EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Gillard**
Respondent:	**Minster Law Limited**
On:	**14 and 15 November 2022**
Before:	**Employment Judge McAvoy Newns**
Heard at:	**Leeds Employment Tribunal (via CVP)**

Appearances:

For the Claimant:	**Mr J Ratledge, Counsel**
For the Respondent:	**Mr I Ahmed, Counsel**

WRITTEN REASONS

Background

1. Oral judgment was given at the hearing on 15 November 2022 and, on that date, the Claimant requested written reasons.

2. The purpose of the hearing was to determine the Claimant's claims. At the outset, when clarifying the Claimant's breach of contract claim, it became apparent that the Respondent was asserting that the 'effective date of termination' ("EDT") of the Claimant's employment was 16 December 2021 rather than 22 December 2021, as stated in the ET3. It had only paid the Claimant to 16 December 2021 and was saying, during this hearing, that it was entitled to do so, because employment terminated on that date.

3. The parties were asked to consider and confirm whether, if the EDT was 16 December 2021, it impacted upon my jurisdiction to consider the claim, bearing in mind the Tribunal's time limits. It appeared to me that it might. It took some

time for the parties to consider this and take instructions and therefore this was ultimately addressed on the second day.

4. I considered whether the hearing should be adjourned until the parties were able to confirm their position on time limits. I decided not to do so. The case had only been listed for three days. There was a lengthy file of documents and several witnesses giving evidence. Had I done this, and had the Claimant's claim been allowed to proceed, it would have certainly gone part heard. This would not have been compliant with the overriding objective particularly bearing in mind that the fact that the Claimant was dismissed almost a year ago and the Respondent had not raised any time limit issues before the commencement of this hearing. Therefore, after finishing my reading, I heard evidence from two of the Respondent's witnesses on the first day. I informed the Claimant's Counsel that the time limit issue would need to be addressed at the beginning of the second day.

5. I considered whether I ought to press the Claimant to confirm his position regarding time limits soon after it came to my attention on day one. This was because the calculation was fairly straightforward and shouldn't have taken the Claimant's representative more than 30 minutes or so to work it out and consider it, together with the potential impact, with the Claimant. I decided not to do so. The suggestion that the EDT might be on a date other than 22 December 2021 understandably caught the Claimant off guard. I decided that he should be provided with sufficient time to consider his position and obtain advice.

6. The Claimant's Counsel raised the fact that the Respondent would need to seek leave to amend its response in order to advance an argument that the EDT was 16 December 2021. Whilst I sympathised with the Claimant's position and agreed that the issue ought to have been raised well in advance of this hearing, I did not consider an application for permission to amend to be needed. The EDT is a statutory concept. It is clear from the case law that it is not a matter that the parties can agree between themselves. It is something that I was required to determine myself.

7. In preparing these written reasons I observed an error in my oral decision regarding the breach of contract claim. I had concluded that, because the EDT was 16 December 2021, the breach of contract claim should fail. That is not necessarily correct and further submissions on this point may have been needed. This is because, as highlighted in these reasons, the date upon which termination takes effect from a contractual perspective and the EDT may not be the same. However, as with the unfair dismissal claim, this claim is out of time and it was reasonably practicable to present it in time. Consequently, it is dismissed for the same reasons as the unfair dismissal claim. I have issued a corrected judgment confirming this alongside these reasons.

Evidence

8. I heard evidence from the Claimant relevant to time limits. With the parties' consent, as no witness statement had been prepared, the Claimant's Counsel

asked the Claimant open questions as evidence in chief and the Respondent then cross examined him.

Findings of facts

Time limits

9. The Claimant's position was that his employment terminated on 22 December 2021 when he received his dismissal letter. The Respondent's position was that it terminated on 16 December 2021, when the Claimant was informed, during his outcome meeting, that he was being dismissed immediately.

10. The Claimant initiated the ACAS early conciliation process (the **"ACAS process"**) on 31 January 2022. The ACAS process ended on 13 March 2022. The claim was submitted on 29 April 2022. The parties agreed that if the EDT was 22 December 2021, the claim was in time. But, if the EDT was 16 December 2021, it was out of time by four days. I checked and agreed with their calculation.

Reasons for late submission of claim

11. The Claimant explained that, whilst he knew that he was being dismissed and such dismissal was effective immediately during the meeting on 16 December 2021, he later believed that his termination date was 22 December 2021. This was because of:

    1. what he had been advised;

    2. the contents of the termination letter and the appeal outcome letter, both of which are quoted below; and

    3. the contents of his contract of employment, also quoted below.

