Neutral Citation Number: [2022] EAT 108

Case No: EA-2020-000972-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 November 2021

Before:

THE HONOURABLE MR JUSTICE CAVANAGH

- -

Between:

CYGNET BEHAVIOURAL HEALTH LTD	**Appellant**
- V -	
MR G BRITTON	**Respondent**

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- -

Charles Crow (instructed by **Gregsons Solicitors**) for the **Appellant**
George Britton the **Respondent** in person

Hearing date: 16 November 2021

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JUDGMENT

SUMMARY

Jurisdictional/Time Points

In this case, the EAT found, in light of the primary facts as found by the ET, that the ET's findings that it had not been reasonably practicable for the Claimant to claim in time and that the claim had been presented within a reasonable period after expiry of the primary time limit, were perverse. The EAT substituted a finding that the claim was presented outside the relevant time limits and so the claim was dismissed.

THE HONOURABLE MR JUSTICE CAVANAGH:

Cygnet Behavioural Health v Britton

1. In these proceedings, the respondent to the appeal, Mr Britton, brought a complaint of unfair dismissal against the appellant, his former employer, Cygnet Behavioural Healthcare Ltd on the basis that his dismissal on 24 October 2019 had been automatically unfair because the reason or principal reason for his dismissal was that he had made protected disclosures. I will call Mr Britton "the claimant" and Cygnet "the respondent" in this judgment.

2. The claimant had been employed as a Band 7 Senior Physiotherapist at Brunel Hospital in Bristol. He was dismissed during his probationary period. Section 111(2) **Employment Rights Act 1996 (the "ERA")** provides the relevant part that:

> "An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal:
> (a) before the end of the period of three months beginning with effective date of termination, or
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

3. The primary limitation period has been amended by the **ERA,** section 207A. The effect of section 207A ensures that the period between the date when the prospective claimant contacts ACAS and the date when the prospective claimant receives or is treated as receiving the ACAS Early Conciliation Certificate and does not count towards the three-month primary limitation period.

4. The claimant began the early conciliation process on 15 November 2019. A certificate was issued and sent to him on 15 December 2019. It was common ground that pursuant to sections 111 and 207A of the **ERA** the primary time limit for the claimant's claim expired on 22 February 2020. The claim form was presented on 29 April 2020, this meant that it was 62 days outside the primary limitation period. The ET only has jurisdiction to hear the claimant's claim therefore if it had satisfied the ET that (a) it had not been reasonably practicable to present his claim within the primary time limit; and b) he had presented his claim within a reasonable period thereafter.

5. These issues were considered by the ET sitting in Bristol, Employment Judge Midgley sitting

alone, on 13 October 2020. A detailed written judgment and reasons were sent to the parties on 29 October 2020. The ET held that it had jurisdiction to deal with the claimant's claim of unfair dismissal. The ET held that the combination of having to deal with the fitness to practice ("FTP") investigation by the claimant's regulatory body, the HCPC, deterioration of the claimant's mental health, and his dyslexia meant that it was not reasonably practicable for him to have presented his claim by 22 February 2020.

6. The ET also found that the further delay of 62 days between 22 February 2020 and 29 April 2020 was reasonable in light of the time and effort that the claimant was expending dealing with the HCPC investigation, exacerbated by his dyslexia. Employment Judge Midgley said that:

> "50…Although there was no clear evidence on the point, it appears that once the claimant had concluded his response to the FTP allegations, he was able to turn his attention to the tribunal claim. The further delay therefore occurred because the claimant was involved in those activities, and because he remained ignorant that the time limit had already expired."

7. The respondent appeals against the decision of the ET that the claim was in time on the ground that the ET's ruling was perverse both in finding that it had not been reasonably practicable for the claimant to claim within the primary time limit and also in finding that it had been reasonable not to present a claim for a further 62 days. The respondent does not challenge the findings of primary fact made by the ET and does not submit that the ET misdirected itself in law. Rather, the respondent submits that this is a pure perversity case in that, in light of the primary facts, the conclusions to which the employment judge came were not open to a reasonable ET, even when directing itself correctly on the law.

