore it was certain: see, for example, *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] 1 AC 11, para 2, per Lord Hoffmann.

---

<sup>6</sup> The effect of measures taken to treat or correct an impairment are of course excluded from consideration where those measures, if not being taken, would be likely to mean that the substantial adverse impact would be present (Equality Act 2010, Sch1 Part 1; Guidance, para B12).

70 But predictions are very different from findings of past fact. It is not a question of weighing the evidence and deciding whom to believe. It is a question of taking a large number of different predictive factors into account. There are cases, as my noble and learned friend, Lord Rodger of Earlsferry points out, in which the doctors can predict with all too much confidence what will happen to the patient. But in many others, putting numbers on what may happen in the future is a guessing game. Who can say whether something is more than a 50/50 chance? That is what the doctor in *Latchman v Reed Business Information Ltd* [2002] ICR 1453 found so difficult. But assessing whether something is a risk against which sensible precautions should be taken is an exercise we carry out all the time. As Girvan LJ put it in the Court of Appeal [2009] IRLR 54, para 19:”

64. The Tribunal is not entitled to consider what happened after the date of the act of last alleged discrimination when deciding whether the effect did, or did not, last 12 months; Dougall v Richmond Adult Community College [2008] ICR 431, confirmed in All Answers Limited v W [2021] EWCA Civ 606). The Tribunal must look at the facts and circumstances existing at the date of the claimed acts of discrimination.
65. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material period, see Cruickshank v VAW Motorcast Ltd [2002] 729, EAT.
66. In this case the claimed acts of discrimination, set out in the claim form and the proposed further and better particulars of claim<sup>7</sup>, happened on or before 11<sup>th</sup> June 2020; the date of the claimant’s appeal was dismissed.
67. Based on my findings of fact and my decisions, as set out above, by the 11<sup>th</sup> June 2020 the claimant had, for the purposes of Section 6 of the Equality Act, been a person with a disability for about four and a half months.
68. The question I must determine is this; “as of the 11<sup>th</sup> June 2020, was it likely that the claimant would continue to be a person with a disability until late January 2021?”
69. The claimant and Mrs. Curtis may very well expect that the answer to that question could only be “yes”; because the evidence available to me on the 13<sup>th</sup> July 2021 demonstrates that the claimant’s health worsened. But, as I have set out above, I am required to assess “likelihood” without taking into account information that postdate the 11<sup>th</sup> June 2020.
70. From the claimant’s medical records, I note that on the 8<sup>th</sup> June 2020 a Med3 certificate was issued stating that the claimant was not fit for work. I glean, from the date issue of the next certificate (24<sup>th</sup> July 2020) that the 8<sup>th</sup> June certificate covered a five- or six-week period.

---

<sup>7</sup> For the purposes of this decision I have taken into account the claimant’s oral explanation of his proposed further and better particulars of claim.

71. Thus, as of the 11<sup>th</sup> June 2020, it was evident that the claimant would, by reason of his impairment be unfit to work for at least five weeks.
72. I have read the respondent's note of the claimant's interaction and oral representations at his appeal hearing of the 4<sup>th</sup> June. The notes give the impression of a person who is coherent, and responsive.
73. Further I note that the claimant's appeal was his last opportunity to remain in employment and the rejection of his appeal was likely to have, at best, a neutral effect and quite possibly an adverse effect on the claimant's mental health.
74. Balanced with the above was the possibility of some recovery through treatment to which the claimant referred in the appeal hearing; (medication and counselling) and the removal of any future contact with people whom, on the claimant's further and better particulars of claim, had created and maintained a hostile working environment for a number of years.
75. I remind myself that the test which I must apply is not "on the balance of probabilities"; a test which by its own logic sifts one probability from amongst a number of possibilities. I consider that the test of "could well have" allows for more than one possible future outcome; thus, it is possible for a tribunal to conclude that a claimant's disability "could well have continued for 12 months" and also conclude that the same disability "could well have ceased within 12 months". Those contrary likelihoods, at least in principle, are not mutually exclusive.
76. What must be established by the claimant, is that the continuity of his impairment and its substantial adverse effects on normal day to day activities, was a possible future that "could well have" occurred.
77. I have cautioned myself to consider only those substantial adverse effects which were present, on the evidence before me, as of the 11<sup>th</sup> June 2020. In that respect, as set out in my findings of fact, they are the three symptoms recorded in Dr William's letter; poor sleep, reduced appetite and headaches.
78. Whilst I acknowledge the possibility that for the reasons I have noted above, the claimant's health "could well have" recovered. The claimant has discharged the burden upon him to persuade me that, as of the 11<sup>th</sup> June 2020, it could well have happened that the claimant's reaction to the appeal outcome, his continued unemployment, his reduced means and his continued substantial isolation from his family would lead to a continuation of the aforesaid symptoms and that those symptoms would continue to have a substantial adverse effect on his ability to undertake normal day to day activities for a year.
79. By reason of the above, in my judgment, from late January 2020 the claimant was a person with the protected characteristic of disability for the purposes of section 6 of the Equality Act 2010.

