EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Michael Hawkins	AND	Dorset Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 2 January 2024
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Attempted but Unable to Attend (In person)**
For the Respondent: **Miss G Nicholls of Counsel**

JUDGMENT

The judgment of the tribunal is that:
1. The claimant's complaint of unfair dismissal was presented out of time and it is hereby dismissed; and
2. The claimant's claim for entitlement to a statutory redundancy payment will proceed to be determined at a hearing.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time.
2. This has been a remote hearing which had been consented to by the parties. The form of remote hearing was by Video. The hearing was originally listed to be heard by the Video Hearing Service but not all parties were able to join that platform. The platform was then changed to Cloud Video Platform. All parties with the possible exception of the claimant were able to attend by CVP. The claimant was unable to take part in the hearing, but it is possible that he might have heard the limited manner in which the hearing progressed. The decision to dismiss his claim for unfair dismissal was therefore taken in his probable absence, and an explanation has been provided further below as to how the claimant might seek reconsideration of this decision if he considers it in the interests of justice to do so.
3. The claimant was ordered to provide a statement to explain his delay in presenting these proceedings, and he did so. Ms Tracy Scott, a Senior Advisor in the respondent's HR Department, also provided a signed statement on behalf of the respondent. The parties

had also agreed bundle of the relevant documents. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.

4. The Facts:
5. The respondent is Dorset Council, and the claimant was employed by the respondent as an Estate Officer from 1 May 2015 until his dismissal by reason of redundancy which the parties agree took effect on 5 October 2021. In April 2020 Purbeck District Council and the respondent Dorset Council had merged and a restructuring of some departments followed that merger. The new structure resulted in a staff reduction from approximately 173 full-time equivalent staff down to about 110.
6. On 26 April 2021 the claimant was given notice of termination of his employment by redundancy. This was withdrawn on 4 August 2021 when the claimant was appointed to the position of Planning Technical Support Officer subject to a trial period of four weeks. On 15 September 2021 the claimant notified the respondent that he did not accept the new alternative role and wished to "default to the redundancy scenario". On 30 September 2021 the respondent reviewed the position and concluded that the claimant had unreasonably refused an offer of suitable alternative employment, and in these circumstances proposed to refuse to pay the statutory redundancy payment. A number of meetings then took place at which the claimant was supported by his trade union officer. The claimant's employment was terminated with effect from 5 October 2021, and the respondent has refused to make the statutory redundancy payment to the claimant. It is quantified at £2,932.54.
7. Although the claimant felt aggrieved, he did not exercise his right of appeal. He had access to advice and support from his trade union at the time. The claimant then commenced the Early Conciliation process with ACAS on 19 October 2021 ("Day A"), and ACAS issued the Early Conciliation Certificate on 15 November 2021 ("Day B"). However, he did not present tribunal proceedings at that time.
8. The claimant then commenced correspondence with the respondent. By email to Ms Scott dated 23 November 2021, and headed "Redundancy Pay", the claimant gave a detailed explanation running to nearly three pages as to why he was of the view that the alternative position on offer was not suitable and why he had refused it. He concluded his email by stating: "With consideration to the further information above, please would you review issuing the redundancy payment which I feel should be paid and I am relying on." Further correspondence took place between the parties, with the respondent continually restating its position to the effect that the claimant had unreasonably refused suitable alternative employment, and that the statutory redundancy payment would not be paid.
9. The claimant subsequently presented these proceedings on 1 May 2023. The claims are for unfair dismissal, and for entitlement to a statutory redundancy payment. The respondent has entered a response which denies the claims.
10. Having established the above facts, I now apply the law.
11. The Law:
12. The relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.
13. Under section 163 of the Act any question as to the right of an employee to a redundancy payment, or the amount of redundancy payment, shall be referred to and determined by an employment tribunal. Section 164(1) of the Act provides that an employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date – (a) the payment has been agreed and paid, (b) the employee has made a claim for the payment by notice in writing given to the employer, (c) a question as to the employee's right to, or the amount of, the payment had been referred to an employment tribunal, or (d) a complaint relating to his dismissal has been presented by the employee under section 111.

14. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
15. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (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.
16. The relevant law relating to Early Conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunal to hear relevant proceedings is as follows. Section 18 of the Employment Tribunals Act 1996 defines "relevant proceedings" for these purposes. This includes in subsection 18(1) the discrimination at work provisions under section 20 of the EqA. Section 140B EqA sets out how the EC process is taken into account. Where the EC process applies, the limitation date should always be extended first by section 140B(3) or its equivalent. However, where this date as extended by section 140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate, time to present the claim is further extended under section 140B(4) for a period of one month (applying Luton Borough Council v Haque [2018] ICR 1388 EAT). In other words, it is necessary first to calculate the primary limitation period, and then add the EC period. Having reached that date, it is necessary to ask whether it is before or after one month after Day B (the date of issue of the EC certificate). If it is before then the limitation date is extended to one month after Day B. Otherwise, if it is after one month after Day B, then limitation will be extended to that later date.
17. I have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; London International College v Sen [1993] IRLR 333 CA; Asda Stores Ltd v Kauser UKEAT/0165/07; Schultz v Esso Petroleum Ltd [1999] IRLR 488 CA; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; Hetherington v Dependable Products Ltd [1971] ITR 1 CA; Price v Smithfield and Zwanenberg Group Ltd [1978] ICR 93 EAT; Bentley Engineering Co Ltd v Crown and Miller [1976] ICR 225 QBD; and Germain v Harry Taylor of Ashton Ltd ET 51738/95.
18. The Normal Time Limit:
19. In this case the claimant's effective date of termination of employment was 5 October 2021. This is also the "relevant date" for the purposes of s149 of the Act and the statutory provisions which apply. The normal time limit of three months for the unfair dismissal claim therefore expired at midnight on 4 January 2022. This was extended by the "stop the clock" provisions of the Early Conciliation period. The claimant commenced the Early Conciliation process with ACAS on 19 October 2021 ("Day A"), and ACAS issued the Early Conciliation Certificate on 15 November 2021 ("Day B"), some 27 days later. The time limit was thus extended to 31 January 2022.
20. The claimant presented these proceedings on 1 May 2023, which for the unfair dismissal claim was some 15 months out of time.

