EMPLOYMENT TRIBUNALS

Claimant **Paul Cross**

Respondent **Openreach Limited**

Heard at: Southampton (by VHS) **On:** 7 February 2023
Before: Employment Judge Hogarth

Appearances
For the claimant: Mr Cross in person
For the respondent: Ms Priscilla Nketiah, employment advocate

JUDGMENT

1. The claim for unfair dismissal was not made within the period allowed by section 111(2)(a) of the Employment Rights Act 1996.
2. It was not reasonably practicable for the claimant to make the claim within that period and the claim was made within a reasonable further period.

REASONS

Background

1. The claimant was dismissed from his employment as a field engineer by the respondent (in a notice given to him by hand on 29 June 2021) so that his last day of employment was 3 August 2021. His dismissal followed a period of suspension on full pay for reasons connected with the claimant's arrest in August 2020 for a number of serious offences, for which he was sent for trial. He was acquitted on all charges, after the jury failed to reach a verdict. He was then dismissed.

2. The claimant wished to bring a claim for unfair dismissal and eventually presented his claim on 27 August 2022. It was common ground that the form was not submitted within the normal statutory time limit after the termination date of 3 August 2021 (3 months plus 15 days for early conciliation). That period ended on 17 November 2021.

3. The respondent's response asserts that the claim is time barred and that, in any event, the dismissal was fair. The respondent invited the Tribunal to order an open Preliminary Hearing to determine whether the claim should be struck out.

4. A preliminary hearing was ordered on 10 November 2022 by Employment Judge Midgley to determine three specified issues in order to resolve the question whether the claim for unfair dismissal is time barred.

5. It was common ground that the claim was not made within the time allowed by section 111(2)(a) of the Employment Rights Act 1996 (3 months, plus the extra time for early consideration). Accordingly, the only issues remaining to be determined at the preliminary hearing were the two issues set out in paragraph 13 below.

Preliminary Hearing (7 February)

6. The hearing took place by video. There were no serious connection difficulties.

7. The claimant appeared in person. The respondent was represented by Ms Nketiah, Employment Advocate.

8. After hearing evidence and submissions, I adjourned and gave an oral judgment on the two remaining issues in favour of the claimant, resulting in time being extended in favour of the claimant. Accordingly, the claim can proceed.

9. The rest of the hearing was taken up with discussion of various procedural and case management issues, as a result of which case management orders were made, which are contained in a separate document with a Case Summary.

10. Subsequently to the preliminary hearing, the respondent asked the Tribunal for written reasons for the decision to extend time. These are given below

Evidence

11. I was provided with a hearing bundle of 64 pages (with some content being redacted and blocked out), together with a Skeleton Argument from Ms Nketiah and a “statement of facts” from the claimant contained in an email to the Tribunal dated 17 November 2022.

12. The claimant gave sworn evidence as to why his claim was presented out of time. He was cross-examined by Ms Nketiah.

Issues relevant to the application

13. As it was common ground that the claim was made out of time, I explained to the parties at the outset that the issues for me to decide were:

    1 Was it reasonably practicable for the claim to be made to the Tribunal within the time limit (i.e. the period allowed by section 111(2)(a) of the Employment Rights Act 1996)?

2 If it was not reasonably practicable for the claim to be made to the Tribunal within that time limit, was it made within a reasonable further period?

14. Ms Nketiah submitted that the answer to the first question was yes and the answer to the second question was no. She relied mainly on the principle in the case of *Dedman v British Building & Engineering Appliances Limited [1974] WLR 171* and asserted that because the claimant had a solicitor acting for him he is unable to rely on his own ignorance of law or procedure or on a mistake by the solicitor. She also submitted that, in any event, the delay before a claim was presented by the claimant on 27 August 2022 was unreasonable and that he should have made more enquiries and acted sooner.

15. The claimant submitted that the answer to the first question was no and the answer to the second question was yes. He maintained that he had a good reason for not making his claim in time in that his adviser had for some reason deceived him into believing that a claim had been made in time (fabricating a document to substantiate that deceit) and that in the circumstances it was made within a reasonable time. He had acted promptly once he discovered what had happened.

