EMPLOYMENT TRIBUNALS

Claimant: Mr J Jordan

Respondents: 1. RJ Urmson
2. RJ Urmson Commissioning Engineers Ltd

HELD AT: Manchester **ON:** 18 August 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr S Jordan (Claimant's Father)
Respondents: Mrs C Moolenschot, Consultant

JUDGMENT AT PRELIMINARY HEARING

1. R J Urmson is removed from the proceedings as a respondent. The proper respondent is R J Urmson Commissioning Engineers Ltd.

2. The Tribunal has no jurisdiction over this claim because it was presented outside the time limits applicable under the relevant statutory provisions. The claim is therefore dismissed.

REASONS

Introduction

1. This was a preliminary hearing convened to consider whether the claim was presented within time. The claimant was represented by his father, to whom I will refer as "Mr Jordan", and the respondent by its consultant, Mrs Moolenschot.

2. Having undergone early conciliation between 20 March and 18 April 2017, the claimant presented his claim on 16 May 2017. He brought three complaints arising out of the termination of his employment as an engineer with the respondent in December 2016: unfair dismissal, breach of contract in relation to notice, and that there had been unlawful deductions from his final payment of wages.

3. In its response form of 19 June 2017 the respondent resisted the complaints on their merits but also raised the possibility that the claim was out of time. Both the claim form and the response form asserted that the effective date of termination had been 13 December 2016. The time limit issue was listed for determination at this preliminary hearing.

4. Each of the three claims brought in these proceedings has its own provision regarding time limits. It was not argued that the claim had been presented within the three month time limit prescribed by each of those provisions[1]. The issues to be determined were therefore as follows:

(a) Whether the claimant could show that it had been not reasonably practicable for him to have lodged his complaint within the three month time limit, and if so

(b) Whether he lodged his complaint within such further period as the Tribunal considered reasonable.

Relevant Legal Framework

5. The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996:

> **(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.**

[1] Subject to the point in paragraph 53 below.

6. The provisions of section 207B provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect initiating early conciliation "stops the clock" until the ACAS certificate is issued, and if the claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present his claim.

7. There are equivalent provisions applicable to complaints of breach of contract and of unlawful deductions from pay which do not materially differ, save that for a complaint of unlawful deductions from pay time runs from the date of the payment from which it is said a deduction has been made[2].

8. Two issues may therefore arise if a claim is presented outside the three months (allowing for early conciliation): firstly whether it was not reasonably practicable for the claimant to present the complaint before the time limit expired, and, if not, secondly whether it was presented within such further period as is reasonable.

9. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal). Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

10. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

11. The position where an employee relies on advice from a professional adviser has been the subject of a number of earlier cases. They were reviewed by the EAT in **Northamptonshire County Council v Entwhistle UKEAT /0540/02** in May 2010**.** The then President, Mr Justice Underhill, identified the following principles (paragraph 5 of the judgment):

> **"(1) Section 111 (2) (b) should be given "a liberal construction in favour of the employee". This was first established in *Dedman*** [Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53]**. There have been some changes to the legislation since but this principle has remained: see, most recently, paragraph 20 in the judgment of Lord Phillips MR in *Williams-Ryan*, at page 1300.**
>
> **(2) In accordance with that approach it has consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit. This was first clearly established in the decision of the Court of Appeal in the *Walls* case** [Walls Meat Company Ltd v Khan [1979] ICR 52]**, but see most recently paragraph 21 of Lord Phillips' judgment in *Williams-Ryan* and, in particular, the passage from the judgment of Brandon LJ in *Walls* there quoted, at pages 1300 to 1301.**

[2] See paragraph 53 below.