12. His claim was lodged when it was lodged because it was believed that 22 December 2021 was the termination date.

13. The dismissal letter dated 22 December 2021 stated: *"Further to the disciplinary hearing held on 25th November 2021, I write to confirm that you have been procedurally dismissed from your role as Team Manager following your final written warning issued on 12th November 2020 and* ***your employment has been terminated with immediate effect"****.*

14. The appeal outcome letter stated: *"In summary, I dismiss all of your grounds of appeal. I am satisfied that the disciplinary process was followed fairly and that the decision to dismiss you was reasonable.* ***You therefore remain procedurally dismissed from your role as Team Manager in accordance with the outcome letter dated 21 December 2021".***

15. The Claimant's contract of employment stated: *"You may terminate your employment with Minster by giving the period of notice specified in Part A.*

Minster may terminate your employment by giving you the period of notice specified in Part A subject to clauses 5, 15 and 19 . ***In all cases, notice must be in writing".***

16. The Claimant confirmed that he had worked in a law firm for around 18.5 years and knew how to undertake legal research. He knew that time limits were important in litigation and that different legal jurisdictions had different time limits, albeit he only did personal injury work. He confirmed that his legal representatives, a firm of solicitors, had been advising him since early November 2021 and they had drafted and lodged his claim in the Tribunal. Although he did not recall a specific conversation with his solicitors about time limits he said: *"I would expect them to deal with it within the prescribed time limits. They advised when the case needs to be issued ".* He said that his legal representative had confirmed that his EDT was 22 December 2021 because his contract of employment said notice needed to be in writing. He accepted that the appeal outcome letter did not state that his termination date had changed but believed it "implied" that it did. Finally, when referring to his firm of solicitors, he said: *"I would expect it to be dealt with properly".*

The Law

Unfair dismissal

17. Section 97(1) of the Employment Rights Act 1996 ("ERA") states:

"Subject to the following provisions of this section, in this Part "the effective date of termination" —
(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect".

18. Section 111(2) of the ERA states that in respect of a complaint for unfair dismissal, the Tribunal:

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

19. The test is the same for breach of contract claims pursuant to Article 7(a) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623.

Early conciliation

20. Section 207B of the ERA states:

> *(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").*
> *(2) In this section—*
> *(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*
> *(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*
> *(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*
> *(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*
> *(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.*

EDT

21. In *Radecki v Kirklees MBC [2009] EWCA Civ 298* the Court of Appeal held that the effective date of termination should be freed of the niceties and uncertainties of contract law and of its general requirement that, where there was a repudiatory breach, the contract would nevertheless continue until that breach was accepted. Thus, the effective date of termination would be the date of summary dismissal, as long as that was known to the employee. In this case, it was relevant that, on the established effective date of termination, the local authority had stopped paying the employee.

22. In *Robert Cort & Son Ltd v Charman [1981] 7 WLUK 267* the Employment Appeal Tribunal found that, where an employer summarily dismisses an employee with salary in lieu of notice the effective date of termination is the date of summary dismissal rather than the expiry of the period in respect of which the salary is paid.

23. In *Rabess v London Fire and Emergency Planning Authority [2016] EWCA Civ 1017* the Court of Appeal concluded that an employer's internal appeal process following an employee's summary dismissal had not altered his effective date of termination for the purposes of bringing an unfair dismissal claim against the employer. The effective date of termination was the date of the summary dismissal, whether or not the dismissal might have been a repudiatory breach of contract by the employer. It was reinforced in this case that s.97 of the ERA

was untrammelled by contract laws, and the EDT might be different from that established by contract law in certain circumstances.

Not reasonably practicable test

24. Following *Porter v Bandbridge 1978 ICR 943*, the Claimant has to satisfy the Tribunal not only that she did not know of her rights throughout the period preceding the complaint and there was no reason why she should know, but also that there was no reason why she should make enquiries. In this regard, the burden of proof is on the Claimant.

25. Following *Palmer v Southend-on-Sea Borough Council 1984 ICR 372,* the term 'reasonably practicable' means something like 'reasonably feasible'.