Section 111 of the Employment Rights Act 1996

80. It is common ground between the parties that:

- a. The claimant's effective date of termination was the 6<sup>th</sup> April 2020,
- b. That the three-month period set out in Section 111 expired on the 5<sup>th</sup> July 2020
- c. That the claimant commenced early conciliation on the 9<sup>th</sup> July and
- d. The claim was presented on the 7<sup>th</sup> August 2020
- e. And accordingly, he makes an application under section 111 (2)(b) of the Employment Rights Act 1996.

81. The essence of Mr Greeves' application, as set out in his witness statement, is:

- a. That, in all the circumstances, it was not reasonably practicable to present his claim in accordance with section 111(2)(a) and;
- b. That he presented his claim in a further reasonable period.
- c. That, due to his disability he was particularly dependent upon the advice of the regional officer of his trade union.
- d. That he informed the regional officer of his desire to claim unfair dismissal at the employment tribunal in April 2020 and sent documentary evidence to the officer the same month.
- e. Despite that, and the regional officer taking part in the claimant's appeal hearing on the 4<sup>th</sup> June 2020, his trade union did not inform him of the existence of a limitation period or the last date for presenting a claim until the 18<sup>th</sup> July 2020; when it was too late. However, he had become aware of the time limit, and the need to contact ACAS, via a friend and he did so on the 9<sup>th</sup> July 2020.
- f. Thereafter, given his disability, his lack of understanding and his lack of money, he acted reasonably quickly in instructing someone who could complete the ET1 form competently and could also promptly submit it for him.

82. The respondent opposes both limbs of Mr Greeves' arguments and invites me to strike out his case.

Documents and witness evidence

83. I have had the benefit of considering the content of the ET1, ET3 and Mr Greeves six-page statement along with the various items of correspondence (by electronic message and email) between him and his trade union's regional organiser.
84. In cross examination the essence of Mr Greeves' case remained the same. It became clear that the principal reason for the late presentation within the primary period ( i.e. to the 5<sup>th</sup> July 2020) was the failure of the trade union's regional officer to provide advice to the claimant despite the trade union's awareness of Mr Greeves' health difficulties.
85. After Mr Greeves' oral evidence, I heard submissions from Mrs. Kaye for the respondent and I then allowed Mrs. Curtis and Mr Greeves some time to formulate a response.

#### Discussion and Conclusions

86. I accept Mr Greeves' evidence. In particular, based on his witness evidence I find that his mental health declined during the months of June and July and he became physically isolated and found it increasingly hard to assimilate, process and retain unfamiliar information. This in turn increased his reliance on the Trade Union's Regional Officer for guidance and advice. I also accept that the said officer was aware of Mr Greeves' mental health condition.
87. In my judgment the reason why the claim was not presented before the 5<sup>th</sup> July and why the ACAS conciliation process had not been commenced before that date was Mr Greeves' reliance on his trade union, particularly in the last month of the three-month period, and the absence of any advice from his trade union representative on the time limits or the necessity of commencing Early Conciliation before the 5<sup>th</sup> July 2020.
88. In the case of Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA, the circumstances of an employee who was too ill (due to depression) to instruct solicitors during the last six week of the limitation period were found to be "not reasonably practicable" for the submission of a timely claim. However, in this case Mr Greeves had been able to instruct his Union and been able to provide information and evidence to the union.
89. I find that the trade union had been sufficiently instructed to act as Mr Greeves' representative during the disciplinary and appeal process and had sufficient information to submit an ET1 on his behalf.
90. On this latter point the respondent points out that this is a case where the employee's advisor is, on the evidence, the cause of the failure to present the claim in time. I was referred to the dicta in Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53 CA. In Wall's Meat Company v Khan 1979 ICR52, CA it was said that ignorance or mistaken belief will not be reasonable if it arises from the fault of a solicitor or other professional advisor in not giving the claimant such information as they should reasonably in all the circumstances have given him.

91. The dicta in *Dedman* has been held to apply to trade union representatives when they are advising their members. In this case Mr Greeves was advised and represented by a Regional Officer who had access to the union's solicitors. It is evident in the Regional Officer's letter of the 20<sup>th</sup> July 2020 [106] that he was aware of the relevant time limits.
92. In my judgment it was reasonably practicable for the trade union to provide the correct advice in good time for a claim to be presented before the 5<sup>th</sup> July. Whilst the claimant was not at fault; his circumstances place him in difficulty the as the dicta in *Times Newspapers Ltd v O'Regan* 1977 IRLR 101. EAT confirms that Mr Greeves cannot, on the facts in this case, escape the fault of the union which is attributed to him.
93. For these reasons, I find that it was reasonably practicable for the claim to have been presented within the limitation period and accordingly the claim of unfair dismissal, contrary to sections 94 to 98 of the Employment Rights Act 1996, is dismissed.