(3) In *Dedman* the Court of Appeal appeared to hold categorically that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a skilled adviser, even if that adviser had failed to advise him correctly. Lord Denning MR said this at page 61 E-G:

> **"But 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] ICR 148. 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. Summing up, I would suggest that in every case the Tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the four weeks to pass by without presenting the complaint. If he was not at fault, nor his advisers, so that he had just cause or excuse for not presenting his complaint [within] the four weeks then it was not practicable for him to present it within that time. A court has then a discretion to allow it to be presented out of time if it thinks it right to do so, but if he was at fault, or his advisers were at fault in allowing the four weeks to slip by, he must take the consequences. By exercising reasonable diligence the complaint could and should have been presented in time."**
>
> **…**

(5) However, in *Williams-Ryan* Lord Phillips reviewed the relevant authorities in some detail with a view to identifying whether it was a correct proposition of law that, as he put it at paragraph 24 (page 1301):

> **"… if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the Employment Tribunal in due time. The fault on the part of the adviser is attributed to the employee."**

He concluded squarely at paragraph 31 (page 1303):

> **"What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in *Dedman* 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."**

The passage from *Dedman* there referred to is part of the passage which I have set out at (3) above. I think it is clear that Lord Phillips was intending to confirm that what he elsewhere called "the principle in *Dedman*" is a proposition of law …

(6) Subject to the *Dedman* point, the trend of the authorities is to emphasise that the question of reasonable practicability is one of fact for the Tribunal and falls to be decided by close attention to the particular circumstances of the particular case …"

7. Consequently, in paragraph 9 Underhill P concluded that there may still be cases where a mistake by a skilled adviser is not fatal to the claimant's case:

> **"In my judgment the Judge was right not to read Lord Phillips' endorsement of the *Dedman* principle in *Williams-Ryan* as meaning that in no case where a claimant has consulted a skilled adviser and received wrong advice about the time limit can he**

> **claim that it was not reasonably practicable for him to present his claim in time. It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is itself reasonable. … The paradigm case, though not the only example, of such circumstances would be where both the claimant and the adviser had been misled by the employer as to some material factual matter (for example something bearing on the date of dismissal, which is not always straightforward). …"**

The Evidence

12. The evidence provided to enable me to determine this issue included evidence on oath from Mr Jordan pursuant to a witness statement which ran to 15 paragraphs. He also produced 17 documents to which I will refer by number where appropriate. The respondent relied on a handful of documents, but most of them appeared in the claimant's bundle. The exception was an exchange of emails on 12 and 13 December 2016 to which I will refer below.

13. I did not hear any evidence from the claimant personally. It was clear that Mr Jordan had been dealing with this matter for him.

Findings of Fact

14. Having heard the evidence and considered the documents I made the following findings of fact. These findings are confined to those relevant to the time limit issue. It was not relevant for me to consider the merits of the unfair dismissal complaint or any conduct of the parties after the claim form was presented. I found Mr Jordan to be an impressive witness who was entirely candid throughout. Understandably there were occasions when he was unable to recall precise dates or details. That did not detract from his credibility.

15. The claimant was employed as an engineer by the respondent in December 2014. In late 2015 there was an allegation that he had been involved in the falsification of certain documents. He denied the allegation. He was called to a disciplinary hearing which took place on 12 December 2016 and at which he was accompanied by his father. Notes of the hearing were prepared by Mr Jordan shortly thereafter (document 16). Those notes recorded that at the end of the hearing the manager conducting it, Dean Murray, informed the claimant and Mr Jordan that he was going to issue a first written warning, but that there was also mention of "gardening leave". It was unclear to Mr Jordan and the claimant what this meant.

16. At 16:41 that day Mr Jordan emailed Mr Murray asking him whether he had made a decision and whether there was any work lined up for him for the rest of the week.

17. The reply came from Mr Murray at just after 17:24 on 12 December 2016. The email included the following:

> **"Further to our meeting I have reviewed the evidence and can confirm my decision is that this constitutes gross misconduct. As such we will be dismissing you with effect from tomorrow. A letter confirming this will be sent to you tomorrow. Please remove all personal items for the van. I will arrange for the van and R J Urmson equipment to be collected tomorrow between 12.00pm and 2.00pm."**

18. The claimant responded to that email on 13 December 2016 at 10:07. He explained where the key for the van could be found so that it could be collected. The claimant knew that his employment had ended.