Findings of fact

16. I found the claimant to be a credible witness and I accepted the somewhat extraordinary account he gave of the events subsequent to his dismissal as being substantially accurate, as I considered that to be more probable than not. I did not consider there to be any grounds to suggest his account was fabricated and, in any event, the respondent did not seriously contradict the essential facts as put forward by the claimant.

17. The facts according to the claimant's evidence (which I have accepted) are as follows.

18. After his dismissal, the claimant researched his options for taking his employer to the Tribunal and was aware of his right to bring a claim for unfair dismissal. He understood that the first step was to apply for an Early Conciliation Certificate which he did, making a request on 2 September 2021. The Certificate naming Openreach as the prospective respondent is dated 17 September 2021.

19. He would have presented his own claim but for the fact that his Trade Union branch secretary persuaded him to speak to a legal adviser called Peter Kerslake and to put the matter in his hands. She told him Mr Kerslake was a solicitor. He was not at that time aware that Mr Kerslake did not work for a firm of solicitors. He understood that the Union would meet the costs and so did not make any agreement to pay the costs himself. He was entitled to advice and support as a member of the Union and he acted on it.

20. Mr Kerslake explained to him the time limit for bringing a claim correctly (3 months, plus the early conciliation extension). The claimant asked him to file

an ET1 form on his behalf on the understanding that Mr Kerslake might represent the claimant subsequently.

21. He relied on what the Union had done and said, and so believed that he was a solicitor who could help him as someone who knew about Employment Tribunal proceedings. His understanding was that Kerslake's services were being provided to him through arrangements made by the Union.

22. It does not appear that the claimant attempted to checked the status of the "solicitor" concerned, Mr Kerslake. The claimant does not know if the person introduced as Mr Kerslake was in fact at the time a solicitor.

23. The claimant assumed that an ET1 form would be filled in and submitted to the Tribunal on his behalf. He was informed by Mr Kerslake that an unfair dismissal claim was presented on 24 October 2021, within the time period allowed for bringing the claim. He was also told that he should sit back and wait for developments because progress of employment claims had been affected by the pandemic.

24. The claimant said he was not at that point sent any documentary information about the claim and had to ask the Union to chase Mr Kerslake, who on 18 November 2021 sent an email to the claimant with the subject heading "Employment tribunal: claim submitted". The unsigned message is "FYI" and the email forwards what purports to be an email dated 24 October to Mr Kerslake with the same subject heading from "employment.tribunals @notifications.service.gov.uk".

25. The heading to the forwarded email also says "reply to CFTBAUSupport @Justice.gov.uk". The body of the email contains a heading - "GOV.UK" and under that heading appears a reference to "Claim number: 33201788867". The email then acknowledges that Paul Cross has submitted a claim to the Employment Tribunal on 24 October 2021.and informs the recipient what happens next.

26. In cross-examination the claimant agreed he had not tried to reply to either of the email addresses referred to, because he thought matters were being dealt with on his behalf by Mr Kerslake.

27. At the time the claimant believed on the basis of this email and what he had been told by Mr Kerslake that a valid unfair dismissal claim had been made to the Tribunal in time.

28. The claimant texted Mr Kerslake on a few occasions for updates and usually Mr Kerslake would phone back and re-assure him, telling him there was no news and that it would all take time. It did not occur to the claimant to question the truth of anything he had been told or sent. Initially he was not concerned about that, and all he felt he needed to do was chase for information from time to time from his point of contact, Mr Kerslake.

29. Ms Nketiah asked why he did not contact the Tribunal, given he knew about the time limits for a claim. He replied that he was checking things with "his solicitor" rather than the Tribunal because he had no experience of tribunal

proceedings. He was being reassured by Mr Kerslake and, also, he had looked online to discover that some Tribunal cases were taking up to 2 years to be resolved.

30. He explained that he read a news article about an Employment Tribunal case that appeared to have been concluded within a year and this made him concerned as to why his claim had not progressed. So he approached Bristol Employment Tribunal ("Bristol ET") on 31 July 2022. He was told they had no record of his claim having been presented but there may have been a system error.

31. It was at this point that the claimant began to realise that something might be seriously wrong. It was beginning to look as if no claim had ever been made, despite his being told clearly that it had been made.

