THE EMPLOYMENT TRIBUNALS

Claimant	***Respondent***
Ms S Slater	White House Farm Centre

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
At a PUBLIC PRELIMINARY HEARING

HELD AT NORTH SHIELDS ON 23 JANUARY 2019
EMPLOYMENT JUDGE GARNON (SITTING ALONE)

Appearances
For Claimant: in person
For Respondent: no attendance

JUDGMENT

1. The claim of unfair dismissal was presented outside the time limit for doing so in circumstances where it was reasonably practicable for it to be presented within time. The Tribunal cannot consider the claim which is hereby dismissed.

2. The claims under the Equality Act 2010 (the EqA) were brought more than three months after the date of the last act to which the complaint relates .It is not just and equitable the Tribunal should decide those claims which are hereby dismissed.

REASONS (bold print is my emphasis and italics are quotations)

1 The Issues and Statutory Provisions

1.1. Rule 53 of the Employment Tribunal Rules of Procedure 2013 (the Rules) empowers me to issue a final judgment even at a preliminary hearing if the issue I decide is determinative of the whole case. In the claim of unfair dismissal the issues are (a) whether the claim was presented before the end of the relevant time limit (b) if not, was it reasonably practicable for it to have been (c) if not, was it presented within a reasonable time after? In the claims under the Equality Act 2010 (EqA), related to the protected characteristic of disability (the claimant has Bi-Polar Affective Disorder and claims the types of unlawful conduct defined in sections 13, 15, 19, 20/21, 26 and 27) the issue is whether the claim was presented before the end of 3 months (as extended by s 140 B) starting with the date of the act to which the complaint relates**,** or such other period as the tribunal thinks just and equitable.

1.2. Section 97 of the Employment Rights Act 1996 (the ERA) defines the "Effective Date of Termination". It is agreed to be 9 March 2018.

1.3. Section 111 says the Tribunal ***shall not consider*** a complaint under that 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 it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

1.4. If this was the only relevant provision, the claim needed to be presented on or before midnight on 8 June 2018. Section 207B provides for extension of time limits to facilitate conciliation before institution of proceedings thus

(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.

1.5. Section 120 EqA confers jurisdiction on Employment Tribunals, and s. 123 says :
(1) Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.
Section 140B has the same effect as s207A of the ERA.

2 The Facts

2.1. The claimant contacted ACAS on 1 June 2018 (Day A). ACAS sent the Early Conciliation (EC) Certificate on 1 July 2018 (Day B). Applying the more favourable ss (4), the time for presentation would now be 1 August. It arrived on 5 September.

2.2. The claimant started work for the respondent in August 2014. In a very well worded letter written with the help of solicitors , Jacksons, dated 26 October 2017

she raised a grievance. It was addressed marked "strictly private and confidential" to a man to whom I will refer only as Mr L because this judgment will be posted online and the person in question has had no opportunity to answer the allegations against him. The letter complains of events principally in 2017 and the main person of whose conduct she complains is Mr L . She told me today he was a business consultant who became a director of the respondent . Its managing director was a Ms T and she is part of the "management " against whom complaints are made

2.3. In an equally well worded letter of resignation again written with Jacksons help dated 9 March 2018 she complains again mainly about Mr L but also of exceptional delay in the handling of the grievance and retaliatory action as a result of her raising it which took place in January 2018. The claim form adds little to her grievance and resignation letter because it does not need to. It does specify all the types of discrimination she is claiming. The claims are well pleaded and it is clear the acts complained of are all on or before dismissal, so , at best for the claimant the time for presentation expires on 1 August 2018.

2.4. The claimant is aware her claim was submitted out of time. She attaches to the claim form a letter of 29 August 2018 from "Merseyside Employment Law" ("MEL") signed by a Ms Kathy Durham . The letterhead shows MEL is funded by the City of Liverpool to give civil legal advice as part of a national advice line for England and Wales. It is a registered charity and a company limited by guarantee. I quote from the letter:

"*As you are aware from our telephone conversation today we have missed the deadline for your claim to be lodged with the Employment Tribunal. I became aware of the problem when I took over your claim from an ex-colleague who had failed to follow the safeguards required from all staff to prevent this very issue occurring.*

I am afraid that you cannot now make an Employment Claim but you should take this letter to an independent firm of solicitors for advice on the next steps you must take. You asked me whether you would be liable to pay fees and I suggest that you ring local firms to see which ones are prepared to take this case without you having to pay legal fees prior to commencing a claim. The firm you select should also be able to assess the merits of your claim.

We will return all your documents to you once they have been copied, but this should take no more than seven days.

I would like to take this opportunity to say how sorry I am that this has occurred and appreciate that it was not the outcome you were hoping for."

I have nothing but praise for this full and frank admission. I express the hope it will not even be suggested that any insurance cover which MEL has would be invalidated by it.