21. The time limit is different for the claim for entitlement for a statutory redundancy payment. The normal time limit of six months from the relevant date therefore expired at midnight on 4 April 2022. This was extended by 27 days under the “stop the clock” provisions of the Early Conciliation period. The time limit was thus extended to 1 May 2022.
22. Claim for Entitlement to a Statutory Redundancy Payment.
23. In my judgment the claimant is entitled to pursue his claim for a statutory redundancy payment for the following reasons. As set out above, the relevant statutory provisions do not necessarily require a claimant to present tribunal proceedings within a specified time limit in circumstances where section 164(1)(b) applies. This requires the employee to make a claim for the payment by notice in writing given to the employer within the initial period of six months. There is no statutory requirement to present tribunal proceedings within any subsequent specified amount of time. This was confirmed by the High Court in Bentley Engineering Co Ltd v Crown and Miller.
24. The claimant’s lengthy email to the respondent dated 23 November 2021 which was headed “Redundancy Pay” stated “… Please would you review issuing the redundancy payment which I feel should be paid and I am relying on.” In my judgment, applying Price v Smithfield and Zwanenberg Group Ltd, having received this statement the respondent would reasonably understand it in all the circumstances of the case as being the intention to the claimant to seek a redundancy payment. That statement was made within the initial primary time period of six months. Accordingly, the claimant’s claim for entitlement to a statutory redundancy payment can proceed, and separate case management orders have been made today in this respect.
25. Unfair Dismissal
26. The claimant was ordered to provide information as to why he might suggest that it was not reasonably practicable to have issued the unfair dismissal proceedings within the relevant time limit. He relies on a written statement which merely says this: “The Employment Tribunal application was made outside of the timeframe because I was fearing of my position. I was also in ongoing communications with Dorset Council regarding this matter (23 November 2021 to 22 March 2023). I hoped that a resolve/settlement could be reached without going to the employment tribunal. It was considered that a claim to the Employment Tribunal would jeopardise the ongoing communications and any prospect of a resolve/settlement with Dorset Council. Unfortunately, Dorset Council did not offer any resolve whatsoever despite the lengthy communications. I was then compelled to refer the matter to the employment tribunal to seek a fair and independent resolve.”
27. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall’s Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
28. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee’s failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor’s knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his

adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

29. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
30. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
31. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "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 a good reason" for doing so. As Browne Wilkinson J (as he then was) 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 v Hampshire Area Health Authority [1982] ICR 200 at p 204).
32. The Employment Tribunal must make clear findings about why the claimant failed to present his originating application in time, and then assess whether he has demonstrated that it was not reasonably practicable to have presented it in time (London International College v Sen.
33. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
34. Conclusion:
35. At no stage has the claimant asserted that he was ignorant or confused about his legal rights, nor that he was ignorant of any facts, nor that any legal advisers were at fault. The claimant does not rely on any alleged illness which might have prevented him from submitting a claim in time, nor does he rely on any disability, postal delays, or any mistaken belief that the claim was already proceeding.
36. The claimant had access to support and advice from his independent trade union officer at all relevant times. He was clearly advised and was aware of the appropriate procedure to adopt in order to issue Tribunal proceedings because he commenced the Early Conciliation process with ACAS within a reasonable time. In my judgment the reason relied upon by the claimant for not issuing proceedings, namely that it might upset the prospect of a resolution or settlement with the respondent, is not a sufficient excuse. It seems clear to me that it was reasonably practicable for the claimant to have issued these proceedings

within the time limit as extended by the Early Conciliation provisions to 31 January 2022. There is no good reason why the claimant did not do so.

37. In addition, applying Cullinane, even if it had not been reasonably practicable for the claimant have presented these proceedings within that (extended) period of three months, it seems clear to me that the claimant did not present these proceedings within a reasonable period thereafter. There is no real reason or acceptable explanation as to why the claimant continued to delay the issue of proceedings during the period from 31 January 2022 until the claim was eventually presented well over a year later on 1 May 2023.
38. For these reasons in my judgment the claim was presented out of time and it is hereby dismissed.
39. Reconsideration:
40. This decision has been taken in the absence of the claimant who do not attend this hearing, apparently through no fault of his own. He is entitled to seek reconsideration of this Judgment in accordance with Rule 70. Any such application must be made in writing within 14 days from date this Judgment is sent to the parties, and must be copied to the respondent, in accordance with Rule 71. However, given the significant delay in issuing the unfair dismissal claim the claimant must ensure that any such application addresses the following points: (i) in circumstances where the claimant had access to advice and support from his trade union and was clearly aware of the procedure for presenting proceedings because he had commenced the Early Conciliation process, exactly why the claimant asserts that it was not reasonably practicable for him to have presented these proceedings before the extended time limit which expired on 31 January 2022; and (ii) even if in those circumstances it was not reasonably practicable to have presented these proceedings before that time, exactly why he then goes on to assert that it was not reasonable for him to have presented these proceedings until after the expiry of a further 15 months on 1 May 2023.

Employment Judge N J Roper
Dated 2 January 2024

Judgment sent to Parties on
15 January 2024

For the Tribunal Office

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