EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104406/16

Held in Edinburgh on 27 February 2017

Employment Judge: Ian McPherson

Mr Paul Martin Graham	**Claimant** **In Person**
Sky In Home Services Ltd	**Respondents** **Represented by:** **Ms Catriona Aldridge - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claim lodged by the claimant was not presented timeously and, accordingly, this Tribunal does not have jurisdiction to determine the claimant`s complaint of unfair dismissal against the respondents, which claim is dismissed as time-barred.

REASONS

Introduction

1. This case called before me on Monday, 27 February 2017, for a Preliminary Hearing on time-bar previously assigned by Notice of Preliminary Hearing (Preliminary Issue) issued by the Tribunal to parties on 21 December 2016. It identified the specific preliminary issue to be considered as time-bar, and assigned the claim to be heard by an Employment Judge sitting alone

commencing at 10.00am, and allocating 3 hours for this Preliminary Hearing. In the event, the Preliminary Hearing lasted longer than the estimated half day.

Claim accepted Out of Time

2. The respondents provide installation and maintenance of satellite, telephony and broadband equipment for Sky TV subscribers. The claimant was formerly employed by the respondents as a Satellite Engineer from 13 July 1992 until his dismissal on 8 April 2016, for "***some other substantial reason***", due to the claimant having been found guilty of possession of a blade whilst in a public place in Glasgow and receiving a criminal record. In view of the claimant`s role, being one of a lone worker who required to attend customer`s properties, and given the nature of the conviction, the respondents were unable to continue to employ the claimant in his role, either as an Engineer or in any other role.

3. The claimant hand delivered an ET1 claim form to the Employment Tribunal on 19 August 2016, complaining of unfair dismissal, and stating that, in the event of success with his complaint, he sought to be reinstated to his old job, and to receive compensation from the respondents, which he valued to be in excess of £110,000, based on 4 year's annual salary, and loss of benefits, including employer's pension, medical insurance and private use of a company van

4. That ET1 claim form was rejected by the Employment Tribunal, on 19 August 2016, as no Tribunal fee or valid remission application with supporting evidence was provided by the claimant. It was returned to the claimant, who represented it, by post, on 24 August 2016, following which, on 29 August 2016, the claim was accepted by the Tribunal, and a copy served on the respondents, although it was noted that the claim appeared to have been submitted outwith the period within which unfair dismissal claims should normally be brought.

5. The Tribunal, in accepting the claimant`s claim, albeit accepted out of time, wrote to him, by letter dated 29 August 2016, headed "***Time Limit for making a Claim***" advising him that because his claim of unfair dismissal appeared to have been presented outwith the period within which claims of that type should normally be brought, being 3 months from date of termination of employment, the Tribunal would need to be satisfied that it was "***not reasonably practicable***" to submit the claim within the relevant period, and that the claim was then submitted within a further reasonable period.

6. Accordingly, although his claim had been registered, the claimant was further advised that the Tribunal would have to decide, as a preliminary issue, whether the claim of unfair dismissal should be allowed to proceed, and once a response had been received, the file would be referred to an Employment Judge for initial consideration, and the Tribunal would write to him further after that had taken place.

7. In that letter of 29 August 2016, the claimant was further advised that, if he decided, having now become aware of the time limit, that he wished to withdraw his claim, he could do so by informing the Tribunal of this in writing as soon as possible. The claimant did not do so, in reply to that letter, or at all. At this Preliminary Hearing, the claimant advised me that he wished to progress his claim against the respondents to a Final Hearing for his complaint of unfair dismissal to be assessed by the Tribunal on its merits.

Response

8. Further, in addition to the Notice of Claim served on the respondents, by letter from the Tribunal likewise dated 29 August 2016, they too were sent a separate letter from the Tribunal entitled "***Claim Accepted Out of Time***". They were advised that the Tribunal had noted that the claim of unfair dismissal appeared to have been submitted outwith the period within which

claims of that type should normally be brought, and that the Tribunal would have to decide, as a preliminary issue, whether the claim should be allowed to proceed.

9. In order to be allowed to defend the claim of unfair dismissal, the respondents were further advised by the Tribunal that they must complete and return the ET3 response form by 26 September 2016. However, they were also advised that they might wish to submit a limited (sometimes known as a "***skeleton***") response at that stage dealing only with the issue of time-bar, and provide a fuller response dealing with the merits of the case at a later stage, if the decision of the Tribunal was that they could consider the claim.