32. During August 2022 the claimant was in touch with Bristol ET on a number of occasions.

33. He was unable at this time to elicit any further response from Mr Kerslake, and discovered from the Companies House website that the company whose name appeared on emails (Brooklands HR Ltd) had in fact been dissolved. This is confirmed by the Companies Register, which records that the company was dissolved on 9 August 2022. The directors were given as Peter Kerslake (occupation "company director") and his wife.

34. He said that at first he could see that messages to Mr Kerslake were "read" but not answered, but then that stopped.

35. On the advice of Bristol ET staff, the claimant raised a complaint with the Tribunal so they could investigate further. He did that. Bristol ET confirmed by email that they could not locate his case and informed him that there were anomalies with his "receipt", the email supposedly sent by the Tribunal on 24 October 2021. He now understood that that email was not genuine.

36. He was also informed by Bristol ET that Regional Employment Judge Pirani had confirmed that judicial discretion might be available if he filed a claim "now". He followed that advice and filed his ET1 form on 27 August 2022.

37. The claimant had since been in touch with the central office of his Union who had told him that the way in which he had been referred to Mr Kerslake was not the way in which the Union would ever recommend a solicitor to act for a member, and that Mr Kerslake was outside their usual network of legal advisers This suggests to the claimant that there was something very irregular about his initial referral. The claimant stated that the Union were initially inclined to deny that things could have happened the way he described, but he was able to show them various emails from the time.

38. The claimant is unable to explain what had happened or why he appeared to have been the subject of deceit or fraud. He had no direct proof an offence had been committed and he understood that his only recourse might be a civil case, which was unrealistic. He also emphasised that he did not receive

negligent advice, but rather fraudulent information about his claim having been made.

39. He submitted that presenting a claim within four weeks of contacting Bristol ET was reasonable given he was working full time and has a young child at home.

40. I find in the light of the claimant's evidence about his state of mind at the time and the circumstances in which he was referred to Mr Kerslake by a Union official that he believed, on reasonable grounds, that Mr Kerslake was a solicitor acting as such with experience of employment proceedings. There was no reason for the claimant as a lay person to disbelieve what he was told.

41. Whether Mr Kerslake was in fact what the claimant believed him to be is less clear. "Brooklands HR Ltd" was plainly not a firm of solicitors. There is no evidence before me (apart from the claimant's account of what he was told by the Union branch official in 2021) that establishes, one way or another, whether Mr Kerslake was a solicitor or other kind of skilled adviser in the area of employment law. Whoever or whatever he was, he does not appear to have acted professionally at any point, once he had advised correctly on the time limit for bringing a claim.

42. I do not consider that what the claimant was told by the Union official is sufficient evidence for me to conclude that Mr Kerslake was a solicitor or any other kind of skilled adviser in the area of employment law. The Union has informed the claimant more recently that the referral to Mr Kerslake was irregular. In these circumstances I find, on the balance of probabilities, that he was not a solicitor or any other kind of skilled adviser in the area of employment law. He appears to have held himself out (or to have allowed himself to be held out) as a solicitor, but that is not the same thing as being one.

43. I find that the email dated 24 October and purporting to come from "GOV.UK" is not a genuine communication from an Employment Tribunal. This is plain on the face of the document, and the only inference possible from that is that it is a complete fabrication. What the motive was for creating it and sending it to the claimant, rather than making the claim properly, is a mystery. The fact no claim was made was bound to come out eventually.

44. I also find, on the basis of what the claimant was told by Bristol Employment Tribunal staff, that no claim was in fact made on the claimant's behalf in October 2021.

Applicable law

45. A complaint to a tribunal of unfair dismissal has to be presented in accordance with s. 111(2) of the Employment Rights Act 1996:
"*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 a further period as the tribunal considers reasonable in a case where it is satisfied that he was not reasonably practicable for the complaint to be presented before the end of that period of three months.*"

46. Section 111(2A) secures that the period of 3 months referred to in section 111(2) is extended under section 207B of the 1996 Act to facilitate early conciliation before institution of proceedings. In this case the result is to add 15 days to the 3 months.