8. The respondent also seeks to rely on fresh evidence which was not available at the time of the ET hearing on 13 October 2020. This is a letter addressed "to whom it may concern" from the claimant's GP. This letter which is dated 15 October 2020, two days after the ET hearing, was subsequently disclosed by the claimant to the respondent. The letter stated in relevant part:

> "George has a long history of anxiety and depression which is associated at times with suicidal thoughts. His mental health was difficult to manage in 2018 and he

> had consultations with the mental health department regarding this. Towards the middle of 2019 things seemed to stabilise and he was managing his symptoms with regular exercise and medications at the time. His mental state was so stable that we did not have any further consultations between 09.05.2019 and 12.05.2022. He had managed to come off his medications and had been reasonably happy through the spring after some phone call appointments and reasonably effective self-management.
>
> We had a consultation on 12.05.2020 when he told me that he had been dismissed from a job and was no longer able to practice as a physiotherapist due to a suspension. This happened in April 2020 and seemed to have a significant effect on his mental health. His anxiety seemed to increase significantly and it is reported during a consultation with one of my colleagues that he was having suicidal thoughts."

9. Later in the letter, the GP reported that the claimant "does feel that his dismissal from this particular job did have a significant impact on his mental health, and indeed from the notes it does seem that he did experience a deterioration following dismissal."

10. In my view, the reference to the claimant being reasonably happy through the Spring is clearly a reference to Spring 2020, though there is also reference to phone calls with his GP and self-management steps.

11. This hearing has taken place by MS Teams. The respondent has been represented before me by Mr Charles Crow of counsel, and I am grateful for his helpful submissions both in writing and made orally. The claimant appeared in person. He is currently living in Ecuador so the hearing has taken place in the early morning in the time zone in which he is living. He has also provided me with clear and helpful submissions.

12. I will first remind myself of the circumstances in which the EAT can set aside an ET's judgment on perversity grounds. I will then summarise the law relating to the "not reasonably practicable" extension to time limits. Then I will summarise the ET's findings and reasoning, and I will consider whether the respondent's submissions that these findings were perverse is correct.

The test for perversity

13. The test for perversity challenges is very well established. In a famous passage in **Stewart v**

Cleveland Guest (Engineering) Ltd [1994] IRLR 440, at 443, Mummery J said:

> "This Tribunal should only interfere with the decision of the Industrial Tribunal where the conclusion of that Tribunal on the evidence before it is 'irrational,' 'offends reason,' 'is certainly wrong' or 'is very clearly wrong' or 'must be wrong' or 'is plainly wrong' or 'is not a permissible option' or 'is fundamentally wrong' or 'is outrageous' or 'makes absolutely no sense' or 'flies in the face of properly informed logic."

14. In **Yeboah v Crofton** [2002] IRLR 634, Mummery LJ stated that perversity should:

> "Only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached…"

In **Yeboah v Crofton** Mummery LJ also warned that:

> "There was an increased risk that the appellate body's close examination of the evidence and of the findings of fact by the employment tribunal may lead it to substitute its own assessment of the evidence and to overturn the findings of fact made by the Employment tribunal."

15. In **Chiu v British Aerospace** [1982] IRLR 56, the EAT said that it is well established that merely to conclude that a finding was "contrary to the weight of the evidence", or that the tribunal had "heeded evidence that is hard to believe", will not be sufficient to constitute perversity.

16. Notwithstanding these words of caution in the appellate authorities, there can be cases which the ET's conclusions, in light of the primary facts, make so little sense that they can properly be set aside on the basis that they were perverse. In **Asda Stores v Kauser** UKEAT/0165/07/RN, Lady Smith said that:

> "Legitimate inferences [by the EAT] may more readily arise where the factual assessment subjected to scrutiny is a matter of inference, particularly when it is for the purpose of deciding whether a statutory test is met."

17. The respondent submits that this is such a case. Like the present case, **Kauser** was a case in which the challenge was to the finding that a claim should proceed even though it was presented outside the primary limitation period because it was not reasonably practicable to present the claim in time and it had been presented within a reasonable period thereafter.

The "not reasonably practicable" test

18. There are two standard time limits in statutory employment law. The present case is

concerned with the question whether the claimant can show that it was not reasonably practicable to claim in time and that the claim was presented within a reasonable further period. The other type of time limit, of course, is the test which requires the ET to consider whether it would be just and equitable to allow the claim to succeed. This applies for example in discrimination cases. The "just and equitable" test is very much more generous towards the claimant than the "not reasonably practicable" test.

19. The strictness of the test under consideration in the present case was emphasised by Judge LJ in **London Underground Ltd v Noel** [1999] IRLR 621 said this:

> "By section 111(2)(b) this period may be extended when the tribunal is satisfied 'that it was not reasonably practicable for the complaint to be presented before the end of that period. The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, 'in all the circumstances', nor when it is 'just and reasonable', nor even where the tribunal, 'considers that there is good reason' for doing so."