19. A letter of dismissal was issued by Mr Murray. It formed document 17. The letter was undated. It began by referring to a disciplinary hearing which had been held:

> **"On the 21st December 2016."**

20. It went on to say that the decision had been to dismiss the claimant for gross misconduct and it included the following:

> **"Therefore, I have decided to take the severest sanction an employer can take against an employee and to summarily dismiss you with effect from 13 December 2016. You are not entitled to notice pay. I will arrange your P45 to be forwarded to you in due course, together with payment for any outstanding holiday that you have accrued."**

21. The letter gave the claimant the right of appeal.

22. The letter was addressed to the claimant and marked "private and confidential". I accepted Mr Jordan's evidence that the claimant was not at home between 13 and 16 December 2016. The letter was not opened and read by the claimant or his father until late on 16 December 2016. An appeal letter was prepared the same day and received by Mr Murray on 19 December 2916 (document 3).

23. However, and importantly, the claimant and his father knew that he had been dismissed before they received the letter. That was evident from the email from Mr Murray of 12 December 2016. Mr Jordan contacted a solicitor he instructs for his own business, and that solicitor put Mr Jordan in touch with an employment law barrister under the Direct Access Scheme. Contact with the barrister thereafter was exclusively by email save for a brief telephone conversation on 20 March 2017.

24. Mr Jordan explained that the contact with the barrister must have been on or before 15 December 2016, because he had received an email reply from the barrister that day. The contents of the email were privileged and I did not see it, but Mr Jordan confirmed that the barrister referred to the claimant having received "notice of dismissal". I concluded that it was apparent to the barrister that the claimant had been dismissed prior to 15 December 2016. Mr Jordan accepted in evidence that he only contacted the barrister because of dismissal.

25. When the dismissal letter arrived a copy was sent to the barrister. He had also received the notes of the disciplinary hearing on 12 December 2016 which Mr Jordan had kept.

26. I accepted Mr Jordan's evidence that no advice was given by the barrister about time limits. The claimant had never been involved in an Employment Tribunal case before and had no knowledge of time limits. Mr Jordan had appeared as a witness in an Employment Tribunal case but had no knowledge of time limits.

27. The focus in the weeks that followed was on dealing with the appeal. There was an argument about whether Mr Jordan would be allowed to accompany the claimant at the appeal hearing. Because of this dispute an appeal hearing scheduled for 17 January 2017 did not take place and the respondent made clear its view that the appeal was closed.

28. Mr Jordan knew that the appeal was closed as he said as much to the barrister in an email of 23 January 2017 at page 11. He asked the barrister to write a strong letter on behalf of the claimant to the company.

29. I accepted Mr Jordan's evidence that around this time he had a "working knowledge" that there was a time limit applicable, but he had not received any specific advice to that effect. I accepted that his understanding of the time limit did not "crystallise" until he spoke to ACAS on 20 March 2017.

30. On 3 March 2017 Mr Jordan emailed the barrister again. He provided copies of a letter and an email from the respondent from January. He did not receive any response from the barrister.

31. He emailed the barrister again on 16 March 2017 (document 13) in the following terms:

> **"Further to my last email dated 3 Mar 17 (enclosed). Have you had an opportunity to consider this? I am conscious we may be running out of time for the Tribunal."**

32. This resulted in email contact from the barrister on 20 March 2017 and a telephone discussion. The email from the barrister at document 14 said that the time for the letter had passed and a decision had to be taken about proceeding with the Tribunal claim. That same day Mr Jordan spoke to ACAS to initiate early conciliation. ACAS advised him of the position in relation to time limits.

33. The early conciliation period ran from 20 March to 20 April 2017. ACAS told Mr Jordan that the claimant had a month after the issue of the certificate in which to present his claim. The claim form was presented on 16 May 2017.

34. As well as dealing with this matter for his son, Mr Jordan had the demands of his own business to attend to. He was also affected by a health issue between late February and mid March 2017. In that period he had one hospital admission (24 February), one appointment (13 March) and a procedure (14 March). His health concerns made it more difficult for him to focus on the Tribunal claim for his son.