26. As Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* explained: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

27. In *Marks & Spencer v Williams-Ryan [2005] ICR 1293* the Court of Appeal observed that W-R had contacted a citizens advice bureau, which advised her to exhaust the internal appeals procedure but did not tell her of her right to make a complaint to an employment tribunal. It also observed that M had sent a letter confirming her dismissal and set out the internal appeal procedure. It also referred to her separate right to make a complaint to a tribunal but it did not refer to the three-month time limit. W-R exhausted the internal appeal procedure during which time the time limit to make a claim to the tribunal had expired and she lost her appeal. W-R then made a claim for unfair dismissal to the tribunal, sending a covering letter explaining why it was outside the time limit. The tribunal found that W-R thought she had to wait for the decision of the internal appeal procedure before bringing a claim. The Court of Appeal held that whilst the tribunal's decision was generous to W-R it was not outside the ambit of conclusions available to it. They held that section 111(2) of the Act should be interpreted liberally in favour of employees and the tribunal was entitled to find, inter alia, that advice given by M was misleading and insufficient. They held that no doubt the letter from M setting out the internal appeal procedure was intended to be helpful but it was capable of bearing the misleading suggestion that a claim to the tribunal was something that should be left until the internal appeal procedure had reached its conclusion.

28. In the same case, at paragraph 21, it was stated: *"it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an Employment Tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and the time limit for making such a complaint...It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances."*

29. Also, at paragraph 24, it was stated: *"… if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the employment tribunal in due time. The fault on the part of the adviser is attributed to the employee"* and *"If a man engages skilled advisers to act for him − and they mistake the time limit and present it too late − he is out. His remedy is against them."*

30. In *Cygnet Behavioural Health Ltd v Britton 2022 EAT 108*, the EAT disagreed with the employment tribunal's conclusion that it was not reasonably practicable for B to have presented his unfair dismissal claim in time because of depression and dyslexia, combined with ignorance of the time limit. He had limited mental and physical energy and his primary focus during the relevant time was on a regulatory investigation into his fitness to practise as a physiotherapist. The EAT observed that, notwithstanding B's conditions, he had been able to do a great deal during the period between his dismissal and the expiry of the time limit, including appealing against his dismissal, contacting Acas about his potential claims, working as a locum and then in a temporary post, moving house and engaging in great detail with the regulatory investigation. While he had been very busy, the EAT considered that it would be 'the work of a moment' to ask somebody about unfair dismissal time limits or to type a short sentence into a search engine. There was no rational explanation or justification in the tribunal's judgment as to why B's conditions prevented him from finding out about the time limit.

Submissions

31. Both parties gave oral submissions in respect to both points. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

32. In respect to the EDT point, the Claimant's Counsel conceded that, based on the authorities and the evidence in this case, the EDT was 16 December 2021. He did not put forward a positive case that the EDT was 22 December 2021. I expect that this approach was adopted because he was mindful of his obligations to the Court.

Conclusions

When was the EDT?

33. It was common ground that the Claimant was told that his employment was terminating summarily during a meeting which took place on 16 December 2021. In his witness statement, the Claimant stated: *"in this meeting, I was informed that I was dismissed **immediately**, and my notice would be paid in lieu".*

34. The Claimant argued however that his employment terminated on 22 December 2021 because his contract of employment required notice to be

provided in writing. It is correct that his contract states this – this is set out in clause 13 which I quoted earlier.

35. The EDT is defined in section 97 of the ERA. This states, at 97(1)(b), that if employment is terminated without notice, the EDT is the date on which termination takes effect. Both parties acknowledged that employment was terminated summarily on 16 December 2021, with a payment in lieu of notice. Therefore, I have had to consider when the termination 'took effect'.

36. As the Claimant's Counsel acknowledged, the case law is clear that the determination of the EDT is a statutory matter and should be freed of the niceties and uncertainties of contract law. The *Radecki* case, quoted earlier, in particular provides a helpful analysis of the legal position.

37. An objective analysis needs to be undertaken by the Tribunal in determining when an EDT took place. Having undertaken this analysis, and for the following reasons, I concluded that the EDT was 16 December 2021.

38. Firstly, the Claimant was aware that his employment was terminating immediately during the meeting on 16 December 2021. This was his clear evidence in his witness statement.

39. Some of the documents did however cause me to doubt that this may be correct. For example, the relevant parts of the notes of the meeting state: *"I could see no further option other than to procedurally dismiss you from your role by issuing you with a final written warning for these actions alone"*. This does not state that the Claimant was to be dismissed immediately. Additionally, the dismissal letter dated 22 December 2021 stated: *"Further to the disciplinary hearing held on 25th November 2021, I write to confirm that you have been procedurally dismissed from your role as Team Manager following your final written warning issued on 12th November 2020 and* ***your employment has been terminated with immediate effect"****.* This could suggest that the Claimant was only told that his employment had been terminated with 'immediate effect' on this date.