20. As Browne-Wilkinson J observed:

> "The statutory test remains one of practicability … The statutory test is not satisfied just because it was reasonable not to do what could be done'- **Bodha (Wishnudut) v. Hampshire AHA** [1982] ICR 200, 204."

21. The employment judge referred to this passage in **London Underground v Noel** in his judgment. He also reminded himself that the onus of proving that presentation of the claim in time was not reasonably practicable rests with the claimant. He also reminded himself that the test is an empirical factual test based on practical common sense (referring to **Wall's Meat Co. Ltd v Khan** [1979] ICR 52 CA).

22. The employment judge directed himself that he had to consider a number of factors. Of particular relevance to the present case he noted that the tribunal had:

(i) To identify the substantial cause of the claimant's failure to comply with the statutory time limit;

(ii) To determine whether and if so the claimant knew of his rights;

(iii) To determine whether the claimant had been advised by anyone; and

iv) To determine the nature of any advice given and whether there was any substantial fault

on the part of the claimant which led to the failure to present a claim in time. This was not a case in which it was suggested that the respondent had misled the claimant in any way that led him to missing the time limit.

23. As for ignorance on the part of the claimant and his rights or of the time limits, the employment judge said that the ET had to be satisfied both of the truth of the assertion and that the ignorance was reasonable on an objective inquiry. He said that ill-health may have meant that it was not reasonably practicable to claim in time, but that mere stress as opposed to illness or incapacity is not sufficient. Mental health problems may, in some cases, mean that it was not reasonably practicable to claim in time even if the claimant was able to undertake some day to day tasks. He noted that in some circumstances where a claimant seeks to rely on ill health, it may be necessary for the claimant to produce medical evidence to back up his or her contention that she or he was suffering from ill-health.

24. The employment judge further directed himself that the ET must also separately consider whether, even if was not reasonably practicable to claim in time, the claim was also presented within a reasonable further period. That requires an objective consideration having regard to all of the circumstances of the case, including what the claimant did, what he knew or reasonably ought to have known about time limits, and why it was that the further delay occurred.

25. In my judgment, this is an accurate summary of the law, being based on a number of authorities listed by the ET including **Wall's Meat Co. Ltd v Khan**, **Palmer and anor v Southend-on-Sea Borough Council** [1984] ICR 372, CA, **Porter v Bandridge** [1978] ICR 943, CA, and two unreported EAT cases, **Midland Bank plc v Samuels** EAT 672/92 and **Nolan v Balfour Beatty Engineering Services** EAT 0109/11.

26. There were a couple of observations made by the Employment Judge in his review of the test for the not reasonably practicable extension, which in my view, if taken in isolation, do not reflect the law as it currently stands. The judge referred to an observation by Lord Denning MR in **Wall's Meat Co. Ltd v Khan** that the test is simply to ask "had the man just cause or excuse for not

presenting his complaint within the prescribed time." In my judgment, with the greatest of respect, this is not entirely accurately reflect the test set out in section 111.

27. Also the employment judge directed himself that section 111(2) should be given a liberal construction in favour of the employee, citing **Dedman v. British Building & Engineering Appliances Ltd** [1974] ICR 53, CA. In my judgment, I note that this is not reflect the way that section 111(2) has been interpreted and applied by the Court of Appeal in more recent cases. The test is a strict one and, perhaps in contrast to the "just and equitable" extension in other statutory contexts, there is no valid basis for approaching the case on the basis that the ET should attempt to give the "not reasonably practicable" test a liberal construction in favour of the claimant.

28. However, as I have said, the respondent does not take issue with the summary of the relevant legal principles on the part of the ET. Taken in the round, it is clear that the employment judge correctly directed himself for the test that he was to apply.

The Findings of Fact and Reasoning by the Tribunal

29. The employment judge found the claimant to be an intelligent, truthful, and very credible witness. He accepted that the claimant had suffered from mental health difficulties throughout his life, consisting of situational anxiety and depression. In addition, he had suffered from severe dyslexia throughout his life and he uses a coping mechanism for seeking information by speaking to people rather than by reading the information.

