



EMPLOYMENT TRIBUNALS

Claimant: Mrs A E Benton

Respondent: Give 2 Give (A Charity and Company)

Heard at: London South (Croydon) **On:** 16 November 2017

Before: Employment Judge John Crosfill

Representation

Claimant: Mrs Ann Benton

Respondent: Mr Doug Frame of Hill & Abbots Solicitors

JUDGMENT

1. The Claimant's claim for unfair dismissal was presented within the statutory time limit set out in Section 111 of the Employment Rights Act 1996.
2. The Respondent's application to strike out the Claimant's claim as having no reasonable prospects of success is dismissed.

REASONS

1. This matter was listed for a preliminary hearing to determine the following issues:
 - 1.1. Whether or not the claims were presented within the statutory time limit prescribed by Section 111 of the Employment Rights Act 1996; and
 - 1.2. If they were whether they should be struck out as having no reasonable prospect of success.

2. By a claim form presented to the tribunal on 15 August 2017 the Claimant has brought a single claim that she was unfairly dismissed contrary to Section 94 of the Employment Rights Act 1996. The effective date of termination of her contract was 24 February 2017 (being the end of a period of notice). She contacted ACAS for the purposes of early conciliation on 3 May 2017 and the conciliation period ended on 3 June 2017. It was agreed between the parties that the last day upon which a claim would ordinarily have been made in time would have expired on 3 July 2017.
3. The Claimant acknowledged that her claim had been presented outside the time limit imposed by Section 111(2)(a) of the Employment Rights Act 1996 but said that she had refrained from presenting a claim in time because she had been under the impression that she would have to pay a fee which she could not afford. She said that as soon as she learned of the effect of **R (On the Application of Unison) v Lord Chancellor [2017] UKSC 51**, which was handed down on 26 July 2017, she attended a CAB for advice and issued her claim. She argues that it was not reasonably practicable to present the claim in time and that she presented the claim in a reasonable time after the fees order was quashed. She therefore argues that her claim is within the extended time limit provided by Sub-section 111(2)(b) of the Employment Rights Act 1996.
4. The issue that the tribunal had to decide was therefore whether it was not reasonably practicable for the Claimant to present her claim before 3 July 2017 and, if it was not, was the claim form presented in a reasonable time thereafter. In order to decide this question, it was necessary to make findings of fact, and accordingly I invited the Claimant to give evidence. She did so and was cross examined by Mr Frame on behalf of the Respondent. Having heard that evidence I make the following findings of fact.
5. The Respondent is a charity which had two shops from which goods donated to the charity were sold. The Claimant was employed, either as an acting manager, or a shop assistant. She worked at the Respondent's shop in Bromley for 7 hours per day for three days a week. Her earnings were modest at around £500 per month after statutory deductions. In addition to her job with the Respondent the Claimant had a further job as a "Traffic Numerator" for Bromley Council. In that role, she works on an, as and when, basis but averages 1 to 2 days per week at a rate of £45.00 per day.
6. The Claimant was dismissed by the Respondent in circumstances which it appears a redundancy situation existed (I make no finding on this). At around the same time staff had been transferred from another shop in Petts Wood which was temporarily closed following a fatal accident. The Claimant was given contractual notice which expired on 24 February 2017. At the time the Claimant was dismissed, she thought that her dismissal

had been “just one of those things”. She later believed that in fact more staff had been retained than she had been led to expect. She came to the view that she had been replaced by staff from Petts Wood and that her dismissal was unfair.

7. The Claimant attended the Bromley CAB on about 14 February 2017. She first met with an advisor and discussed the merits of a claim. From that discussion, the Claimant believed that she had a good case of unfair dismissal and wished to progress matters. At some stage, and it is not clear when, the Claimant was informed that to bring a claim before the Employment Tribunal she would have to pay a fee. She thought that the fee was about £1,000. The Claimant, probably with the benefit of hindsight, suggests that a possible reason why fee remission was not raised was that she had a second job. She infers that this might have given the impression that her means were greater than they actually were.
8. On 13 April 2017, the advisor at the CAB assisted the Claimant in drafting a grievance letter. The thrust of the complaint was that the Claimant felt that she had been replaced by another employee from the Petts Wood shop. She complained that her dismissal was unfair on that basis.
9. On 3 May 2017, the Claimant attended the CAB and with assistance she completed the ACAS Early Conciliation form. At some point, probably during the conciliation period, the advisor who had been helping the Claimant suggested that she should speak to a solicitor who attended the CAB on a Wednesday evening. The Claimant discussed the merits of her case with the solicitor. She says that from that discussion she believed that she had a good claim but had said that she could not pay the tribunal fee. In cross-examination by Mr Frame it was put to the Claimant that she had the assistance of a “specialist solicitor”. The Claimant simply said that she assumed that was the case. There is no evidence whether or not that description was correct. I find that:
 - 9.1. the Claimant did speak with a solicitor in addition to a general advisor; and
 - 9.2. that she did discuss the merits of the claim and knew that a time limit was applicable (if not exactly when it expired); and
 - 9.3. that she raised the fact that she could not afford the fee with the CAB and solicitor; and
 - 9.4. that neither the general advisor nor the solicitor made any enquiries about her income or capital.