40. However, notwithstanding these doubts, the fact the Claimant was informed that his employment was terminating immediately on 16 December 2021 was the Claimant's clear evidence. The confirmation of 'dismissal' in the notes is clear and unambiguous. The Claimant had also been informed that this meeting would be a decision meeting. Consequently, I concluded that the Claimant was aware that his employment was terminating immediately on 16 December 2021.

41. My second and final reason for concluding that the EDT was 16 December 2021 was the fact that the Claimant was not paid beyond 16 December 2021. This was also a relevant factor in *Radecki.* In ceasing to pay the Claimant beyond this date, the Respondent was making clear that the employment relationship had ended.

Should discretion be exercised to consider the claim outside of the normal time limits?

42. Both parties acknowledged that a claim for unfair dismissal must be presented to the Tribunal within 3 months from the EDT. The same applies to claims for breach of contract. These deadlines are subject to extensions arising from the ACAS early conciliation process.

43. It was accepted by the parties that, bearing in mind these extensions, the Claimant ought to have presented his claim by 25 April 2022. As the Claimant did not do so until 29 April 2022, both parties acknowledged that the claim was, on the face of it, out of time.

44. I do have discretion to extend time provided that I am satisfied that it was not reasonably practicable for the complaint to be presented by the deadline and the claim was brought within such further period as I considered to be reasonable. In this regard, the burden of proof is on the Claimant and the standard of proof is the balance of probabilities. Although the case law states that a liberal interpretation, in favour of the Claimant, ought to be given, there should be no presumption that discretion to extend time ought to be exercised. Further, when assessing whether something is reasonably practicable, Tribunals should consider whether something is 'feasible'.

45. The Claimant's position is that he believed that the EDT was 22 December 2021, having been advised of such from his legal representatives. This decision regarding when the EDT had occurred had led to the Claimant being advised to lodge his claim when he did, on 29 April 2022. Those legal representatives have supported him with his dispute with the Respondent since November 2021. In evidence he said he expected them to ensure his claim was issued within the appropriate timescales. Although capable of undertaking research, he did not undertake such research himself.

46. Additionally, the Claimant says that the Respondent's dismissal letter and appeal letter were misleading and led him to believe that his employment had been terminated on either 21 or 22 December. He relies upon the fact that, in the ET3, the Respondent had plead that 22 December 2022 was the termination date, suggesting that they had in fact misled themselves about this matter too.

47. The Claimant gave no other reason in evidence about why his claim was lodged late.

48. The law states that if the Claimant does not know when to bring the claim and relies upon this as the reason why time ought to be extended, not only does the Claimant need to satisfy me that he did not know of the correct deadline, but that he ought not to have known it.

49. The Claimant had access to legal representation from a firm of solicitors prior to his dismissal and many months prior to lodging his claim. It is reasonable to expect a Claimant in such a situation to know the deadline for lodging a claim in the Tribunal and to do so within the correct timescales.

50. Some cases specifically concern situations where skilled advisers may be at fault. Skilled advisers in this context include solicitors. It was accepted that the Claimant was being represented by a firm of solicitors.

51. It is clear from the line of case law concerning this that where the skilled adviser was at fault for failing to submit a claim in time, the Tribunal will usually decide it was reasonably practicable for the claim to be presented in time. This is because reasonable practicability should be judged with reference to what could have been done if the advisers had provided the advice that the claimant reasonably expected them to provide.

52. There are circumstances where an adviser's failure to give correct advice will be reasonable and where a Tribunal could therefore conclude that it was not reasonably practicable for the claim to be presented in time. This may be, e.g. where the Claimant and his adviser have been misled by the employer as to a material fact, particularly one that is complicated, such as the EDT.

53. This was what was being relied upon here albeit the advice that the Claimant's solicitors provided to the Claimant has not been provided to me. The only evidence I had before me of such advice is that which the Claimant explained in oral evidence. This was, as stated earlier, although he did not recall a specific conversation with his solicitors about time limits he said: *"I would expect them to deal with it within the prescribed time limits. They advised when the case needs to be issued ".* He said that his legal representative had confirmed that his EDT was 22 December 2021 because his contract of employment said notice needed to be in writing.

54. I was referred to the case of *Marks and Spencer v Williams Ryan* and have given the parts of this judgment that I was specifically referred to careful thought. In this case a letter was sent to the Claimant by the Respondent which stated:

    "Please remember that the Appeal Hearer's decision concludes the internal appeal process. Independently of the internal appeal process, employees with one or more year's continuous service have the right to take a claim of unfair dismissal to an employment tribunal".

55. The Court of Appeal held that this was least capable of being misleading, suggesting to the reader that lodging a claim in the Tribunal is something which can perhaps be left to be done if and when the internal appeal process reaches an unsuccessful conclusion.