47. It is for the claimant to show that it was not reasonably practicable to bring the claim in time and that the claim was then brought within a reasonable time. The legal test for extending time is a hard one to meet on the face of the wording of the Act.

48. First it requires consideration of whether it was reasonably feasible for the claim to have been issued in time. A tribunal is entitled to take a liberal approach (*Marks & Spencer-v-Williams-Ryan* [2005] EWCA Civ 470 and *Northamptonshire County Council-v-Entwhistle* [2010] IRLR 740), but it nevertheless must apply the statutory test to the facts. The question of what was or was not reasonably practicable is essentially one of fact for the tribunal to decide. In a leading case on the meaning of the statutory wording, *Palment and Saunders v Southend on Sea Bourogh Council [1984] IRLR 119, CA, M*ay LJ interpreted "reasonably practicable" as meaning "reasonably feasible". This meant more than whether something was possible but less than simply "reasonable". The possible factors relevant to the test in practice were many and various, and as May LJ stated, they cannot be exhaustively described They depend upon the circumstances and facts of each case.

49. If the claimant instructs legal advisers and there was a delay through a failure on their part, the tribunal will have to examine whether the claimant or the advisers were at fault. The question as to whether or not the litigant is fixed with the error of his advisers may depend upon the level of skill possessed by the adviser which, again, will be a question of fact. It has been long established that claimants are affixed with the negligence of their professional advisers (*Dedman-v-British Building and Engineering Appliances Ltd* [1973] IRLR 379

50. In the case of *Dedman,* the Court of Appeal established the principle that as a general rule a claimant cannot rely on a mistake by or negligent advice from a skilled adviser as a basis for asserting (under what is now section 111(2)(b)) that it was not reasonably practicable to bring a claim in time. The

subsequent cases have established that a “skilled advisor” does not have to be a solicitor or other qualified lawyer but does need to be someone it is reasonable to expect to give reliable advice and to act professionally. The principle has, for example, been extended to legal advice from union advisers (*Alliance & Leicester-v-Kidd* UKEAT/0078/07 and *Cullinane-v-Balfour Beatty* UKEAT/0537/10) and the CAB (*Riley-v-Tesco* [1979] ICR 323, CA). However, the source of the advice and the level of skill held by the advisor may be factors (*Theobald-v-Royal Bank of Scotland* [2007] All ER (D) 4).

51. The second requirement in section 111(2)(b) is for the claim to have been brought in what the Tribunal considers to be a reasonable further period after the normal period allowed for bringing a claim. This usually involves similar considerations to the “reasonable practicability” test and will focus on the reasons for the delay before the claim was presented.

52. In my view there is a specific question of law that arises in this case, namely whether the *Dedman* principle applies where an adviser does not do what their client has asked (and reasonably expects) them to do but instead deceives the client into believing that the claim was made in time.

53. I have not been able to find a reported case that provides a direct answer to that question. I am struck by the fact that the *Dedman* case, and cases following it (for example *Marks and Spencer v. Williams-Ryan; Northamptonshire CC v Entwistle*, *Paczkowski v Sieradzka* [2017] ICR 62) all focus on a claimant whose case for an extension of time is based on mistakes by or poor advice from a skilled adviser.

54. In my view it does not follow from *Dedman* or the cases applying it that the principle in that case does (or should) apply in a case of deceit or fraud. I have concluded that it does not apply and that, as a result, I can determine the issues in this case without inhibition by the *Dedman* principle.

55. Also, If Mr Kerslake was not a skilled adviser then the *Dedman* principle does not apply in any event. I do not consider that the fact the claimant believed he was such an adviser makes any difference as a matter of law. That goes to whether it was reasonable for the claimant to have acted as they did before finally presenting a claim.

56. In these circumstances the Tribunal must determine the issues set out above, which turn in the end on questions of reasonableness, and are essentially matters of fact.

57. In this regard I note that Scarman LJ in *Dedman,* observed that the situations that might justify not bringing a claim in time included "some untoward and unexpected turn of events".