Submissions

35. At the conclusion of the evidence each party made a brief oral submission to help me make my decision.

36. For the respondent Mrs Moolenschot submitted that the effective date of termination was 13 December 2016 and therefore time expired on 12 March 2017. Waiting for advice or pursuing internal appeal procedures did not mean it was not reasonably practicable to bring a claim. A decision to defer legal proceedings to see if the matter could be resolved internally was a choice not to pursue proceedings, not

a situation where the claimant was prevented from doing so. Mr Jordan had had some working knowledge of time limits on his own account during the limitation period, but in any event a skilled adviser had been instructed. It was not possible that the skilled adviser could reasonably have thought that the termination date was 21 December 2016 because he was contacted before the dismissal letter was issued and he knew that the disciplinary hearing had actually been on 12 December 2016. Accordingly if the skilled adviser had made a mistake, the **Dedman** principle meant that the claim was out of time.

37. If I was against her on that, she submitted that it had still not been lodged within a further reasonable period. Once the early conciliation certificate was issued on 18 April 2017, it was not reasonable for the claimant to wait almost a full month before lodging his claim when he already knew it was out of time.

38. On behalf of the claimant Mr Jordan had prepared a submission which had helpfully been reduced to writing and a copy of that appears on the Tribunal file. Reference to that submission should be made if appropriate. In broad terms, however, he emphasised the way in which the dismissal had taken place and the confusion about what the decision had actually been, the importance attached by the claimant to obtaining an outcome from the appeals process without resorting to litigation, the delays in obtaining advice from the barrister, particularly during the key period in early to mid March, the error in the date in the dismissal letter, and the speed with which he had acted on behalf of the claimant once aware that early conciliation through ACAS was needed. He also emphasised that ACAS had told him that he had a month after early conciliation in which to lodge the claim.

39. Mr Jordan also referred to two matters which were not in evidence before me: the first being the health position of the claimant as a consequence of dismissal, and the second being that the claimant found a new job in March 2017 and was worried about the reference he would get from the respondent if he had started proceedings. He therefore waited until he had started the new job before presenting the claim. Formally I discounted these matters because they were not in evidence before me, but even if they had been properly evidenced they would not have made a difference to the outcome.

Discussion and Conclusions

40. There were a number of matters raised by Mr Jordan on behalf of the claimant in evidence and submissions which it is convenient to deal with before addressing the heart of the matter.

Dismissal not Effective by Email

41. Mr Jordan suggested that the dismissal should not be regarded as effective until confirmed formally by letter, but there is no legal authority for that proposition. Save in exceptional cases dismissal is effective if communicated verbally, by text or by email, or by letter. The effective date of termination is defined in section 97 of the Employment Rights Act 1996, and in broad terms is the date upon which dismissal purports to take effect unless that is not communicated to the claimant until after that date. In this case it was agreed that the claimant was informed of his dismissal by

email on or before the date it took effect,13 December 2016, and therefore (as the claim form acknowledged) that was the effective date of termination. Whilst a belief that dismissal was not effective until confirmed in a letter might reasonably be held by a lay person, it would have been apparent to a skilled adviser such as an employment law barrister that this was not tenable as a matter of law.

Internal Appeal

42. Laudable as the desire to resolve matters internally is, the fact that a claimant is pursuing an appeal against dismissal does not make it not reasonably practicable to lodge a claim even while the appeal is pending. Tribunals are commonly asked to stay unfair dismissal complaints pending the outcome of an appeal. In any event in this case it was clear to Mr Jordan and the claimant that the appeal was closed by 23 January 2017, still some seven weeks or so before the expiry of the limitation period.

No Information from Respondent

43. Mr Jordan also criticised the respondent for not explaining time limits or the obligation to go to ACAS in its dismissal letter. Whilst it might be thought good practice for employers to do this, the failure to include it in a letter does not help the claimant. He was able to seek advice from an independent source, and indeed did so with the help of his father.

Ignorance of Time Limits

44. For the same reason the lack of experience of Employment Tribunal proceedings or any knowledge of time limits does not help the claimant because he had access to someone who knew all about those matters.