10. Mr Frame put it to the Claimant that it was inconceivable that the “specialist solicitor” would not have been aware of the possibility of obtaining fee exemption and have advised her upon it. The Claimant’s evidence was that this had not been mentioned until after the Unison decision. The Claimant had brought written submissions prepared by the CAB in which it was set out in terms that the issue of fee remission had never been discussed. An assertion is also made in those submissions that the Claimant had not had the benefit of professional advice. The status of the “specialist solicitor” is therefore unclear.
11. The Claimant gave evidence that she believed that the issue of the ACAS Early Conciliation certificate meant that time had expired for bringing any claim. She had therefore thought that the matter was closed and that her lack of the means to pay a fee had prevented her bringing a claim. She says that shortly after Unison was decided she was telephoned by a friend who pointed out that the newspapers were suggesting that claims stifled by the fee regime might now be brought. She therefore sought advice and issued her claim.
12. I consider that the fact that the Claimant acted so soon after Unison does support the suggestion that she had always wished to bring her claim. In the light of that I do not accept the suggestion made by Mr Frame that she must have been made aware of the possibility of fee exemption. Had she known that there was no reason why she could not have brought the claim at the time, and I find that she would have done.
13. One matter that was, quite properly, explored by Mr Frame was the extent of any enquiries made by the Claimant on her own behalf. He suggested to the Claimant that had she looked on-line, or attempted to complete an ET1 online she would have found out about the possibility of fee exemption. The Claimant said, and I accept her evidence, that she did not make any independent enquiries as she is “not good with computers” and that she had placed her trust in the CAB and her understanding of the advice she had received.

The Law

The Statute

14. The material parts of the Section 111 of the **Employment Rights Act 1996** are as follows:

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 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(a).

A two-stage test

15. Where a claim is presented outside the period of 3 months it is necessary to ask firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. There is no general discretion to extend time and the burden of proof rests squarely on the Claimant to establish that both limbs of the test are satisfied.

The meaning of “reasonably practicable”

16. The expression “reasonably practicable” does not mean that the employee can simply say that his/her actions were reasonable and escape the time limit. On the other hand, an employee does not have to do everything possible to bring the claim. In ***Palmer and Saunders v Southend-On-Sea Borough Council* [1984] IRLR 119** it was said that reasonably practical should be treated as meaning “reasonably feasible”.
17. ***Schultz v Esso Petroleum Ltd* [1999] IRLR 488** is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

“Reasonable ignorance”

18. The question of whether it is open to an employee ignorant of her rights to

rely upon that ignorance as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. In **Dedman v British Building and Engineering Appliances Ltd [1973]** IRLR 379 Scarman LJ said the following:

“Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events.

Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim “ignorance of the law is no excuse.” The word “practicable” is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court.”

19. In **Wall's Meat Co Ltd v Khan [1978]** IRLR 499 Brandon LJ dealt with the issue of ignorance of rights as follows:

“The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable.”

20. In those and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practical turns, not on what was known to the employee, but upon what the employee ought to have known **Porter v Bandridge Ltd [1978]** ICR 943, **Avon County Council v Haywood-Hicks [1978]** IRLR 118. A further proposition can also be gleaned from those authorities. Where an employee is aware that a right to bring a claim exists it will be considerably harder to show that they ought not have taken steps to ascertain the time

limit within which such claims should be presented.

Bad (or no) advice

21. In what is probably best regarded as a subset of “reasonable ignorance” is the situation where the employee has taken steps to obtain advice on some aspect of their claim but the advice was incomplete or wrong. I have extracted the following passages from **Harvey on Industrial Relations and Employment Law** which deal with the issue of whether an employee can show that it was “not reasonably practicable” to present a claim in time where missing the proper deadline followed advice given, or not given, by an advisor.

*“If a professional adviser, such as a solicitor, has been instructed by the claimant to advise or act for him, then any wrongful or negligent advice or conduct on his part which results in the time limit being missed will be attributed to the claimant with the result that he will ordinarily not be able to rely on the escape clause. In *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 All ER 520 at 526, [1973] IRLR 379, Lord Denning MR stated (at 381):*

“If a man engages skilled advisers to act for him — and they mistake the time limit and present [the complaint] too late — he is out. His remedy is against them.”

*Lord Denning repeated the principle in *Wall's Meat Co Ltd v Khan* [1978] IRLR 499, [1979] ICR 52 (at 502, 56, respectively), where he said:*

“I would venture to take the simple test given by the majority in [Dedman]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights — or ignorance of the time limits — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.”

*And Brandon LJ in the *Wall's Meat* case said (at 502, 60) that whilst ignorance of, or a mistaken belief regarding, the time limit could mean that it was not reasonably practicable to present the claim in time, provided the ignorance or mistaken belief was itself reasonable, neither state of mind will be reasonable:*

“ ... if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have

made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'.

22. I pause to reflect on a matter seemingly underpinning the decision in **Dedman** which is the apparently comforting assumption that the disappointed claimant's remedy for any negligent advice "*is against them*". Today, unlike the time when **Dedman** was decided, civil legal aid has been withdrawn for most professional negligence claims. Court fees in the civil courts are prohibitive. Professional representation is beyond the means of the majority of the population. A professional negligence claim, based, as it would be, on the loss of chance of success of an unfair dismissal claim for a low paid employee, is an unattractive proposition for a conditional fee agreement. The reality is that in a case like the present one it is highly unlikely that the Claimant would be able to access any remedy against anybody who may have given her negligent advice.
23. When **Dedman** was decided the legal services market was highly regulated and the voluntary sector reasonably funded. Today the range of low cost available advisors is diverse. It ranges from the knowledgeable, committed and passionate to the misguided, incompetent and occasionally corrupt. The coverage of quality free legal advice has been decimated by cuts in grants and public funds. The reality is that a potential litigant who cannot afford professional advice is likely to seek advice where they can find it. The quality of that advice is likely to be more a matter of luck than anything else. However, I am bound by numerous more recent authorities of the Employment Appeal Tribunal and Court of Appeal and I cannot depart from the reasoning in those decisions. Any doubts as to whether the principle in *Dedman* is of general application were removed by the decision on the Court of Appeal in **Marks & Spencer plc v Williams-Ryan** [2005] IRLR 562.
24. Where an employee has sought some advice, it will not make any difference that she has not entrusted the whole of her case to the advisor **T Mobile (UK) Ltd v Singleton** UKEAT/0410/10. That said the circumstances in which the advice was given may be a material factor **Remploy Ltd v Brain** UKEAT/0465/10/CEA.

Advice from a CAB

25. It is clear that where an employee seeks advice from a person holding themselves out as a skilled advisor the **Dedman** principle will apply. That case of skilled advisors is not limited to members of the legal profession but includes trade unions, employment consultants and the volunteers at the Free Representation Unit.

26. In **Marks & Spencer plc v Williams-Ryan** [2005] IRLR 562 Lord Phillips MR stated (at para 32):

"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 CAB. 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 CAB 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."

27. However, the remarks of Lord Phillips must be seen in the context that the Court of Appeal expressly affirmed the **Dedman** principle and did not decide the case on the basis that the Claimant had received advice.
28. More recently in **Paczkowski v Sieradzka** [2017] ICR 62 the question of whether advice from a CAB was to be equated with that of a "skilled advisor" was considered to be a question of fact depending on the nature and circumstances of the advice given. I take that to be the proper approach.

Causation and reasonable practicality

29. In **Palmer v Southend-On-Sea Borough Council** [1984] IRLR 119 following a review of the earlier authorities including **Dedman** and **Wall's Meat** May LJ concluded that the question of whether a step was or was not reasonably practicable would include the advice given, or available, but that was a material consideration which would have to be taken into account along with all of the other circumstances.
30. In the Employment Appeal Tribunal in the case of **London International College v Sen** [1992] IRLR 292 Knox J said that it was necessary to make findings of fact as to what had been the substantial cause of the delay and accepted that the fact that there had been erroneous advice by an advisor at some stage did not mean that it necessarily followed that it was not reasonably practicable to bring a claim in time. That reasoning was upheld in the Court of Appeal.
31. In **Northamptonshire County Council v Entwhistle** [2010] IRLR 740 after an extensive review of the authorities the then President of the EAT said that the question posed under Section 111(2) of the Employment Rights Act 1996 "*is not one of causation as such*". In that case an earlier error by the employer has led to a negligent assumption by the Solicitor retained by the Claimant. The EAT overturned the decision of the Employment Judge that it was not reasonably practicable to bring the claim in time.

A reasonable period thereafter

32. The question of whether an employee has presented their claim within a reasonable time of the original time limit is a question to be determined objectively by the employment tribunal taking into account all material matters see **Westward Circuits Ltd v Read [1973] ICR 301, NIRC.**
33. In **Cullinane v Balfour Beatty Engineering Services Ltd UAEAT/0537/10** the then president of the EAT said:

“Ms Hart pointed out that the question which arises under the second stage in s 139(1)(b) is couched simply in terms of what further period the tribunal would regard as “reasonable”, and not, like the question under the first stage, in terms of reasonable practicability. She submitted that it followed that the “Dedman principle” – namely that for the purpose of the test of reasonable practicability an employee is affixed with the conduct of his advisers (see, for the most recent review of the case law, Entwistle v Northamptonshire County Council (2010) UAEAT/0540/09/ZT, [2010] IRLR 740) – does not fall to be applied. She pointed out that that principle is a consequence of the ultimate test being one of practicability (not even, be it noted, when the test was first formulated, reasonable practicability), and that the consideration of what further period was “reasonable” did not require so strict an approach. She made it clear that she was not saying that the fact that a Claimant had been let down by his advisers was decisive of the question of reasonableness at the second stage, but she submitted that it must be a relevant consideration.

[16] I accept the validity of the formal distinction advanced by Ms Hart, but I do not believe that it makes any real difference in practice as regards the question of the relevance of the culpability of the Claimant's legal advisers. The question at “stage 2” is what period – that is, between the expiry of the primary time limit and the eventual presentation of the claim – is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months. If a period is, on that basis, objectively unreasonable, I do not see how the fact that the delay was caused by the Claimant's advisers rather than by himself can make any difference to that conclusion.”

34. What I take from these authorities is that, in assessing whether proceedings have been brought within a reasonable period after the expiry of the original time limit, it is necessary to have regard to all relevant matters including, where appropriate, the factors that made it not

reasonably practical to present the claim in time. Whether or not they remained operative may be an important matter.

The decision in Unison

35. I consider that it is relevant to any examination of whether it was reasonably practicable to present a claim in time to look at how the Supreme Court categorised the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (which I have and continue to refer to as “the fee order”). Lord Reed categorised the question for the court as follows:

“The issue in this appeal is whether fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals (“ETs”) and the employment appeal tribunal (“EAT”) are unlawful because of their effects on access to justice.”

36. It seems to me that the issue of whether it is “reasonably practicable” to present a claim in time and the question of whether the fee regime unlawfully inhibited access to justice are inextricably interlinked. To explain that statement it is necessary to look at the evidence before the Supreme Court and the reasons given for their Lordships conclusions that the fee regime was an unlawful fetter on the right of access to a court.

37. In paragraphs 45 and 65 Lord Reed set out the some of the evidence before the Supreme Court:

“45. In 2015 Acas published research carried out on its behalf, based on a survey of a representative survey of claimants (“Evaluation of Acas Early Conciliation 2015”). It included figures relating to claimants who were unable to resolve employment disputes through conciliation but who did not go on to issue ET proceedings. The most frequently mentioned reason for not submitting an ET claim was that the fees were off-putting. More than two thirds of the claimants who gave that reason said that they could not afford the fees. Others said that the fee was more than they were prepared to pay, or that the value of the fee equalled the money they were owed.

46. On the basis of that research, and additional management information, the Review Report concluded that, of the 83,000 claimants who had notified Acas of their claims during 2014/15, “we estimate that the potential size of the group of people who said that the affordability of fees was the reason why they did not pursue a claim to the ETs would be around 8,000” (para 164). This estimate leaves out of consideration the claimants, identified in the Acas research, who gave as their reason for not bringing proceedings in the ET that the value of the fee equalled the money they

were owed. It also leaves out of consideration the possibility that claimants who settled may have done so at a level which undervalued their claim, because they did not feel that they could afford the alternative of bringing proceedings in the ET.”

38. As Lord Reed says at paragraph [78] *“Impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible”*. The evidence before the Supreme Court was not limited to consideration of whether the fees were “affordable”. Lord Reed’s reasons for quashing the fee order included his conclusion that even where the fees were affordable the fact that some claims would be of low value or the fact that there was a real risk of non-recovery meant that the fee order amounted to a real deterrent to bringing claims. At paragraph 96 he says *“Furthermore, it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it futile or irrational to bring a claim”*.
39. Throughout his speech Lord Reed distinguished between what is theoretically possible (albeit with a bit of difficulty) and what is reasonable. The argument to the contrary of the Lord Chancellor (as summarised in the second sentence of paragraph 90) was decisively rejected. The following passages are contained in the reasoning of Lord Reed:
- 39.1. *“In that regard, it is necessary to bear in mind that the use which people make of ETs is governed more by circumstances than by choice.” [para 92]*
- 39.2. *“The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can reasonably¹ be afforded.” [para 93]*
- 39.3. *“for example, fees of £390 have to be paid in order to pursue a claim worth £500 (such as the median award in claims for unlawful deductions from wages), no sensible person will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full. If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded”*. [para 96]

The aftermath of Unison

¹ Emphasis present in the judgment

40. Since the decision in Unison was handed down the Ministry of Justice have announced the practical measures that will apply to claims presented and impacted by the fee regime. These are:
- 40.1. That a Claimant who has paid a fee but failed to recover it may reclaim it from the MoJ; and
 - 40.2. That a Respondent who was ordered to and did repay a fee paid by a Claimant can reclaim it from the MoJ; and
 - 40.3. Any claim that was rejected because no fee was paid or struck out for a failure to pay a fee will be restored administratively.
41. This means that Claimants who have brought claims that have failed as well as those who have won will have their fees returned, whether they could have afforded to pay them or not. The effect of the last of those provisions is that a Claimant who has had a claim rejected or struck out when a fee was unpaid will have their claim restored regardless of whether the failure was caused by any lack of funds, negligence in applying for remission, choice or simple inadvertence. All claims will be restored regardless of merit. In the case of a claim rejected for want of a fee, the Respondent may have taken no steps in the proceedings and yet will be faced with a claim that may be up to 3 years old. It can only be assumed that the Supreme Court was fully aware of the practical effect of their decision. In short, the fee order is treated as if it had never been made. For a certain class of employees/claimants it will be as if the fee order never existed. The question is how that should be applied to the Claimant?

Discussions and conclusions

42. The first matter which I should address is the question of whether I find that there was any fault by the CAB. I am very conscious of the fact that I have not heard from the CAB and any findings that I make must be read in that light. On the other hand, I am told, and it seems clear, that the CAB drafted the Claimant's submissions for the hearing in which it was accepted that the Claimant had no advice in respect of fee remission.
43. Whilst the written submissions prepared by the CAB assert that the Claimant had no "professional" advisor those submissions do not directly contradict what the Claimant said about having been referred to a solicitor who attended on Wednesday evenings. I have no evidence that that person was a "specialist solicitor" and am not prepared to infer that that was the case just because the Claimant adopted the phrase when it was put to her in cross examination.