30. The claimant had not referred to his mental health difficulties in his claim form or in a statement that he had prepared for the purposes for the ET's hearing. The matter only came to light when the employment judge questioned the claimant during the hearing. The respondent's advocate (not Mr Crow) did not challenge the claimant as to the fact of his mental health difficulties, though he did question why they had not been referred to in his statement. The employment judge accepted the claimant's explanation that he did not think it was relevant because the he thought the case was about the correctness of the manner of the dismissal not about his disability.

31. The employment judge also considered whether he should accept the claimant's assertions

about his mental health, or whether he should have said that it was incumbent upon the claimant to provide some medical evidence in this respect. The employment judge decided that it was not necessary nor in accordance with the overriding objective to insist upon medical evidence before accepting that the claimant genuinely had mental health problems at the relevant time. He said that he had heard direct evidence from the claimant about these matters and he found the evidence to be entirely credible and valid. There had been no order for medical evidence in this case. He further decided that it would not be in accordance with the overriding objective to adjourn so that medical evidence could be provided at a further hearing.

32. The employment judge decided that the time and the manner of the claimant's dismissal during his probationary period, without a hearing, and in circumstances in which the claimant was unable to attend a review hearing due to ill-health, had been a cause of significant stress to him. The employment judge found that the claimant was referred by the respondent to his regulator on 22 October 2019 on the basis that there were concerns about his fitness to practice; a lengthy investigation followed. The claimant appealed against the decision to dismiss him on 24 October 2019 and the appeal was dismissed on 6 November.

33. The claimant contacted the ACAS helpline some time between 6 and 11 November. He understood from that conversation that he had to complete the online referral to commence the early conciliation process which he did on 11 November 2019. About the same time, he spoke to an ACAS adviser, Steve Molloy who told him that once he had submitted the form and the early conciliation process had concluded, he would receive the Certificate and that the clock would then run for general limitation. The employment judge said that:

> "23…The claimant was aware in a general sense that there was a limitation period and that in order to comply with it he should act as soon as possible after he received the ACAS certificate. In his words he regarded the receipt of certificate as the "trigger" for his next steps."

34. The claimant did not, however, take any steps to identify what the applicable time limit was. He said that it was difficult for him to access information from a website or a library. He needed to speak to people or as a fallback to send or receive emails. There was evidence that the claimant sent

lengthy and detailed emails, but the employment judge accepted his argument that this did not mean that he was fully able to read documents, as the two functions involved different cognitive processes, upon which his dyslexia has differing effects.

35. The ACAS Certificate was sent to the claimant by email on 15 December 2019 and so would have been available for him to read on the same day. The claimant does not dispute that he received this email but said that it was one of only about 100 that were passing between him and the respondent and the regulator in the period between December 2019 and April 2020.

36. The employment judge accepted the claimant's evidence that at the time he was focused on the FTP investigation and he needed to practice his profession in order to be able to afford to live. He also accepted the claimant's evidence that his mental health was suffering significant effects at the time: the claimant stated at times he struggled to get out of bed and on occasions suffered from suicidal ideation.

37. In December 2019 the claimant obtained work as a locum on a two to three week contract. He told the ET that his mental health deteriorated and he sought support from his GP who suggested medication. The claimant was reluctant to take medication and so tried to manage his condition using cognitive behavioural therapy techniques, and other practices in which he was trained.

38. In mid to late January 2020, the claimant secured a new position which he was to occupy until his interim suspension as a physiotherapist in late April or early May 2020. He also started to write very long emails to the regulator, 40 or 50 pages long, twice a month. He said that this took a huge effort, he often wrote through the night, or for 10 or 12 hours at a time. Also during this period he moved home.

39. In February 2020 the claimant discussed bringing a tribunal claim with a former colleague at Brunel Hospital. Although time limits were not discussed in this conversation, this prompted him to look at the ACAS Certificate, which he found in mid-February 2020. He emailed Mr Molloy on 12 February 2020 asking how he could present his claim to the tribunal. Mr Molloy replied on 13 February identifying the details that he should put in his ET1. The claimant asked when he should

submit his claim but Mr Molloy said that he could not comment on the specific time limits but the sooner the better. The claimant said in evidence he believed that the timeframe would be similar to that which is fairly universal in NHS matters, that being six to eight weeks.

40. The claimant continued to correspond with the regulator and the bundle of correspondence eventually amounted to some 537 pages.

41. The claimant said that he was able to turn his mind to the ET claim when the matters with the regulator had settled, even though his mental health problems continued, and he issued proceedings in the tribunal on 29 April 2020.