56. I therefore gave careful consideration to the Claimant's submission about the similarities of this case to that of *Marks and Spencer v Williams Ryan*. In essence, the Claimant's Counsel's submission was that the contents of the termination letter and the appeal letter, in conjunction with the contract of employment, mislead the Claimant into believing that employment terminated on 21 or 22 December 2021.

57. The letter dated 22 December 2021 does state that the Claimant's employment *"**has** been terminated with immediate effect".* It uses the term *"has",* rather than "had". It does not state that it was terminated with effect from 16 December 2021. Based on the contents of the Claimant's contract of employment, as quoted earlier, a reasonable person may have concluded that the EDT was 22 December 2021. I agree that considering the termination letter and the contract alone, this could have reasonably confused the Claimant.

58. However, there are other points to bear in mind and the termination letter and contract cannot be looked at in isolation. Looking at the other points, I do not conclude that the Claimant was misled. Firstly, the Claimant's evidence was that, during the 16 December 2021 meeting, he was informed that he was being dismissed immediately, and his notice would be paid in lieu. Irrespective of what was stated in the termination letter, the Claimant's clear evidence was that he knew his employment was terminating on 16 December 2021. Secondly, the Claimant was also not paid after 16 December 2021. Thirdly, the Claimant had access to legal advice from skilled advisers who ought to have been able to advise him about when the EDT took place or, alternatively, dealt with the possibility that the EDT might have been earlier than 22 December 2021 when assessing the deadline for Claimant to lodge his claim.

59. The appeal letter states: *"You therefore remain procedurally dismissed from your role as Team Manager in accordance with the outcome letter dated 21 December 2021".* I agree with the Respondent that this does not mislead and I do not think it could have reasonably confused the Claimant. It simply refers the Claimant to what was stated in his dismissal letter.

60. Whilst the Respondent plead in its ET3 that the termination date was 22 December 2021, it is impossible for this to have mislead the Claimant into lodging his claim when he did based on his understanding that the EDT was 22 December 2021. This is because the ET3 was served after he lodged his claim.

61. The *Williams Ryan* case states if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the employment tribunal in due time. The fault on the part of the adviser is attributed to the employee.

62. Although the letter dated 22 December 2021 in conjunction with the contract of employment alone could and possibly would have reasonably confused the Claimant as to when his EDT may have been, this alone does not satisfy me that it was not reasonably practicable for the Claimant to present his claim in time.

63. Although I have given this test a liberation interpretation in favour of the Claimant, I am mindful that the burden of proof is on the Claimant and there should be no presumption in favour of exercising discretion to extend time. It is highly relevant that the Claimant had skilled advisers supporting him at the relevant time who had been advising him for over a month before his dismissal.

It is also highly relevant that the Claimant's own evidence for this Tribunal was that his employment had been terminated, effective immediately, during the 16 December 2021 meeting. The Claimant knew that the Respondent had stopped paying him with effect from 16 December 2021.

64. It appears that, at some point, the Claimant's advisers may have advised him that his EDT was 22 December 2021 because that was when written notice was given to terminate employment. I cannot say whether this advice was given and/or when because I have not seen such advice. I have only heard evidence from the Claimant about this point, which is summarised above. However, I can say that, if this advice was given, based on my conclusions regarding the EDT, that advice was incorrect.

65. In summary, either the Claimant should have been aware of the deadline to lodge his claim or, if he was provided with inaccurate advice about when to do so, the fault on the part of the solicitor in providing such inaccurate advice is attributed to him. It was therefore reasonably practicable for the Claimant to present his claims in time.

66. If I had found that it was not reasonably practicable for the Claimant to present his claims prior to 25 April 2022, I would have found that they were presented within a reasonable period of time thereafter. This is because only four days elapsed during this time which is not a significant period of time. This was acknowledged by the Respondent in submissions.

67. To avoid any confusion on this point, section 111(2) states that I should not consider the claim unless it is presented to the Tribunal either within the time limits or within such further period as I consider reasonable in a case where I am satisfied that it was not reasonably practicable for the complaint to be presented within the time limits.

68. If it was not reasonably practicable to present the claim prior to 25 April 2022, the four days between then and 29 April 2022 is not an unreasonable period of time. However, when assessing reasonable practicability itself, the case law makes it clear that it doesn't matter whether the claim was presented 4 minutes of 4 days after it.

69. As the claims for unfair dismissal and breach of contract are out of time, they have been dismissed.

Employment Judge McAvoy Newns

21 November 2022

Sent to the parties on:
2 December 2022
For the Tribunal:

CM Haines