44. The Claimant's evidence was that she was told initially that there was a fee of £1,000. Either the Claimant has misunderstood what was said or, as I consider more likely, that information was given by a general advisor at the CAB doing their best to help. A further indication of the quality of the advice given was the fact that the Claimant erroneously believed that the time limit expired on the date of the ACAS certificate whereas she had at least a further month to bring her claims. The correct fee would have been £250 to issue and £950 for a hearing fee. Any such fee was beyond the Claimant's means. Certainly, by the point that the time limit expired, and on the information the Claimant provided to me, her income and capital were such that she would have qualified for fee remission.
45. Whilst the Claimant's evidence was, for entirely human reasons, vague. She said, and I accept, that she discussed the merits of her claim with the solicitor and that she had said that she could not afford the fee. The Claimant said, and I accept, that this did not prompt any discussion about fee remission. The Claimant, as I find it speculating on the reasons for that, believes that the fact that she had two jobs might have given a misleading impression of her means. She may well be right about that.
46. I regret to say that I am driven to find that, faced with a person with an apparently arguable claim, who stated that they could not afford a court or tribunal fee, a reasonably competent solicitor or even CAB Advisor would have been put on enquiry as to whether there was any fee remission scheme in place. This is not a case where the Claimant was conducting matters herself she was dependent on the CAB. They assisted her with correspondence (an appeal letter) and to complete the ACAS Early Conciliation form on line. It is with considerable regret, having regard to the fiscal constraints on the CAB movement and the dependence on volunteers and helpers, that I am driven to find that the failure to research the existence of the fee remission scheme was an error by persons holding themselves out as competent to advise on such matters.
47. If this was the only material factor then, I would be bound by the line of authority normally starting with Dedman to conclude that it was reasonably practicable to have brought the claim in time. However, I do not consider that that is the only material factor in this case.
48. If I am wrong about my conclusion on the Dedman issue, I would have rejected Mr Frame's alternative position that, making an effort on her own behalf, the Claimant "ought to have known" of the fee remission scheme. Whilst reasonable practicality is assessed objectively, the authorities show that the personal characteristics of the employee are a relevant matter. Here the Claimant had completely trusted the CAB to advise her. It was in the light of that she took no steps to research the position herself. She was told and believed that she had to pay a fee she patently could not afford. She told me, and I accept, that her computer skills are poor. As such "google" type legal research may well have been beyond her. It follows

that but for the fact that she had access to advice from the CAB I would have found that it was not reasonably practicable for her, acting without advice, to have presented her claim in time.

49. If the Claimant had been advised about the existence of the fee remission scheme she would have been in a financial position to bring her claim and I find that she would have done. If I approach the matter in a simple “but for” way it is clear that, but for the omission to give proper advice, the Claimant would have presented her claim in time. However, the authorities that I have identified above suggest that that is not the proper approach. The proper approach is to have regard to all of the circumstances. Where there are two reasons why a claim is not presented in time it may, depending on the facts, be necessary to have regard to both.
50. I consider it highly material that, at the time that the Claimant needed to present her claim the fee order placed an additional obstacle in her way. It was by no means the only obstacle. In all of the authorities set out above it has been recognised that the time limits in employment tribunals are strict. At the time of *Dedman* an employee had just 28 days to bring a claim. Since then the time limits have gone up and down. Under the Employment Act 2002 the time limit depended upon the completion of complex statutory procedures. Presently, the time limit may vary from 3 months to 5 and a half months depending on the timing and duration of the ACAS Early Conciliation procedures. The calculation of the date of termination from when the time limit starts can be fraught with difficulty. Yet it is clear that the imposition of relatively short time limits is a decision of Parliament and strikes a calculated political balance between the rights of workers and employers. The fact that the mere existence of those time limits provides an obstacle for employees is plainly not, by itself, a material factor in the assessment of reasonable practicability. Equally, the requirements of the ACAS Early Conciliation Scheme place another obstacle in the path of an employee wishing to bring a claim. A simple failure to accurately transpose all of the digits of a conciliation number can be fatal to a claim². Again, the existence of such a scheme per-se could not be a material factor excusing compliance with the time limit. Currently there are procedural requirements as to the form and content of the ET1 that can trip the unwary. Again, it those requirements by themselves would not meant that it was not reasonably practicable to bring a claim. It would be necessary to show something more than the mere existence of a difficulty imposed by statute.
51. Should the existence of the fee order be treated any differently to the other obstacles in the way of presenting a claim? In my opinion the existence of an unconstitutional, and therefore unlawful, impediment to justice cannot be equated with lawful procedural requirements no matter how irksome or difficult they may prove to be. I consider that the fact that an unlawful scheme was in place is a material circumstance that I ought to consider in weighing up the factual question of whether it was, or was not, reasonably

² Sterling v United Learning Trust [2015] UKEAT 0439

practicable to bring the claim in time. I am reinforced by that view by the words of Lord Justice May in *Palmer v Southend-On-Sea Borough Council* where he said:

“Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal taking all the circumstances of the given case into account.”