The Employment Tribunal's conclusion

42. The employment judge decided that the substantive cause of the claimant's failure to comply with the primary time limit was his poor mental health and his ignorance of the time limits. He had limited mental and physical energy and his primary focus was on the regulatory FTP proceedings. He would attend work and then come home and focus on the FTP investigation. His dyslexia meant that it took more time than would have been the case for someone without a disability.

43. He had prioritised the FTP proceedings over the ET claim. He did not look, in any active sense, for the ACAS certificate which he regarded as the trigger for beginning ET proceedings. His lack of urgency derived from his ignorance of the time limit that applied to the proceedings. His dyslexia was a primary cause of that ignorance as he found it difficult to read and process information from a webpage and written documents and preferred to speak to people to understand his rights. This was compounded because, since the lockdown in March 2020, researching online was the main and most accessible source of information.

44. Whilst it is true that Mr Molloy advised the claimant that he should issue the claim as soon as he could after receiving the Early Conciliation Certificate, this was something that he interpreted using his experience of timeframes within the NHS to be somewhere in the region of four to six weeks. Mr Molloy did not tell him that there was a three-month time limit or tell him when it would expire. The claimant therefore remained ignorant of the statutory time limit that applied his claim.

45. The claimant's mental health also meant that he had to divest his energies in attending work and also in dealing with the FTP proceedings upon his return. He did not know the time limits until after he had presented his claim. He knew about the basis of his claim.

46. The employment judge said:

> "48. In all the circumstances, I am satisfied that the combination of the HTPC proceedings, the deterioration of the claimant's mental health and the impact of his disability meant that it was not reasonably feasible for the claimant to present his claim by 22nd February 2020. The Claimant's reasonable ignorance of the time limits had the effect that it was not reasonably feasible for him to have presented his claim within time."

47. As for whether the claim was presented within a reasonable period thereafter, the claim was presented some two and a half months after the time limit expired. The claimant believed that the applicable time limit would be somewhere in the region of six to eight weeks after he received the Early Conciliation Certificate. The tribunal said that after he had received the Certificate in February, it appears that he concluded that the time limit would expire approximately two months later, in April. He continued to work full time and correspond with the HCPC. The correspondence took many hours and he worked through the night on occasions. The time involved in the conduct of that detailed, important, and fatiguing exercise was exacerbated by the claimant's dyslexia. Although there is no clear evidence, it appears that once the claimant had concluded his response to the FTP allegations, he was able to turn his attention to the ET claim. The further delay occurred therefore because the claimant was involved in those activities and because he remained ignorant that the time limit had already expired.

Discussion

48. The test is whether the ET's decision based on its findings of fact was (to use the words of Mummery J in **Stewart v Cleveland Guest**) 'irrational', 'offends reason', 'is certainly wrong' or 'is very clearly wrong' or 'must be wrong' or 'is plainly wrong' or 'is not a permissible option' or 'is fundamentally wrong' or 'is outrageous' or 'makes absolutely no sense' or 'flies in the face of properly informed logic.'"

49. This is a very high hurdle for the appellant to surmount. The starting point is that there is no basis for challenging the tribunal's decision that the claimant was an intelligent, truthful and very credible witness.

50. The first question is whether the tribunal was perverse to find that it had not been reasonably practicable for the claimant to fail to present its claim before the primary limitation period had expired on 22 February 2020. The tribunal held that the claimant's reasonable ignorance of the time limits meant that it was not reasonably feasible for him to have presented the claim within time. In other words, the ET found that it was not reasonably practicable for the claimant to have found out the time limit before it expired on 22 February 2020.

51. I accept that the ET was entitled to find that the claimant was suffering from depression during this period and that he had dyslexia. This is despite the absence of any medical evidence in support of this contention, and also despite the fact that the claimant had not even mentioned his mental health difficulties during this period before he gave his evidence before the ET. Although it is better to have medical evidence of these matters, rather than to rely on the say-so of a claimant who has an obvious self-interest in emphasising these matters, there is no rule of law that there must be medical evidence in every case. It was not perverse for the tribunal to decide to accept that the claimant was depressed and suffered from dyslexia on the basis of the claimant's own assertion. However, the fact that a claimant has suffered from depression and the fact that a claimant is dyslexic does not mean automatically that it is not reasonably practicable for him to be able to claim during the primary limitation period, and in particular, that it was not reasonably practicable for him to be aware of the time limits.