2.5. The claimant went to MEL because she could not afford to instruct Jacksons. who are known to me as well versed in employment law. She took the MEL letter to Jacksons who submitted the claim. Box 15 of the claim form says she had the help of MEL and found out they had not submitted the claim when she was chasing them for an update by telephone on Thursday, 29 August. When she found out, she instructed Jacksons to act on her behalf on Monday, 3 September. The claim was sent to the tribunal on the following day. I have no doubt that from the time the claimant found out what had happened, she acted promptly.

2.6. The claim was served on 27 September. A response form was due by 25 October. On 23 October one arrived in manuscript completed by Mr Dean Hogarty . In response to the question as to whether he agreed about what the claimant did in the process of EC he writes : " *Cannot comment as I became managing director in July/August this year (2018) after the previous managing director & management team stood down in the summer I was never given the information*". He does defend the claim but only pleads the time limit point for the simple reason he cannot answer the factual allegations directed at Mr L and the previous senior managers.

2.7. The claimant told me today Mr Hogarty and his wife to her knowledge did take over after Mr L and Mr T left and she has no complaint about the acts of Mr Hogarty or any of the present management team. He had told her he did not intend to appear today and relied on the tribunal to rule objectively on the time limit points.

3. Case Law , Discussion and Conclusions

3.1. The " tests" under the ERA and EqA are different . The former is much more rigid . It is notable the Law Commission are presently consulting on whether the just and equitable test should apply to all employment claims. Unless and until Parliament changes the law, I must apply the tests separately.

3.2. I start with the unfair dismissal claim The is ample case law to the effect time limits are just that—limits not loose targets. Reasonably practicable means reasonably "do-able". The burden of proving it was not reasonably do-able rests on the claimant, see Porter-v- Bandridge 1978 ICR 943.

3.3. In Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, the Court of Appeal held that in the majority of cases, an adviser's fault leading to the late submission of a claim, will bind the claimant and a tribunal will be unlikely to find it was not reasonably practicable to have presented the claim in time. Much will depend on the circumstances and the type of adviser involved.

3.4. If a claimant is unable to proceed with a claim because of an adviser's negligence, she may be able to bring a civil action against the adviser. It will not be enough simply to show the adviser has been negligent, she will also need to show she has suffered loss by being denied the opportunity of pursuing a claim - *i.e.* that the claim would have had a reasonable chance of succeeding (see Siraj-Eldin v Campbell Middleton Burness and Dickson 1989 IRLR 208*,)*. I have no doubt that if the facts she alleges are true, she has a valid claim and the value put on it by Jacksons in the claim form of about £25000 is not over ambitious.

3.5. If a claimant engages **solicitors** to act for her in presenting a claim, it will normally be presumed it was reasonably practicable to present it in time and no extension will be granted. As Lord Denning MR put it in Dedman '*If a man engages skilled advisers to act for him - and they mistake the time limit and present [the claim] too late - he is out. His remedy is against them*.' This commonly called the 'Dedman principle'. In Wall's Meat Co Ltd v Khan 1979 ICR 52, Lord Justice Brandon explained the Dedman principle. In his view, ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the claimant or from the fault of his solicitors or other professional advisers.

3.6. The Dedman principle has been questioned In Riley v Tesco Stores Ltd 1980 ICR 323, Lord Justice Stephenson said he would hesitate to say that in every case a claimant would be bound by the fault of the adviser as each case depends on its own facts. However the Court of Appeal affirmed the Dedman principle in Marks and Spencer plc v Williams-Ryan 2005 ICR 1293 . Lord Phillips MR said the correct proposition of law derived from Dedman is that where the employee has retained a solicitor to act for her and fails to meet the time limit because of the solicitor's negligence, the solicitor's fault will defeat any attempt to argue it was not reasonably practicable to make a timely complaint to the tribunal.

3.7. The EAT in Northamptonshire County Council v Entwhistle 2010 IRLR 740 , also confirmed the principle but said there could be exceptions such as where the adviser's failure to give **the correct advice** was itself reasonable for example, where the employee and her solicitor had both been misled by the employer on some factual matter, such as the date of dismissal. Most of the reported cases concern incorrect advice. This is not such a case but an error of omission. Solicitors do sometimes make such mistakes. A solicitor's failure to have a system in place to ensure a claim posted in time is actually received by the tribunal has also been ascribed to the claimant. Capital Foods Retail Ltd v Corrigan 1993 IRLR 430, and Camden and Islington Community Services NHS Trust v Kennedy 1996 IRLR 381 . A fortiori, a solicitor **whose internal systems for ensuring a claim is sent in time fail**, will fall in the Dedman principle.