The Claims of disability discrimination.

94. Section 123 of the Equality Act 2010 states:

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—  
(a) the period of 3 months starting with the date of the act to which the complaint relates, or  
(b) such other period as the employment tribunal thinks just and equitable.

95. Under Section 123 of the Equality Act 2010 the tribunal has 'a wide discretion to do what it thinks is just and equitable in the circumstances of each case and it is to take into account anything which it judges to be relevant': *Hutchison v Westward Television Ltd* [1977] ICR 279, EAT. The discretion is broader than that which applies to section 111 of the Employment Rights Act 1996 'not reasonably practicable' formula: *British Coal Corporation v Keeble* [1997] IRLR 336, EAT; *Mills and Crown Prosecution Service v Marshall* [1998] IRLR 494.
96. Although the discretion is broader, I must take into account that time limits are exercised strictly in employment cases and that there is no presumption that I should exercise this discretion to extend time on the 'just and equitable' basis. The exercise of discretion is the exception rather than the rule: *Robertson v Bexley Community Centre* [2003] EWCA Civ 576.
97. The burden is on the claimant to persuade the tribunal that it is just and equitable to extend time, in *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0305/13 the EAT stated that a litigant can hardly hope to satisfy that burden unless she provides an answer to two questions:



"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct, the second is the reason, why after the expiry of the primary time limit the claim was not brought sooner than it was.'

98. In Edomobi v La Retraite RC Girls School UKEAT/0180/16 Laing J stated:

"I find it difficult to see how a claimant can discharge the burden of showing that it is just and equitable to extend time if he or she simply does not explain the delay, nor do I understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

Discussion and conclusions

99. In this case the reason for the delay in presenting the claim has been set out in my judgment on the application for an extension of time under section 111(2)(b) of the ERA 1996.
100. That explanation, which I accepted, explains the inaction of the claimant prior to the 9<sup>th</sup> July 2020. I have taken into account the guidance in the case of Chohan v Derby Law Centre 2004 IRLR 685 EAT and Wright v Wolverhampton City Council EAT 0117/08. I find the failure of the trade union to advise the claimant of the relevant time limit was the cause of the delay up to the 9<sup>th</sup> July. I also take into account the findings of fact I have made on the claimant's disability and the deterioration in his mental health; which I have set out above.
101. Having obtained the Early Conciliation certificate dated the 10<sup>th</sup> July 2020 the claimant did not present his claim for a further four weeks. I find the reasons for that passage of time were several:
102. The claimant had been advised by a member of the ACAS staff that the effect of the EC certificate delayed the last date for submission of a claim by one month from the date of the certificate.
103. I find that, due to his worsening adverse effects of his disability, the claimant was not in a state of mind or in possession of sufficient intellectual rigour to be able to compose or submit the ET1 by himself.
104. With assistance, he found a professional Human Resources specialist who took his instructions and submitted the claim on his behalf on the 7<sup>th</sup> August 2020.

105. In my judgment the claimant has proven that the circumstances which lead to the initial delay were ones which were out with his control. Further, after he became aware of the time limit he acted with such haste as he could, given the adverse consequences of his disability.
106. I have considered the degree to which the respondent might be prejudiced by the delayed presentation.
107. I that, had the claimant commenced Early Conciliation on the 4<sup>th</sup> July 2020, the last date for submission of the claim would have been the 5<sup>th</sup> August 2020.
108. Given my finding that the claimant was a disabled person from late January 2020 any claim of disability discrimination which the respondent has to answer will be one which is alleged to have occurred within months of receipt of the ET1.
109. I have therefore concluded that, save for the need to defend the claim, there is no substantial prejudice to the respondent.
110. In my judgment this is an exceptional case which warrants the exercise of my discretion in the claimant's favour and I therefore extend the time for presentation of the claim to the 7<sup>th</sup> August 2020 and find that the claim of disability discrimination is within the tribunal's jurisdiction.

Note

111. I have directed that this case be listed for one further preliminary hearing to settle the particulars of the discrimination claims and give directions for the parties' preparations for a final hearing.
-

**Case Number: 2409593/2020**

**CVP**

Employment Judge R F Powell

Dated: 30th July 2021

JUDGMENT SENT TO THE PARTIES ON

Date: 2 November 2021

.....

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS