Neutral Citation Number: [2026] EAT 184

Case No: EA-2024-000116-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 November 2026

Before :

HIS HONOUR JUDGE JAMES TAYLER
(DEPUTY PRESIDENT)

- -

Between :

Kamyar Soltanimohammadi

Appellant

- and -

AM Construction & Engineering Ltd

Respondent

- -
- -

Naomi Webber (instructed through Advocate) for the **Appellant**
Richard Wayman (instructed through Direct Public Access) for the **Respondent**

Hearing date: 5 November 2026

- -

JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal erred in law in determining a preliminary issue in respect of which the required 14 days' notice had not been given, and in deciding that the complaints were submitted out of time.

HIS HONOUR JUDGE JAMES TAYLER (DEPUTY PRESIDENT)

The Issues

1. The issues in this appeal are whether an Employment Tribunal erred in law in determining whether complaints were submitted out of time without having provided the required 14 days' notice before determining a preliminary issue and whether there was an error of law in the decision that the complaints were out of time.

The judgment appealed

2. The appeal is against a judgment of Employment Judge Morton after a hearing on 6 November 2023 at London South. The judgment was sent to the parties on 20 November 2023 and the written reasons on 19 December 2023. The claimant represented himself at the hearing with the assistance of a Farsi interpreter. The respondent was represented by Mr Wayman of Counsel, as in the EAT.

Procedural background

3. The claimant submitted a claim form that was received by the Employment Tribunal on 7 February 2023 in which he claimed unfair dismissal and made various money claims including unauthorised deductions from wages and for holiday pay. The claimant also ticked the box on the claim form for a redundancy payment. In a document attached to the claim form the claimant stated that the claim was submitted out of time because Citizen's Advice was meant to have submitted a claim on his behalf. The claimant stated that he had travelled to the UK from Iran. The respondent had sponsored his visa but had sought to charge him for doing so and had not paid his wages. The claimant was dismissed on 9 October 2022.

4. In its response, the respondent denied the complaints, asserted that the claimant did not have two years' qualifying service to claim unfair dismissal, and asserted that the claim was submitted out of time.

5. On 22 June 2023, the Employment Tribunal sent a notice for a three day final hearing from 6

to 8 November 2023. The claimant expected the time point to be dealt with as part of the final hearing.

6. On 6 July 2023, the claimant applied to amend his claim to add complaints of automatic unfair dismissal on the basis that the reason, or principal reason, for his dismissal was the making of protected disclosures and/or that he was subject to detriment done on the ground that he had made protected disclosures.

7. On 17 July 2023, Employment Judge Ramsden ordered the claimant to provide additional information about the protected disclosure complaints. Employment Judge Ramsden suggested that, were the amendments to be permitted, it was likely that the matter would have to be re-listed for a longer final hearing.

8. On 25 August 2023, a letter was sent, on the instructions of Employment Judge McLaren, asking the claimant to state, within 7 days, whether he was pursuing the application to amend, and stating that, if so, the final hearing would be postponed and a Preliminary Hearing would be held on 6 November 2023 to determine the amendment application. On 30 August 2023, the claimant wrote to the Employment Tribunal stating that he wished to pursue the application to amend.

9. On 19 September 2023, the respondent wrote to the Employment Tribunal applying for the complaint of "ordinary" unfair dismissal to be struck out on the basis that the claimant had insufficient qualifying service.

10. On 30 October 2023, a letter was sent on the instructions of Employment Judge Dyal stating that the final hearing remained listed and that the application to amend would be dealt with at the outset.

11. On 1 November 2023, a letter was sent, on the instructions of Acting Regional Employment Judge Khalil, stating that the final hearing had been converted into a one day Preliminary Hearing to determine the respondent's strike out application, the claimant's application to amend and to undertake any necessary further case management. Accordingly, when the claimant attended the Employment Tribunal on 6 November 2023, he understood that there was to be a Preliminary Hearing

to determine those matters only.

The Preliminary Hearing before Employment Judge Morton

12. Employment Judge Morton decided not to determine the matters that had been fixed by Regional Employment Judge Khalil, but to consider whether the complaints had been submitted out of time. Employment Judge Morton stated:

> 3. **The Claimant did not expect the question of whether or not his claim could proceed because it was out of time to be decided** at the hearing. **I therefore considered whether it would be in the interests of justice and more consistent with the overriding objective to adjourn the case** to another day, **but the Claimant agreed to proceed on the basis that he had addressed the time limit point in his witness statement and would be relying on only a small number of documents from the extensive bundle he had brought to the hearing**. These were sent to Mr Wayman and **the hearing was adjourned to allow both parties to prepare to address the point.** A full day had been allocated to hear the various applications that had been put forward, and there was therefore adequate time to deal with the jurisdictional issue. **It was furthermore clear to me from the witness statement and the documents I did consult, that the Claimant was well aware that time limits were an issue in this** case and **as the Tribunal does not have jurisdiction unless it is satisfied that the statutory test for extending time is met, I considered that it was necessary to determine the jurisdiction question in advance of any other issue that was potentially to be determined at the hearing.** [emphasis added]

The claimant's evidence

13. The claimant had prepared a witness statement and bundle of documents for the final hearing (separate bundles having been directed because of problems in the parties agreeing a single bundle). The claimant's witness statement dealt briefly with the time point:

> 30. Contacting Citizen Advice
>
> 30.1. **As soon as I received my termination notice from the company, I contacted ACAS and spoke with a gentleman. After hearing my explanation regarding my condition during my employment, he correctly recommended that because of my complicated situation get in touch with Citizen Advice** and discuss the matter with them.
> 30.2. **On 13 September, I contacted Citizen Advice and provided them with the necessary documents. It was agreed that Citizen Advice would correspond with the Employment Tribunal on my behalf and proceed with the case**. **I maintained continuous communication with Citizen Advice Woking until 10 January and both myself and Citizen Advice's Woking were awaiting a response from an Employment Expert at Citizen Advice Head Office.**
>
> 30.3. **On 10 January, a caseworker from Citizen Advice contacted me and**

> **informed me that there was a three-month deadline, which their specialist has stated we has missed.** When I informed them that I have reported this claim to the Citizens Advice on time, **On 24 January, they recommended that I contact ACAS for late claim registration.**
>
> 30.4. **I immediately contacted ACAS again**, and this time, a gentleman registered my request and sent me an email containing the early conciliation certificate.
>
> 30.5. Due to the fact Citizens Advice mistakenly categorizing my case under the "Unfair dismissal" complaint group from the beginning and inadvertently providing me with guidance, coupled with my lack of familiarity with the UK Employment Tribunal laws, however I had included almost all of these aspects in my initial complaint, but they were not separately classified. Based on experts' recommendations, I solely aimed to register the complaint as swiftly as possible, and due to severe financial constraints and the urgency to proceed, I could not seek guidance in this regard. Furthermore, at the time of registering the complaint, it was indicated that I can specify the damages precisely and amend the initial claim after the complaint was filed. And as soon as I gained a relative understanding of the laws, I took steps to request the amendment of my initial complaint. [emphasis added and bundle page number omitted]

14. Mr Wayman, for the respondent, chose not to cross-examine the claimant. Employment Judge Morton asked the claimant some questions.

15. The claimant provided a small 8 page extract of the documents from his proposed bundle for the full hearing, including the part of his witness statement dealing with the time point. The documents included:

15.1. an email showing the claimant sent his contract termination letter to Citizens Advice on 13 September 2022

15.2. an email from Citizens Advice dated 10 January 2023 stating:

> I am aware that this may not be your main priority at the moment but I wanted to update you on your previous employment situation
>
> We have had a reply from our Expert Team but unfortunately we have passed the last date by which a claim has to be reported.

15.3. an email from the claimant to Citizens Advice on 17 January 2023 questioning whether the claim was out of time

15.4. an email from Citizens Advice to the claimant dated 24 January 2023 suggesting

that any claim should have been "registered" within three months of the date of dismissal; i.e. by 8 January 2023 and asking if he had a "reference number"

15.5. an email from the claimant to Citizens Advice dated 24 January 2023 in which the claimant stated he did not have a "reference number"

15.6. an email from Citizens Advice to the claimant dated 24 January 2023 in which it was stated "As it stands the 3-month rule for an Employment Tribunal claim has expired" but it was suggested that ACAS or the Employment Tribunal could be contacted to see if a late claim could be made

15.7. an email from the claimant to Citizens Advice dated 31 January 2023 in which the claimant stated:

> I just spoke with ACAS over the phone, they sent me a form that I have filled it, it was just about my name and employer name and they will be in touch with me by next 10 days.
>
> It is not clear to accept my claim or not

16. ACAS issued an early conciliation certificate on 2 February 2023. The claimant submitted his claim to the Employment Tribunal five days later on 7 February 2023.