3.8. MEL have represented in cases I have handled before and I have found them perfectly competent but I do not believe them to be practicing solicitors . In my view that makes no difference Incorrect advice from an adviser employed by a Citizens Advice Bureau (CAB) was treated as the fault of the claimant in Riley A similar conclusion was reached in Hammond v Haigh Castle and Co Ltd 1973 ICR 148, in relation to an employee's professional association, and in Croydon Health Authority v Jaufurally and anor 1986 ICR 4, in relation to the Free Representation Unit.

3.9. Advice given by employment consultants who are not qualified solicitors was considered in Ashcroft v Haberdashers' Aske's Boys' School 2008 ICR 613, which held negligence or delay by such an adviser in presenting a tribunal claim is to be ascribed to the claimant. Mr Justice Burton said , '*there is a positive plethora of employment consultants who are not solicitors' but who are, or hold themselves out to be, skilled advisers in this field*'. As the adviser fell within that category, no extension of time was granted where he had failed to issue proceedings in time.

3.10 In the claim of unfair dismissal I cannot find that it was not reasonably practicable for the claim to be presented in time. That means I have no further discretion to exercise, so the claim must be dismissed.

3.11. Under the EqA , I rarely favour determining just and equitable extensions at preliminary hearings normally preferring to leave it to the full hearing though there is clear authority in Hutchinson v Westwood Television it can be done at a preliminary hearing. In this case it was wise of Employment Judge Buchanan to set it down for a preliminary hearing. Had I thought it was too fine a decision to take without hearing all the evidence, I would have reserved it to a full hearing.

3.12 . Often cited by respondents is Robertson-v- Bexley Community Centre which held three months is the primary time limit and there must be exceptional reasons for extending time . I do not believe this is still good law. The wording of the time limit provisions from the earliest anti-discrimination statutes in 1975 right up to the coming into force of EqA was notably different. I do not believe Parliament would have changed wording that had been in place for 35 years had it not meant to achieve some relaxation of the rigidity suggested in Robertson. Even if I am wrong about this, it makes no difference to my decision in this case.

3.13. Among the differences between EqA and ERA claims are (a) burden and standard of proof (b) uncapped compensation (c) availability to the claimant of an injury to feelings award (d) availability to the respondent of the "statutory defence" .

3.14. Section 109 of the EqA includes :

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

Subsection 4 is commonly called " **the statutory defence**"

3.15. Section 136 includes
(2) *If there are facts from which the court* ***could decide, in the absence of any other explanation,*** *that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

3.15. This "reversal of the burden of proof" is explained in Igen-v- Wong (elaborated upon in Madarassy –v- Nomura International) and London Borough of Islington-v- Ladele 2009 IRLR 157 .It is for the claimant to prove on balance of probabilities facts from which the tribunal **could** conclude, in the absence of an adequate explanation, the respondent has committed an unlawful act under the EqA . If she does prove such facts an inference they constitute one or other of the statutory torts set out is often easy to draw. In essence this means that without the cooperation of Mr L to provide an explanation, this respondent would be in real difficulties.

3.16. Guidelines on exercising the just and equitable discretion, under the law as it then was, were given in British Coal Corporation v Keeble [1997] IRLR 336. The length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom, the extent of the respondent's co-operation with requests for

information, the speed with which the claimant acted when she became aware of her right to claim and **the extent to which the quality of the evidence is impaired by the passage of time** are all relevant considerations. Unlike the Dedman principle, fault of an advisor is not of itself fatal (see Chohan v Derby Law Centre) .

3.17. Keeble was decided before the reversal of the burden of proof. Short time limits in discrimination cases are there for a good reason. Discrimination cases are extremely fact sensitive. It is necessary for the witnesses to be able to remember not only what was said but the context in which it was said. The sooner an employer is made aware a discrimination complaint may be made the sooner enquiries can be made of witnesses and the results recorded in writing, whilst events are still as fresh as possible in their memory. Of the tests in Keeble, I view as the most important under the present law the extent to which the memories of witnesses, whether they are for or against the claimant, are impaired by the passage of time. On the other aspects of the test the claimant cannot be criticised.

3.18. Once an employer is alerted to the possibility of a discrimination claim about the conduct of a manager , good HR practice is to investigate it with an open mind . It may be the employee making the complaint has a good point. If so, an employer with a sound equal opportunities policy has the option of not “backing the manager”. The problem in this case,as the claimant accepts, is that neither Mr L nor any other manager at the time took her seriously. Because of the departure of Mr L and Ms T and apparent failure to take contemporaneous statements there has been irreparable damage caused to the reliability of the evidence. Some people may have left , and the memories of those who have not will have faded .

3.19. I have on many occasions allowed claims to proceed where the gap of time is greater, but only when there was a good reason for the delay. The prejudice to the respondent of extending time far outweighs the prejudice to the claimant of refusing it. She has a negligence claim to fall back on. I conclude it is not just and equitable to consider the EqA claims outside the primary time limit.

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 23rd JANUARY 2019