52. I do not consider that, just because the Claimant would, in all probability, have received fee remission, it cannot be said that the fee order provided an obstacle to her presenting her claim. It was yet another bureaucratic hurdle which she had to overcome and she failed to do so because of her subjective lack of knowledge and a mistake by the CAB. The more obstacles on the path to justice the more likely a litigant is to trip.
53. It is difficult to see why the present case should be distinguished from a person who took a decision that, because having to pay a fee, they would not bring a claim even though they could afford it. In the present case, the Claimant has not brought her claim because of a lack of knowledge of the remission scheme. In my example, the person deciding not to bring a claim has made a conscious election. Yet in each case the predominant cause is the landscape provided by the fee order.
54. I consider treating the existence of the fee order as a material factor is more realistic than examining hypothetical reasonable effect of the fee order in individual cases. If the latter approach is preferred, where a person made a late application in a “reasonable practicality” case, and argued that they could not afford the fee, it would be necessary to decide whether their means were really such that they were reasonably deterred from bring a claim. Such an examination might turn on when they last replaced their children’s cloths or took a holiday to decide whether they should have parted with the necessary fee. It may also be necessary to assess the strength of their claim and the prospect that any award would be enforced to decide whether their decision meets the Tribunal’s definition of reasonable. Such an approach neglects to recognize the source of the problem which was the fee order itself. In my view, it is sufficient so as to become a “material factor”, if the existence of the fee order was a material and substantial factor in the failure to present the claim on time.
55. My preferred approach does not open any floodgates. A millionaire who suggested that the existence of the fee order presented a real and substantial factor in his or her decision not to bring a claim could, in most circumstances, expect a short and robust response from the Tribunal. Equally a person who cannot show that the existence of the fee order played a in their failure would, if they later relied on the fees order alone to

excuse their failure, also fail under the test that I have applied in the present case. Additionally, the width of the floodgates, even if they are opened slightly, is limited by the second limb to the question posed by Section 111(2).

56. In the present case, the fault of the CAB was superimposed on the unlawful fee regime. Both were material and substantial causes for the failure by the Claimant to present her claim in time. The question I must ask is that, given all of the material considerations, was it reasonably practicable to bring the claim on time? I find that it was not. The fact is that the Claimant tripped into the hole in the road, metaphorically dug by the fee order, whereas, with more care, she could have got around the obstacle. This does not mean that the hole in the road was not a material and significant factor contributing to her failure. In the circumstances, I conclude that it was not reasonably practicable for her to present her claim in time. The existence and actual effect of the fee order in her case was the greater and predominant cause of her failure or, in my preferred formulation, it was a material and substantial factor in her decision not to present a claim in time. That rendered it not reasonably practicable to do so.
57. Has the claim been presented in a reasonable period after the time limit expired? As set out above the original time limit for presenting this claim expired on 3 July 2017. The decision in Unison was handed down on 26 July 2017 and the Claimant learnt of that decision through a friend shortly afterwards. She then attended the CAB again and issued the present case. It is obvious that the ET1 was completed at speed because on its face it seeks to excuse a lack of particulars due to the urgency.
58. Is a period between 3 July 2017 and 15 August 2017 a “reasonable period”? I consider that until 26 July 2017 (or a few days later when the Claimant heard of the Unison decision) her original reasons for not bringing her claim were still operative. I consider it unsurprising that the Claimant, who does not hold herself out as sophisticated, would seek the advice of the CAB before issuing a claim. In the usual course of events that may take some days to organize.
59. In all, the Claimant has waited for 20 days post Unison. Whilst I consider that to be getting towards the end of the spectrum of “a reasonable period thereafter”. However, I consider that, given the Claimant’s subjective characteristics, principally her need for assistance, it is a reasonable period. A more sophisticated litigant may have been expected to act with greater alacrity.
60. I therefore conclude that the claim has been presented within the time limit imposed by Section 111(2) of the **Employment Rights Act 1996** and the Tribunal has jurisdiction to entertain it.

61. Mr Frame attempted to persuade me that the claim should be struck out as having no reasonable prospects of success. The issue identified in the very sketchy pleadings is whether the Claimant had been selected for redundancy unfairly and in particular whether she should have been chosen for redundancy before another employee from another branch. I consider that it is quite impossible to determine such an issue without full consideration of the evidence. I therefore declined to strike out the claim on that basis. That said the Claimant should take such advice as she can find about the substantive merits of the Response. It would be unfortunate if her claim was based on a misunderstanding.

62. I will produce a separate case management order to progress the matter to a final hearing.

Employment Judge John Crosfill

Date 26 November 2017