EMPLOYMENT TRIBUNALS

Claimant:
Safina Bibi

Respondent:
Interaction & Communication Academy Trust

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds **On: 15 June 2018**

Before: Employment Judge R S Drake (sitting alone)

Appearances
For the claimant: Mr C Echendu (of Counsel – Non-Practising)
For the respondent: Ms G Sherbourne (Solicitor)

RESERVED JUDGEMENT ON PRELIMINARY ISSUE

1 The claims having been issued on 3 March 2018 are out of time in relation to dismissal on 3 December 2017 and alleged causing events.

2 The Claimant has not established it was not reasonably practicable to issue her claims in time or that she issued within a reasonable time after expiry of the Primary Limitation Period.

3 The claims (and all of them) are dismissed for want of jurisdiction as the Tribunal may not hear them.

REASONS

1. I noted that this hearing was first listed as a Case Management Discussion but that expressly the notice thereof specified that any preliminary issues as to jurisdiction were to be determined, despite the Claimant's Counsel arguing first that he didn't expect to be dealing with anything other than directions and orders for trial preparation, and second he

hadn't expected to be opposing an application to dismiss on the basis of absence of jurisdiction (because prima facie the Claimant's claims of unfair dismissal and dismissal /detriment because of the making of a qualifying public interest disclosure are out of time) and he was not fully prepared to seek to argue otherwise and to show that it was not reasonably practicable for the Claimant to issue within time. He relented on instructions from his client, having in any event been alerted to the Respondents' pleading in their ET3 that the claims were out of time, and he confirmed willingness to proceed on the basis as originally foreshadowed by the terms of the notice of the hearing.

2. After hearing evidence from the Claimant and oral submissions, Mr Echendu sought to argue reliance on a decision of either the Supreme Court or Court of Appeal as recently as 2017 which he asserted challenged and indeed overruled the latter Court's decision (per Denning MR) in **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379**. He urged me to consider such decision despite not having come prepared to produce it, so he was granted 7 days to add further written submissions referring to such case and I allowed the Respondents 7 days to respond. I therefore reserved this Decision.

3. I received both sets of further submissions sent respectively on 20 June 2018. I considered both with great care as much as I had considered the evidence and submissions made on the date of the hearing. I noted that Mr Echendu produced a copy of **Marks & Spencer Plc v Williams-Ryan [2005] ICR1293**, which is, though Court of Appeal, I note not dated 2017 and is not from a Court higher than the Court of Appeal as he had suggested at the hearing.

4. Mr Echendu sought to persuade me that **Williams-Ryan** is authority for the proposition that the Dedman principle only applies when there has been mistaken or incorrect advice given by legal advisors such as solicitors or barristers, whereas I find that case is fact-specific to advice given in that case by CAB and not by a Trades Union official. Ms Sherbourne has responded to this production by arguing it is distinguishable on facts and does not change the overall effect of Dedman, but indeed undermines the Claimant and supports the Respondent in any event. I deal with my interpretation of the case below.

5. I have concluded that I do not find that the Claimant's arguments are persuasive in any way, or sufficiently to discharge the onus upon her as set out by the law outlined below, but that indeed the Respondent's arguments in response are more than persuasive and are compelling to the extent that I find myself bound by **Dedman**.

Facts

6. I find the following: -

   a The Claimant was dismissed on 4 December 2017; the Primary Limitation Period therefore expired on 3 March 2018;

   b The Claimant contacted ACAS on 30 March 2018 (26 days after expiry of the Primary Limitation Period) and lodged her claim in this Tribunal on 11 April 2018; the Claimant's claim was therefore lodged 39 days outside of the Primary Limitation Period;

   c The Claimant sought to rely, inter alia, on the assertion that she was misinformed by the GMB regarding the Primary Limitation Period, such that it was not reasonably practicable for her claim to have been brought within the Primary Limitation Period;

d Later, I recorded her in evidence stating that she had in fact been advised by several Union advisors (in this case GMB), that they were all competent officials, and that they had advised her to put on hold the process of issuing Tribunal proceedings until after completion of an internal appeal process;

e The Claimant is a law student capable of consulting the law on matters relevant to her and cognisant of the importance of limitation periods;

f The Claimant chose to accept the advice given top her and consciously decided not to issue until well after expiry of the Primary Limitation Period

g In evidence she told me, and I accept that although she was very consumed psychologically by the claims and their circumstances, she faced no physical, practical or medical (such as hospitalised absence from normal life) barriers to issuing her claims, and no restrictions let alone anything imposed by the Respondents of which there was nothing;

h The Claimant said she had been advised to take advice from a solicitor, but chose not to do so at the relevant times when the alleged causes of action accrued and when time thus started to run;

i If the claims proceeded, the Respondents would have to expect a large number of witnesses to be called to recall after a long passage of time the matters complained of and they would face greater difficulty in defending the Claimant's testimony than she would face, and that if the claim were not to proceed, the Claimant would still be able to pursue, subject to advice, redress from the Union responsible for the advice she sought and took by virtue of which she was late in issuing;

j No explanation was given by the Claimant as to why it took her a further 39 days after expiry to issue her claims sufficient to show such delay was not unreasonable.

The Law (Limitation Periods for both heads of claim)

7. S.111(2) Employment Rights Act 1996 provides as follows:

"[Subject to section the following provisions of this section] an Employment Tribunal **shall not** *(my emphasis) 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 brought before the end of that period of three months.*

8. S.48 ERA 1996 provides as follows:

(1) A worker may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of section 47B(1) ….

> *(3) An Employment Tribunal* **shall not** *(again my emphasis) consider a complaint under this section unless it is presented—*
>
> > *(a) before the end of the period of* ***three months*** *beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.*

9. The burden of proving that it was not reasonably practicable to present a claim in time is an high threshold and rests firmly on the Claimant (**Porter v Bandridge Ltd [1978] ICR 943**).

10. I accept Ms Sherbourne's submission that it is trite law that where a claimant is misadvised on limitation by a skilled advisor, the Claimant will be fixed with her advisor's default. As Lord Denning expressed in **Dedman** at para 18 (authoritatively approved as a proposition of law by Lord Phillips MR in **Williams-Ryan** (with emphasis added):

> *" … **What is the position if he goes to skilled advisers and they make a mistake? The English Court has taken the view that the man must abide by their mistake**. There was a case where a man was dismissed and went to his **trade association** for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was 'practicable' for it to have been posted in time. He was not entitled to the benefit of the escape clause.* [*See* **Hammond v Haigh Castle & Co Ltd [1973] IRLR 91**]. *I think that was right.* ***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*** *… "*

11. Mr Echendu submits that **Williams-Ryan** is authority for the proposition that **Dedman** principle is limited to advice received from solicitors. Nothing of the kind is said in either case and this argument is clearly wrong. **Williams-Ryan** is not authority for the such a proposition as advanced by Mr Echendu. It is authority for the proposition laid down in **Dedman** that where *skilled advisers* are at fault, this will not render it not reasonably practicable for the Claimant to bring a claim in time. In such cases, the Claimant's remedy is against those advisers who gave the incorrect or misleading advice. The Claimant in the present case had the benefit of advice from skilled advisers.

12. Further, Mr Echendu refers to the following paragraph from **Williams-Ryan**, where at Paragraph 47, Lord Justice Keene said (again emphasis added):

> " *… I would emphasise the importance of recognising that this is not a case … where the employee received advice from the CAB to await the outcome of the internal appeal procedures before making a complaint to an Employment Tribunal. The Employment Tribunal, in its Extended Reasons, records that in the short telephone conversation Ms Williams-Ryan had with someone at the CAB, there was, so far as she could remember, no discussion about taking a complaint to an Employment Tribunal. Nor does one know what questions the CAB staff member was asked during the course of that conversation.* ***This, therefore, is not one of those cases where an employee has been wrongly advised by a skilled adviser, nor one where it seems likely that the employee had a remedy against that adviser****".*

13. By contrast, Claimant in the present case was represented throughout her employment, from January 2017 to beyond the date she issued her claims, by three separate full-time officials of the GMB. Whether those officials were full time or otherwise may not now be relevant since they were in any event skilled accredited officials deemed to be seised of experience and appropriate knowledge. These were permanent GMB officials, including a regional GMB representative, all of whom were skilled and trained advisers. **Williams-Ryan** does not therefore support the Claimant's arguments that it was not reasonably practicable to advance her claims in time. If the Claimant was wrongly advised by the GMB – her skilled advisers – then her claim rests against the GMB, not the Respondent.

Conclusions

14. The Claimant's claims are clearly out of time, about which there can be no argument at all. He r case today relies upon the incorrect advice given by the GMB regarding time limits. It is clear from the authorities referred to in all the relevant submissions before me that her ignorance of the time limits, based on incorrect advice received from a skilled adviser, is not sufficient to show that it was not reasonably practicable for her to have brought her claims in time.

15. The case of **Willams-Ryan** is not authority for the proposition advanced by the Claimant. In fact, that case supports the Respondents' arguments today: that the Claimant had skilled advisers and that it was therefore reasonably practicable for her to lodge her claim in time. The facts of **Williams-Ryan** (CAB advisors) are clearly distinguishable from the present case (GMB advisors and representatives). In any event I am still bound by **Dedman** on ordinary principles of the law of precedent.

16. The Claimant in **Williams-Ryan** did not have the benefit of skilled advisers, (per Lord Justice Keane as referred to above). In the present case, the Claimant *was* advised by three skilled GMB advisers. I find that the Claimant cannot therefore argue that it was not reasonably practicable to lodge her claims in time but clearly would have a remedy against the GMB if indeed she was given the incorrect advice relied upon. The Claimant's alleged ignorance of the time limits (and alleged ill health) is not therefore sufficient to render it not reasonably practicable for her to have lodged her claim in time.

17. Further, I find that an unexplained and evidentially unjustified delay of 39 days does not show that the claims were brought within a reasonable time after the expiry of limitation. Taking the termination date as the latest date of the acts complained of (4 December 2017) – the Primary Limitation Period expired on 3 March 2018. The Claimant did not contact ACAS to instigate the EC process for almost a month (30 March 2018) and did not issue her claim until 11 April 2018.

18. I judge the balance of prejudice to favour the Respondents as is clear from my factual finding above.

18. The Claimant faces the burden of proof and she must (1) prove to the Tribunal that it was not reasonably practicable for her to have brought her ERA claims in time; and (2) persuade the Tribunal that there are exceptional reasons justifying the extension of the time limit for bringing the claims. I find there is no valid basis for the Tribunal to accede to any of these applications for the reasons given above having taken all evidence and submissions into account.

19. The claims are time-barred and are therefore struck out for want of jurisdiction.

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Employment Judge R S Drake

15/06/2018