The decision of the Employment Tribunal

17. Having set out sections 111 and 23(2) of the **Employment Rights Act 1996** ("**ERA**") Employment Judge Morton gave herself a relatively brief, but accurate, self-direction as to the basic law on reasonably practicable time limits:

> 8. The applicable test in relation to all of his claims was therefore the 'not reasonably practicable' test set out in the ERA 1996. The meaning of 'reasonably practicable' has been considered in a number of cases, including *Palmer and anor v Southend-on-Sea Borough Council* 1984 ICR 372, CA, where the Court of Appeal concluded that **'reasonably practicable' does not mean either 'reasonable', or 'physically possible', but something like 'reasonably feasible'**. Lady Smith in *Asda Stores Ltd v Kauser* EAT 0165/07 gave this explanation: '**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**'. [emphasis added]

18. The Employment Tribunal concluded that it would have been reasonably practicable for the

claimant to have submitted the claim in time:

> 12. The Claimant's own evidence was that he went to the Citizen's Advice Bureau in September 2022, before his employment actually terminated. Clearly, he had a lot on his mind – the loss of his employment would jeopardise his right to work in the UK and his priority, as he said in his own evidence, was to earn money and survive. **His case is that he handed matters over to the CAB to bring proceedings for unfair dismissal and that the CAB missed the deadline. If this was the case then the Claimant's claim that it was not reasonably practicable for the claim to be presented in time must unfortunately fail**. The test in the Employment Rights Act, which is the relevant statute is **a strict objective test, and does not make allowances for the difficult and unexpected circumstances the Claimant found himself in at the time**. **If a claimant engages skilled advisers to act in presenting a claim, the presumption is that it was reasonably practicable to present the claim in time** (*Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA). In other words, if the adviser did not meet a deadline, that does not mean that it was not reasonably practicable for the deadline to adhered to. **That principle was repeated as regards advice from the CAB by the Court of Appeal in *Riley v Tesco Stored Ltd*, an authority that the employment tribunal is bound to follow in a case with facts such as these. If that is the Claimant's case and the facts were as the Claimant wished to present them, then I am bound to find that it was reasonably practicable for the claim to be presented in time and accordingly the tribunal has no jurisdiction to hear it.**
>
> 13. **I have also considered whether, given the Claimant's unfamiliarity with legal procedures in the UK, that he might have been mistaken about what the CAB was doing for him. In fact I agree with Mr Wayman that the correspondence with the CAB tends to show that it had not in fact agreed to start the proceedings and conduct the claim for him.** But even if the CAB had not in fact undertaken to present the claim for the Claimant, **I am do not think that it was not reasonably practicable for the Claimant himself to have presented the claim in time. In answer to a question from me the Claimant said that he had known to contact the employment tribunal in September or October 2022 because he had conducted a Google search**. **I consider that if he had done so he would have quickly found out that there was a three-month time limit for bringing a tribunal claim and a necessity to contact ACAS. That information is readily and prominently available from multiple sources on the internet. On his own evidence the Claimant did also contact ACAS at an early stage** – he was therefore a resourceful and capable individual and at the hearing **he came across as intelligent and capable of understanding a good deal about the process**. **I also note Mr Wayman's submission that it is inconceivable that ACAS would not have told the Claimant that the employment tribunal operates strict time limits.**
>
> 14. The Claimant is a highly educated man and his grasp of English is also very good, even though he had the benefit of an interpreter at the hearing. **So, if the Claimant was not as a matter of fact relying on the CAB to present the claim for him, I find that it was 'reasonably feasible'** (using the test from *Palmer v Southend on Sea Borough Council*) **for the Claimant to have presented the claim in time himself**. He had **spoken to the CAB and to ACAS prior to the expiry of the deadline, and, again on his own evidence, to the Tribunal itself. There was no evidence that he**

> **had actually been misinformed by any of the agencies he contacted. He had access to the internet and was able to find out about employment tribunals and ACAS** – again well before the deadline. Accordingly, in my judgment, he was also able to find out about tribunal time limits. [emphasis added]

19. Employment Judge Morton held that, if the claimant had handed over the submission of his claim to Citizens Advice, she was bound to find that it was reasonably practicable for the claim to have been submitted within time, because Citizens Advice was a skilled advisor.

20. Although it is clear that Employment Judge Morton very much doubted whether the claimant had agreed with Citizens Advice that they would submit the claim for him, that was the focus of the judgment refusing reconsideration, in which she stated:

> **The Claimant's case about the time limit was that he had instructed the Citizen's Advice Bureau to submit his claim to the tribunal and it had not done so. I set out in my written reasons why I was bound to find as a matter of law that this meant that it was reasonably practicable for the claim to be submitted in time** (*Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA and *Riley v Tesco Stores* 1980 ICR 323 CA). Nothing the Claimant has set out in his submission makes any difference to that conclusion or means that it would be in the interests of justice to reconsider it. To reinforce this point, I set out below what the Claimant said in the witness statement that was among the documents he provided in advance of the hearing [emphasis added]

21. The alternative reasoning of the Employment Tribunal for finding that it was reasonably practicable for the claimant to submit the claim in time was that, if he had not instructed Citizens Advice to submit the claim, he could and should have discovered the time limit and approached ACAS for early conciliation, and thereafter submitted the claim in time.

22. Finally, the Employment Tribunal concluded that even if it was not reasonably practicable for the claimant to submit the claim within the primary time limit, he had failed to submit it within such further time as was reasonable:

> 15. Finally, even if I am wrong about both those arguments, **the Claimant did not explain why there was a delay between him finding out about the expiry of the deadline (which he discovered on 10 January 2023) and his approaching ACAS to rectify the problem (31 January 2023). Three weeks' delay without an explanation creates an insurmountable problem** for the Claimant under the second limb of the test in s111 ERA, **as does the five-day delay between the Claimant receiving the ACAS certificate and his presenting his tribunal claim.** Hence even if it had not been reasonably practicable for the claims to have been presented (by

> means of an approach to ACAS) within the three-month time limit, **there is no evidence that they were presented within such further period as was reasonable.** [emphasis added]

23. The Employment Tribunal set out its final conclusion:

> 16. Accordingly, it is the judgment of the Tribunal that the Claimant presented his claims of unlawful deduction from wages and unfair dismissal outside the statutory time limits set out in sections 23(2) and 111(2) Employment Rights Act 1996.

The law

Preliminary Issues

24. The **Employment Tribunal Rules 2013** ("**ET Rules 2013**") were in force at the relevant times.

25. Rule 53 of the **ET Rules 2013** (now Rule 52 **ET Rules 2024**) provided:

> 53.— Scope of preliminary hearings
>
> (1) **A preliminary hearing is a hearing at which the Tribunal may** do one or more of the following—…
>
> (b) **determine any preliminary issue**;
>
> (c) consider whether a claim or response, or any part, should be struck out under rule 37;
>
> (d) make a deposit order under rule 39; …
>
> (2) There may be more than one preliminary hearing in any case.
>
> (3) **"Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability** (for example, an issue as to jurisdiction or as to whether an employee was dismissed). [emphasis added]

26. Deciding whether a claim was submitted in time is therefore a preliminary issue that can be determined at a Preliminary Hearing.

27. Rule 54 of the **ET Rules 2013** (now Rule 53 **ET Rules 2024**) provided:

> A preliminary hearing may be directed by the Tribunal on its own initiative at any time or as the result of an application by a party. **The Tribunal shall give the parties reasonable notice of the date of the hearing and in the case of a hearing involving any preliminary issues at least 14 days' notice shall be given** and **the notice shall specify the preliminary issues that are to be, or may be, decided** at the hearing.

28. Rule 54 **ET Rules 2013** mandated 14 days' notice of a Preliminary Hearing at which a preliminary issue will be decided and that the notice must "specify" the preliminary issue that is to be decided.

29. These provisions were considered by Her Honour Judge Tucker in **Kolev v Middlesex University** [2023] EAT 173. A Preliminary Hearing had been fixed to consider whether a claim should be struck out because there was no reasonable prospect of it being held that the claim was submitted within time, but instead the Employment Judge considered as a preliminary issue whether the claim was, as a matter of substance, out of time. HHJ Tucker stated when considering the legal principles:

> 29. … There are also a number of cases which contain guidance as to the proper approach to considering limitation issues at a preliminary stage of proceedings and also generally in respect of preliminary hearings. In particular, in *Caterham School Limited v Rose* (UKEAT/0149RN) the EAT, **His Honour Judge Auerbach, emphasised the importance of ensuring that there is clarity as to the purposes of a preliminary hearing and what is to be considered. I agree.** If crucial, at times, wholly determinative issues are to be decided at a preliminary hearing **it is an essential tenet of a fair process that the parties should know what those issues are and have had adequate notice of them so as to be able to fairly and properly address them** and their implications for the claims before the Tribunal.
>
> 30. **It is also necessary to ensure that there is a clarity about whether the preliminary hearing has been listed to determine an application to strike out, or, to determine a preliminary issue.** Strike-out applications may be made wholly on submission, taking the case of the party whose claim or response is at risk of strike-out at its highest. **Fair and just determination of a preliminary issue may require evidence to be given, including oral evidence, and a factual determination to be made so as to reach a definitive outcome on a point which cannot be re-visited at a full merits hearing. In many cases that will require either, agreed case management directions or a hearing to identify the issues which will be considered at the preliminary hearing so that directions can be made as to how and when evidence should be prepared and considered. In addition, the terms or r.54 of the ET Rules of Procedure 2014 are mandatory: in the case of a preliminary hearing involving 'preliminary issues'** as defined in r.53(3) (i.e. those which may determine liability), **at least 14 days notice must be given and that notice must 'specify' the preliminary issues that are, or may be determined**.
>
> 30. Tribunals and Courts are under significant pressure at present from the volume of work before them. **The need for effective case management and application of the principles set out in the overriding objective is clear. That, however, cannot be any justification for short cuts where that leads to unjust or unfair consideration of important issues and claims. Whilst unnecessary delay is inconsistent with the**