52. In the present case, it was common ground that at all material times, the claimant knew the basis for his claim. This is not the type of case in which the underlying factual basis of the claim is not known by the claimant. It is also clear that he knew that there was a time limit because he asked Mr Molloy about it. The basis for the ET's finding was that he did not know what the relevant primary time limits were and that it was not reasonably practicable for him to have become aware of them

prior to 22 February 2020. The ET found as a fact that the claimant was not aware of the time limit during this period and there is no basis for contending that this was perverse.

53. However, in my judgment, it was perverse for the ET to find that the claimant's mental health problems and dyslexia and his focus on the FTP investigation meant that it was not reasonably practicable for him to make himself aware of the time limits prior to 22 February 2020. A person is who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so.

54. There is no explanation in the ET judgment as to why, notwithstanding his dyslexia and mental health problems, the claimant had been able to do a great deal during the period his dismissal in October 2019 and the expiry of the primary time limit on 22 February 2020, and why the only thing that he was unable to do, in the tribunal's decision, was to identify the time limit.

55. Notwithstanding his dyslexia and mental health problems the claimant had been able to do the following things in the relevant period:

(i) Appeal against his dismissal in October 2019;

(ii) To contact Mr Molloy from ACAS about his potential ET claims in mid-November and mid-February 2020;

(iii) To complete the formalities of early conciliation;

(iv) To work as a locum in December 2019;

(v) To work in a temporary post from January 2020 onwards;

(vi) To move house;

(vii) To engage in great detail with the FTP proceedings and to engage in detailed correspondence;

(viii) To discuss his potential claim with a former colleague;

(ix) To ask Mr Molloy what the time limit was in February 2020; and

(x) To ask Mr Molloy how he could go about claiming.

56. In my judgment, against these findings of fact by the tribunal, the conclusion that was reached

was so irrational it has to be perverse. In my judgment, it flies in the face of reason to conclude that the claimant was able to do all of this and yet was not able to ask somebody so as to find out the time limits for a tribunal claim. This is so especially after he did so with Mr Molloy in February and was told by Mr Molloy in mid-February that he had to bring his claim as soon as possible. Even if the pandemic meant that it was not easy to speak to somebody, it makes no sense, in my judgment, that the claimant would not have been able to type a short sentence into a search engine and to seek information about unfair dismissal time limits, or to ask an acquaintance by email to search for that information. The ET said that the claimant could have asked for information by email as a fallback to speaking to someone and there is little difference between doing this and putting a question in a search engine.

57. The ET accepted the claimant's evidence that his cognitive functions were different for sending or receiving and reading emails, but with respect to the ET this does not make sense because in order to engage in correspondence with the regulator, the claimant must have been engaging with the communications that he was receiving from the regulator in order to respond to them.

58. It is true and I fully accept that the claimant was very busy in his day jobs and with the regulatory investigation but it would be the work of a moment to ask somebody about time limits or to ask a search engine. It is clear that the ET claim was still in the claimant's mind during this period because he spoke about it with his colleague in February and then with Mr Molloy. It is clear also from the ET judgment that the claimant did give some thought to ET time limits because he assumed, albeit for no obvious reason, that they would be the same as in NHS procedures.

59. Most significantly, the ET found that the claimant had asked Mr Molloy about time limits and was told that he had to make a claim as soon as possible. Even though Mr Molloy did not tell him in terms what the time limits were, it was plain to him that there were time limits and there is no rational explanation or justification in the ET's judgment why he failed to find out what they were.

60. The claimant plainly and perhaps understandably prioritised the regulatory proceedings over the ET proceedings. That was a matter for him but it does not begin to explain why he took no steps

to find out what the time limit was or to look for the email from ACAS. Even though during this period he was depressed and had dyslexia, this did not mean that he was incapacitated and it did not mean that it was not reasonably practicable for him to find out the time limits.

61. As for the fact that the claimant did not spot the email containing the Early Certification Certificate for two months from mid-December to mid-February 2020. This is something of a subsidiary issue since the reason that the ET found that it was not reasonably practicable for the claimant to claim was his reasonable ignorance of the time limit. The ET's view or that the points made already as to why it makes no sense that the claimant could do other things but could not ascertain the time limit for a ET claim, applying equally to checking his emails for the ET certificate.

62. In my judgment, no reasonable tribunal properly directing itself in law could have concluded that the claimant's depression and dyslexia, or his decision to focus on the regulatory FTP investigation, meant that he could not reasonably practicable to check for an email that he knew was coming.