58. The closest reported case I have found to the circumstances of the present case is *Wall's Meat Co v Khan 1979 ICR.* In it the claimant believed (wrongly but reasonably) that a claim was proceeding in a tribunal and did not appreciate his mistake until informed by the tribunal and advised to see a solicitor. But this was not a case relating to the acts of a skilled adviser. In his judgment, Brandon LJ said:

> *"In my judgment the industrial tribunal …. were entitled as a matter of law to decide that it was not reasonably practicable for the complaint to have been presented by November 22, 1976. Where a man is reasonably misled into believing that proceedings which he wishes to bring have already been brought, a finding that it was not reasonably practicable for him to bring what would have appeared to him to be duplicate proceedings is not a perverse or unreasonable finding. On the contrary, it is, in my view, a sensible and obvious finding, which cannot be successfully challenged in law."*

59. That statement provides some support (in a case where the *Dedman* principle does not apply) for the view that as a matter of law it is open to the Tribunal, where a claimant reasonably believes a valid claim has been made, to regard that as justifying the conclusion that it was not reasonably practicable to bring a claim in time. But each case turns on its own facts, so the Tribunal has to decide the instant case on its merits in the light of its particular facts.

Analysis and decision

60. The claimant is not relying on his own ignorance of the law or procedure applicable to unfair dismissal claims. He is a lay person with no legal knowledge, but he did discover quickly after his dismissal what he needed to do to make a claim. He obtained an Early Conciliation certificate naming the respondent and he was aware of the time limit for bringing a claim.

61. In my view it was reasonable for him to put the matter in the hands of a person he thought was a solicitor familiar with employment claims. He was encouraged to do so by a Union official and was aware, despite his effective legal research, that he was not familiar with employment tribunal proceedings. It appears from what his Union now tell him that the circumstances in which he was referred to Mr Kerslake in 2021 were irregular, but there was no reason for him to know or suspect that at the

time, especially at what must have been a very stressful time for him having gone through serious criminal proceedings and then lost his job.

62. It is of course advisable for a lay claimant to make use of a qualified legal practitioner, if available, not least because of the legal rights of recourse if the practitioner is negligent, the insurance a practitioner should carry and, ultimately, any indemnity arrangements offered by a professional body. In practice it does not appear that the claimant has had any of those protections. And the fact he did not have to pay for any legal services supplied is of course another persuasive reason for accepting the arrangements being offered to him, ostensibly from the Union.

63. I have found that the claimant was deceived by his adviser into believing that a claim had been made in time. I am satisfied that that was the reason why (a) he did not make a claim in time and (b) there was a delay before he did make a claim himself. I have not identified any fault on the part of the claimant in relation to those matters.

64. As explained above, I do not consider that the *Dedman* principle prevents the claimant from relying on the adviser's deceit as a basis for arguing that the issues in this case should be determined in his favour. Another reason for reaching that conclusion is my finding that Mr Kerslake was not a solicitor or other skilled adviser.

65. I have concluded that it was not reasonably practicable for the claimant to have brought his claim in time. This is because I consider that it was reasonable for the claimant to believe, as he did, that a claim had been made in time on his behalf. As a lay person he had no reason to disbelieve what he was told, or that the email he was forwarded was a fake.

66. I have also concluded that the claim was brought within a reasonable time. The claimant was told initially that, in the circumstances of the pandemic, proceedings were subject to delay and that he should not expect speedy progress. That would sound plausible to a lay person and it was reasonable for him to rely on what he was told, rather than questioning whether a claim had been made. He was reassured from time to time by Mr Kerslake that he had to wait, until eventually his patience ran out and he decided to approach Bristol Employment Tribunal staff at the end of July 2022. I consider the delay up until then to be reasonable in all the circumstances.

67. Correspondence with tribunal staff takes time and he followed the advice given, to make a complaint. On being told what the Regional Employment Judge had said about the case, the claimant then brought a fresh claim,

approximately a month after he first contacted the Tribunal staff. That was in my view all done within a reasonable time after contacting Bristol ET at the end of July.

68. It follows from the conclusions I have reached that I am extending time under section 111(2)(b) of the Employment Rights Act 1996. The claim was brought within a reasonable period after the original period for making a claim ended, and it was not reasonably practicable to have brought it within that period.

Employment Judge Hogarth
Date: 16 March 2023

Sent to the parties: 20 March 2023

For the Tribunal