> **proper administration of justice, "justice must never be sacrificed on the altar of speed"**. (See, albeit in a different jurisdiction, but where delay was particularly significant becasuse of a statutory time limit for proceedings per Paulfley J. *in Re: NL (A child)* [2014] EWHC 270).
>
> 31. In my judgment, two further issues are important. First, the position of litigants in person. **Lawyers will be, or should be, familiar with the rules of procedure; litigants in person may not be. They may not appreciate the significance of a PH at which a preliminary issue is to be determined. Employment Judges must be astute to ensure that before such a hearing proceeds, particularly one where preliminary issues (as defined above) are determined. a litigant in person has had adequate notice of both the hearing, the issues to be determined, has understood the purpose of the hearing and (if appropriate) has had time to reflect upon the need for evidence**. Secondly, the question of whether and when some issues should be determined at a preliminary hearing. One party may be keen to proceed with a preliminary hearing to determine what, from their perspective is a knock-out point. For the other, however, that may mean that determination of a key issue has taken place before a full hearing on the merits and prior to disclosure having taken place. [emphasis added]

30. In her conclusions HHJ Tucker held:

> 36. I have already out some relevant matters above when considering the detail of the Judge's Judgment and Reasons. I consider that the Judgment was flawed and that a number of errors of law took place.
>
> 37. **First, in my view, it was clear that the case had been listed as a PH to consider strike-out and whether a Deposit Order should be paid. However, the Judge then proceeded to determine issues of substance, preliminary issues properly so called.** First, whether not claims were out of time, which, in this case, required consideration of whether that which was alleged was "an act which extended over a period". The Claimant asserted that it was. Secondly, the Judge then considered whether or not time should be extended.
>
> 38. **Further, in my judgment, the Judge failed to properly identify how the Claimant put his claim and the issues within those claims**. The Judge' summary of the claims failed to refer to clear and relevant aspects of the Claimant's case. Even if there were doubts about whether or not the way in which the Claimant's case was put would succeed at final hearing, that did not legitimise a failure to identify the way in which the case was put. …
>
> 37. **In addition, there was no proper notice of the preliminary hearing as required by r.54** of the ET Rules of Procedure 2013. **The notice given did not 'specify'** as required by the rules (r.54 read in conjunction with r.53) **the preliminary issue** (as defined in r.53(3) which was, potentially, determinative) which was, or might be, considered at the hearing. **The lack of adequate notice was then compounded by the late provision of documents and the fact that the basis for the preliminary hearing appeared to change at the hearing**. …

31. While Rule 54 of the **ET Rules 2013** (now Rule 53 **ET Rules 2024**) requires 14 days' notice

of a Preliminary Hearing at which a preliminary issue is to be determined, there is the possibility of abridging time or waiving the irregularity. Rule 5 of the **ET Rules 2013** (now Rule 5(2) **ET Rules 2024**) provided:

> 5. Extending or shortening time
>
> The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.

32. Rule 6 of the **ET Rules 2013** (now Rule 6 **ET Rules 2024**) provided:

> 6. Irregularities and non-compliance
>
> A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—
>
> (a) waiving or varying the requirement; …

33. Where a party agrees to the variation of a procedural requirement that may be an important factor in deciding whether to waive the non-compliance, such as the notice requirement for the determination of a Preliminary Hearing; but only if the Employment Judge is satisfied that the matter can be determined fairly and the party, particularly if a litigant in person, has a real choice. There may be circumstances in which going ahead will be unfair such that the party should not be asked to consent to the matter proceeding; because the party has been put in a position they should never have been in. In somewhat different circumstances, where a Preliminary Hearing had been fixed to determine the identity of a claimant's employer as a preliminary issue, without directions being given for exchange of witness evidence, His Honour Judge Auerbach held in **Smirnov v Ramboll UK Ltd** [2025] EAT 12:

> 43. Given that EJ Nash did raise the matter, and the discussion which ensued, and how it concluded, that has given me some pause and reflection as to whether that was sufficient. The claimant did signify that he was prepared to proceed. However, this is not a case like *Mensah*, in which a party did not put forward evidence or argument on a strand of their original case, at a hearing when they could have done so; nor like *Muschett*, in which the Court rejected the suggestion that the judge was under a duty

> to engage in an inquisitorial exercise to ascertain whether there might be further evidence that, if brought, would assist the litigant to advance his case; nor like *Drysdale*, in which the lay litigant's spouse withdrew a claim during the course of a hearing, and the tribunal was not wrong to have failed to take further steps to ensure that this was a properly-considered decision.
>
> 44. Ms Anderson stressed the guidance in *Drysdale* that the determination of the appropriate level of assistance or intervention was properly a matter for the judgment of the tribunal hearing the case, which would have the "feel" for what was fair in all the circumstances. However, what distinguishes the present case is that, as I have said, **the claimant was a litigant in person, who (as well as the respondents and the tribunal) found himself in a situation which should not have arisen at all, and having to make a choice between options, which he should not have found himself having to make**.
>
> 45. I have concluded that in all these circumstances it was wrong for the judge to proceed to adjudicate this issue in the absence of witness evidence. [emphasis added]

34. That said, I consider that generally a litigant in person should be responsible for their decisions and if they consent to a hearing proceeding their autonomy to do so should generally be respected. To exercise that autonomy a litigant in person needs to know that they have a real choice. Where there has been a procedural shortcoming that was capable of being waived, it will often be necessary to decide whether proceeding with the case has resulted in some real unfairness, which often will have resulted in some other identifiable error of law, irrespective of the procedural shortcoming.

Reasonably practical time limits

35. The Employment Tribunal quoted section 111 **ERA** which provides:

> 111 Complaints to employment tribunal.
>
> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
> (2) Subject to the following provisions of this section, 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 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.
>
> (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)

36. The Employment Tribunal also referred to section 23(2) **ERA** which provides:

> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
>
> > (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
>
> (3) Where a complaint is brought under this section in respect of—
>
> > (a) a series of deductions or payments, or
> >
> > (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
>
> (3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).
>
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

37. The Employment Tribunal did not refer to section 164 **ERA** that, in broad terms, provides a six month time limit for an application for a redundancy payment.

38. The Employment Tribunal referred to **Palmer** for the well known proposition that reasonably practicable is to be interpreted as broadly equivalent to being reasonably feasible and to **Asda** for the perceptive analysis that applying the "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".

39. In its analysis section the Employment Tribunal returned to the law. Employment Judge Morton referred to the test being "a strict objective test" that "does not make allowances for the difficult and unexpected circumstances the Claimant found himself in", which significantly overstates the rigour of the test.

40. Employment Judge Morton, referred to **Dedman** for the proposition that if "a claimant engages skilled advisers to act in presenting a claim, the presumption is that it was reasonably practicable to present the claim in time" and suggested that "principle was repeated as regards advice from the CAB by the Court of Appeal in **Riley**" so that if the claimant instructed Citizens Advice to submit any claim she was "bound to find that it was reasonably practicable for the claim to be presented in time".

41. The Employment Tribunal was not referred to the leading authority concerning Citizens Advice, **Marks & Spencer plc v Williams-Ryan** [2005] I.C.R. 1293 CA, in which Lord Phillips of Worth Matravers MR held:

> 31. What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in *Dedman* [1974] ICR 53 was part of the ratio. There the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment tribunal.
>
> 32. **The observations of Stephenson LJ in *Riley* [1980] ICR 323 were, as I said, obiter**. **There is no binding authority which extends the principle in Dedman [1974] ICR 53 to a situation where advice is given by a Citizens Advice Bureau. I would hesitate to say that an employee can never pray in aid the fact that he was misled by advice from someone at a Citizens Advice Bureau**. It seems to me that **this may well depend on who it was who gave the advice and in what circumstances. Certainly, the mere fact of seeking advice from a Citizens Advice Bureau cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application** to an employment tribunal. Indeed, Ms Callaghan did not so suggest. [emphasis added]

The appeal

42. In summary, the claimant asserts that the Employment Tribunal erred in law as follows:

> Ground 1: To determine a preliminary issue on time limits ('the Time Issue') without the required notice was materially unfair and an error of law. This affected all further decisions made by the ET and informs the background to the other grounds of appeal.
>
> Ground 2: The ET failed to make a correct factual finding as to when time began to run for claims of holiday pay, wages and other payments and this amounted to an error of law.
>
> Ground 3: The ET failed to consider whether there was an in-time claim for failure to pay redundancy pay.