Was the claim presented within a reasonable period after the time limit expired?

63. Even if I am wrong so far, in my judgment it is clear that the ET's conclusion that the claim was presented within a reasonable period after 22 February 2020 is perverse. This was a further period of something over two months. During this period, the claimant knew that there was a time limit because he had been told by Mr Molloy on 13 February 2020. He said to the ET that he thought that the time limit was six to eight weeks, but it was considerably more than that period after 12 February when he opened the email containing the ACAS Early Conciliation Certificate before he presented his claim. So even if the claimant had a valid reason for assuming that time limits were the same as for unspecified proceedings of the NHS, which is doubtful, he missed that deadline also. Indeed the ET said at paragraph 50:

> "…Although there was no clear evidence on the point, it appears that once the claimant had concluded his response to the FTP allegations, he was able to turn his attentions to the tribunal claim. The further delay therefore occurred because the claimant was involved in those activities, and because he remained ignorant that the time limit had already expired."

64. The ET judgment therefore acknowledges that there was no clear evidence to support this key part of its conclusion. It was pure speculation but, in any event, just as with an internal appeal, the fact that a FTP investigation was underway is no reason or justification to refrain from bringing a claim or at least to ask someone what the time limits are.

65. Mr Crow made the additional point that the claimant thought that the trigger for the time limit was the date of receipt of the email in mid-December rather than when he opened the email in early February and so that he must have thought that the time ran out no later than eight weeks after the email was actually received. On that basis, it would have run out in mid-February.

66. I do not read the ET's judgment to make such a finding. Indeed it would not be consistent with the fact that the claimant did make a claim, albeit in April. Nevertheless, in my judgment, the finding that the claim was presented within a reasonable period after the time limit expired was perverse.

67. I should add two points. The first is that I have anxiously considered whether I am simply substituting my view for that of the employment judge, but in my judgment this is one of those rare cases in which the ET's judgment can properly be regarded as perverse. Second, I have sympathy with Mr Britton, who is plainly an honest witness and it was equally plain he was struggling during this period. If this had been a case to which the "just and equitable" test applied then it may well have satisfied it, but Parliament had imposed a much stricter test for unfair dismissal claims.

68. In light of this conclusion on perversity, there is no need to go onto deal with the respondent's application to adduce fresh evidence. In any event, however, I say in passing that I do not think that this fresh evidence passes the **Ladd v Marshall** test ([1954] 1 WLR 1489). It is true that it is relevant evidence. It is also true that it was not available to the respondent at the time of the hearing and that the respondent cannot be criticised for not relying upon it before the ET. However, in my judgment, it does not pass the third limb of the **Ladd v Marshall** test because it is not significant enough. It is just a letter from a GP, not from a medical specialist. Indeed it supports the view that during the relevant period the claimant was depressed after his dismissal and also there is reference to telephone

conversations with GPs during this period. It is true that there is also a statement in general terms that the claimant was reasonably happy in spring 2020 but taking the letter overall, in my judgment, it does not it seems to me contradict the evidence the claimant gave to the ET.

69. I should also add that ordinarily where fresh evidence comes to light after the hearing before the ET, the first step for the party seeking to rely upon it should have been to seek a review of the ET. However, if this evidence had passed the **Ladd v Marshall** test, I accept Mr Crow's submission that it was appropriate for the evidence to be raised on appeal rather than by way of an application for a review because this was a case in which the ET had already reached a firm view on credibility, see **Aslam v Barclays Capital Services Ltd** UKEAT/0405/10 at paragraph 44.

70. In light of the conclusions that I have reached and applying the guidance of the EAT in **Jafri v Lincoln College** [2014] IRLR 544, it is not appropriate and it is not necessary to remit this issue for rehearing. As I have concluded that it was it was perverse for the ET, on the basis of its findings of fact, to find that the claim was presented in time, the only rational conclusion open to an ET on the facts is that the claim was out of time and so the ET has no jurisdiction to hear the substantive claim. This is a case in which, without the ET's error, the result would have been different and the EAT is able to conclude what it would have been. In other words, on the findings of fact, there could only have been one possible decision. (Indeed, if there could have been more than one decision, it would follow that the decision reached by the ET was open to it and so the ET's judgment would not have been perverse).

71. This appeal is allowed, and the claim has therefore been dismissed on the basis that it was presented out of time.