Demands upon Mr Jordan

45. Although I did not dispute the demands on Mr Jordan of running his own business, it seemed to me that did not make it not reasonably practicable to lodge the claim. Mr Jordan still had time to make considerable efforts on behalf of his son following the dismissal, including dealing with the appeal, correspondence with the respondent and liaison with the barrister.

46. Similarly although I accepted the factual content of Mr Jordan's evidence about his own state of health from late February onwards, I was satisfied that it did not prevent him from continuing to deal with matters to some extent as evidenced by his emails to the barrister of 3 and 16 March 2017. He was also able to speak to the barrister and to ACAS on 20 March. This point would only have helped the claimant had there been medical evidence to the effect that for health reasons neither he nor his father had been capable of commencing early conciliation and "stopping the clock".

No Advice about Time Limits

47. That left the core issue in this case: the real reason the claim was presented out of time. On the evidence I have heard I found that the barrister did not provide Mr Jordan and the claimant with advice on the time limits and when the time limit

would expire. The effect of that omission was particularly acute in this case. Mr Jordan emailed the barrister on 3 March 2017 seeking advice. He had no reply. The time limit elapsed on 12 March 2017. On 16 March 2017 he sent a reminder email recording his own sense that they may be running out of time. Contact was eventually made on 20 March 2017 following which matters proceeded extremely promptly.

48. I considered the legal framework summarised above. On the face of it this fell within the **Dedman** principle. I noted that in **Entwhistle** a possible exception was where the mistake of the skilled advised was itself reasonable. I considered carefully whether this was one of those cases.

49. One can see that on a quick perusal the undated dismissal letter might give the impression that the decision was made on 21 December 2016. However, I was satisfied for three reasons that this cannot reasonably have been the view of the barrister instructed by Mr Jordan. Firstly, Mr Jordan had been in touch with him about dismissal by 15 December 2016. Secondly, he knew from sight of the disciplinary hearing notes that the hearing actually occurred on 12 December 2016. Thirdly, the letter referred to dismissal taking effect on 13 December 2016. Consequently in my judgment the barrister could not reasonably have been misled by the typographical error in the dismissal letter. Any error as to time limits was not a reasonable one.

50. It is not for me to say whether the failure to advise on time limits amounted to negligence on the part of the barrister. I have not heard any evidence from the barrister. There may be other relevant factors. However, in my judgment on the evidence before me it was reasonably practicable for Mr Jordan to have asked for advice on time limits, or for the barrister to have provided that advice of his own volition, and for the claim to have been presented within time. None of the other factors identified by Mr Jordan made a difference to that conclusion.

51. Accordingly the claimant had failed on the first issue and the claim was dismissed.

Postscript

52. There are two points which should be added by way of postscript. The first is that had I found in favour of the claimant on the first issue, I would have found that the claim had been lodged within a further reasonable period. Although Mrs Moolenschot was right to say that the claimant did not in truth have the benefit of the one month period after issue of the early conciliation certificate because he had initiated early conciliation outside the three month time limit (see, for example, section 207B(4) of the Employment Rights Act 1996), in my judgment Mr Jordan and the claimant acted reasonably because they were told that they did have that month. They could not reasonably have identified that the advice from ACAS was technically incorrect.

53. Secondly, there was no evidence before me about the date of the final payment from which the alleged unlawful deduction was made. If that final payment was made to the claimant on or before 20 December 2016, the complaint of unlawful

deductions is out time. If, however, it was made on or after 21 December 2016, section 23(2) of the Employment Rights Act 1996 means that the three month period starts to run from the date of the payment of the wages from which the alleged unlawful deduction was made. If that is the position then the claimant should apply promptly for a reconsideration of this judgment in so far as it affects the unlawful deductions complaint.

54. That point cannot benefit him in relation to the unfair dismissal and notice claims, since time for those two complaints runs from the effective date of termination.

Employment Judge Franey

22 August 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 August 2017

FOR THE TRIBUNAL OFFICE