Ground 4: The ET made an error of law:

> i. As to the position of advice from CAB when deciding the question of whether it was reasonably practicable to bring a claim in time, and was unable to take the correct approach when the full material was not before it.
>
> ii By not taking into account a number of relevant considerations and significant relevant evidence when reaching the conclusion that it was reasonably practicable to bring the claim in time.
>
> iii By not taking into account relevant evidence or making necessary factual findings when concluding why the claim was not brought within a further reasonable period

Analysis

43. While the point was not raised in the appeal, it is questionable whether it was open to Employment Judge Morton to decide that she would not determine the issues fixed by Acting Regional Employment Judge Khalil absent a material change of circumstances: Rule 29 of the **ET Rules 2013** (now Rule 30 **ET Rules 2024**), **Serco Ltd v Wells** [2016] I.C.R. 768, **Liverpool Heart and Chest Hospital NHS Foundation Trust v Poullis** [2022] EAT 9, [2022] I.C.R. 785. As the point was not raised in the appeal, I have ignored it in reaching my decision.

44. Generally speaking, where a litigant in person has consented to a course of action, I would be slow to go behind the decision. But I have concluded that the decision was not properly informed and that sidestepping the procedural requirement for 14 days' notice resulted in unfairness and a number of freestanding errors of law in the determination of the Employment Tribunal. The analysis is to an extent iterative, because the errors of law I have found are cumulative.

45. Employment Judge Morton noted that the claimant "did not expect the question of whether or not his claim could proceed because it was out of time to be decided at the hearing". The Employment Judge stated that she "considered whether it would be in the interests of justice and more consistent with the overriding objective to adjourn the case to another day". There is nothing to suggest that Employment Judge Morton reminded herself, or told the claimant, that the time point was a preliminary issue in respect of which 14 days' notice was required pursuant to Rule 54 **ET Rules**

2013 (now Rule 53 **ET Rules 2024**) unless time was abridged pursuant to Rule 5 **ET Rules 2013** (now Rule 5(2) **ET Rules 2024**). It might be said that absent an express abridgment of time under Rule 5 **ET Rules 2013** it was not permissible to consider a preliminary issue. That point has not been raised in the appeal and I have not relied on it. I have, however, concluded that Employment Judge Morton should have informed the claimant of his right to 14 days' notice and sought submissions on whether time should be abridged, rather than merely considering whether it would be "in the interests of justice and more consistent with the overriding objective to adjourn the case to another day".

46. I can see that there were arguments that could be advanced that time could be abridged without unfairness because, unlike in **Kolev** and **Smirnov**, the claimant had a witness statement that dealt, albeit briefly, with the time point and he was able to extract a small bundle of the key documents from the bundle he had prepared for the full hearing. Unfortunately, the failure to provide advanced notice that the time point was to be determined, caused or contributed to significant shortcomings in the hearing and analysis of the preliminary issue. As HHJ Tucker noted in **Kolev** "it is an essential tenet of a fair process that the parties should know what [the] issues are and have had adequate notice of them so as to be able to fairly and properly address them" and that "justice must never be sacrificed on the altar of speed".

47. Hurrying to determine the time point contributed to two significant errors that are accepted by the respondent.

48. First, the claim for a redundancy payment was overlooked. That complaint was not out of time. This is raised in ground 3 which the respondent accepts must be allowed. I consider that it is an example of the type of oversight that can result from hurrying ahead with the determination of a preliminary issue for which there has been inadequate preparation.

49. Second, in respect of unauthorised deduction from wages (and possibly holiday pay) it was assumed that time ran from the date of the termination of the claimant's employment. A proper determination of whether a complaint is out of time starts by deciding the date from which time starts

running. In fact the last payment of wages was with a payslip issued after the termination of the claimant's employment on 31 October 2022. Mr Wayman was not aware of the payslip because he had not seen the bundle the claimant had prepared for the final hearing. If there had been time properly to prepare for determination of the preliminary issues Mr Wayman should have been aware of the payslip. The payslip would have been in evidence before the Employment Tribunal. While the claimant accepts that the claim for unauthorised deductions from wages would still have been out of time, the delay would have been considerably less. I do not accept the contention of the respondent that the Employment Tribunal would necessarily have concluded that it had been reasonably practicable to submit the unauthorised deductions from wages complaint in time, or if it was not, the claim was not submitted in such further time as was reasonable. The claimant had been told by Citizens Advice on 10 January 2023 that the claim was out of time. Citizens Advice appears to have made the common error, made by the respondent and the Employment Tribunal, of assuming that time for a claim of unauthorised deductions from wages always runs from the date of dismissal. The Employment Tribunal also did not refer to the email exchanges between the claimant and Citizens Advice in which the claimant questioned whether his claim was out of time. He was actively seeking to understand what had happened during the period in which he was potentially still in time to bring the complaint of unauthorised deductions from wages. Ground 2 is made out.

50. The most significant error that resulted from the lack of proper notice that the time point was to be determined was that a key authority was not cited to the Employment Tribunal. If proper notice of the determination of the preliminary issue had been given, I am sure that Mr Wayman would have brought the decision of the Court of Appeal in **Marks & Spencer v Williams-Ryan** to the attention of the Employment Tribunal, in accordance with his duty as Counsel. Because this key authority was not brought to her attention, Employment Judge Morton's self-direction as to the law went seriously awry. Employment Judge Morton started correctly by referring to **Palmer** for the proposition that reasonably practicable is to be interpreted as broadly equivalent to being reasonably feasible and to

Asda for the analysis that the "test is not simply a matter of looking at what was possible" but the Employment Tribunal should ask "whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done". But in the analysis section Employment Judge Morton went wrong by focussing on **Dedman** and **Riley**. She directed herself that there was "a strict objective test" that "does not make allowances for the difficult and unexpected circumstances the Claimant found himself in". This is not consistent with what she had taken from **Palmer** and **Asda**. While Mr Justice Cavanagh noted in **Cygnet Behavioural Health Ltd v Britton** [2022] EAT 108, [2022] IRLR 906 that the suggestion in **Dedman** and **Marks & Spencer v Williams-Ryan** that the provisions should be given a liberal interpretation in favour of the employee did not fit with the statutory wording or more recent decisions of the Court of Appeal, even applying a strict test to the words "reasonably practicable" permits allowance to be taken of the circumstances of the claimant in determining whether it "was reasonable to expect that which was possible to have been done".

51. More importantly it was wrong to state that **Riley** is authority for the proposition that the full strictness of the test that applies when a party has instructed a solicitor in **Dedman** applies where someone receives assistance from Citizens Advice. In **Marks & Spencer v Williams-Ryan**, Lord Phillips was clear that the approach to be adopted "may well depend on who it was who gave the advice and in what circumstances" and that "the mere fact of seeking advice from a Citizens Advice Bureau cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to an employment tribunal".

52. Employment Judge Morton erred in adopting an either or approach; in which either the claimant had instructed Citizens Advice to act for him and to submit a claim, as if they were solicitors, in which case she was "bound to find that it was reasonably practicable for the claim to be presented in time"; or he had not, in which case he was responsible for checking the time limit which he should have done through the use of the internet and his contacts with ACAS and the Employment Tribunal.

53. The Employment Tribunal only referred to some of the small bundle of email exchanges with

Citizens Advice that the claimant had provided. As Employment Judge Morton noted, whatever the claimant thought was the position, it was pretty clear that Citizens Advice had not agreed to act for the claimant as if they were solicitors; but they were providing advice and assistance in respect of any claim the claimant might make to recover the sums that he said he had paid to the respondent in respect of visa applications, sums that had been deducted by the respondent from his wages, his immigration status and a possible claim for unfair dismissal. It was clear that the person with whom the claimant communicated directly was not an employment law expert, that he had somewhat limited understanding of ACAS early conciliation and submission of claims to the Employment Tribunal and that he had to seek advice from an expert. There was, at least, some delay in that advice being passed on. These were matters that could properly be taken into account in deciding whether it was reasonably practicable for the claimant to submit the claim within the primary time limit and, if not, whether the claim was submitted within such further time as was reasonable. Ground 4 is made out.

54. Taking an overview of the matter, I have concluded that it was unfair to proceed with the hearing absent proper notice, even in circumstances in which the claimant agreed to go ahead. The decision to proceed resulted in substantive unfairness. Ground 1 is made out.

Disposal

55. Regrettably, this is one of those cases in which an attempt to conserve the limited resources of the Employment Tribunal has resulted in a considerable waste of resources. The appeal is allowed on all grounds. This is not a case in which there could only be one answer. I have concluded that, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, the matter should be remitted to a newly constituted Employment Tribunal. The error was fundamental. There would be no or little significant saving by remission to the same Employment Tribunal.