10. In the event on 19 September 2015, the respondents, through Ms Tanushree Sehmbi, Legal Adviser, HR Legal, submitted an ET3 response form, on behalf of the respondents, defending the claim of unfair dismissal brought against them by the claimant, and setting forth their grounds of resistance in a 2 page paper apart, running to 10 separate paragraphs.

11. The respondents submitted that, due to time-bar, the Tribunal had no jurisdiction to hear the claim, as it was filed on 19 August 2016, more than one month after the ordinary limitation date of 7 July 2016, and that a Preliminary Hearing should be listed to determine that issue, but, should the Tribunal decide to allow the claim to proceed, they intended to submit a full response dealing with the merits of the claim at a later stage but, for now, they proposed to rely on their skeleton ET3 response, dealing with jurisdictional issues only.

Preliminary Hearing, and Reconsideration of Dismissal Judgment

12. On 29 September 2016, following initial consideration of the claim and response, the Tribunal directed that there should be a Preliminary Hearing on time-bar, and, by Notice of Preliminary Hearing, dated 29 September

2016, parties were advised that a 3 hour Preliminary Hearing had been arranged for Friday 21 October 2016, at 11.00am, within the Edinburgh Tribunal Office.

13. In the event, on that date, while Ms Aldridge, Solicitor appeared for the respondents, the claimant was neither present, nor represented. In those circumstances, the then presiding Judge, Employment Judge Emma Bell, by reason of the claimant`s failure to attend or be represented, dismissed his claim, in terms of **Rule 47 of the Employment Tribunal Rules of Procedure 2013**. Her written Judgment, with Reasons, dated 21 October 2016, was entered in the register and copied to parties on 21 October 2016.

14. On 1 November 2016, the Edinburgh Tribunal Office received the claimant`s request for reconsideration of that dismissal Judgment. Thereafter, on 10 November 2016, Mrs Sehmbi, the respondents` Legal Adviser – HR Legal, intimated to the Tribunal, and copied to the claimant, that the respondents opposed the claimant`s request for reconsideration of the Tribunal`s judgment to dismiss his claim.

15. Parties having no objection to the reconsideration taking place on paper, and without a Hearing, thereafter, on 29 November 2016, in chambers, Employment Judge Bell revoked her dismissal Judgment dated 21 October 2016, and reinstated the claim, ordering that a Preliminary Hearing be set down to determine the outstanding preliminary issue of time-bar. Her Decision, and Orders of the Tribunal dated 7 December 2016, were entered in the register and copied to parties on that date.

Preliminary Hearing before this Tribunal

16. When the case called before me for this Preliminary Hearing, on 27 February 2017, the claimant was in attendance, unrepresented, and acting as a party litigant. He had a friend, identified as a Mr Hagan, observing, but

he was there for moral support only, and not to give any evidence on the claimant`s behalf.

17. The claimant had no witnesses in attendance to give evidence to the Tribunal, and he advised me that the only evidence on his behalf would be coming from him in person. He tendered a small, A4 sized pink folder, with 5 documents, extending to five pages, which he intended to use as productions at this Preliminary Hearing. He also handed up a 4 page typewritten document, which he stated he wanted to read from, and I had the clerk take copies for myself, the casefile, and Ms Aldridge. I have incorporated its full terms in my findings in fact below, at paragraph 23 of these Reasons.

18. The respondents were represented by Ms Catriona Aldridge, Solicitor with CMS, Solicitors, Edinburgh, acting on behalf of the respondents, and instructed by Mrs Sehmbi, who was not in attendance. Ms Aldridge produced, on the respondents` behalf, a black, lever arch A4 ring binder, with a set of 13 documents, extending to some 43 pages in total, as per an index of documents.

19. Ms Aldridge had no witnesses in attendance to give evidence on behalf of the respondents, and she stated that she would intend to make submissions on their behalf in respect to the preliminary issue of time-bar, pled by them in their ET3 response, specifically at paragraphs 5 to 9 of their grounds of resistance. As the claimant's 5 documents were included in the respondents' bundle, I directed that I would use the respondents' bundle page references.

20. As the claimant was an unrepresented, party litigant, I explained to him the purpose of the Preliminary Hearing, which was restricted to the preliminary issue of time-bar, and accordingly that the Preliminary Hearing would <u>not</u> be considering the merits of his complaint of unfair dismissal by the respondents, which complaint would be considered, at a later stage, <u>only</u> if

the Tribunal allowed the claim to proceed, although presented outwith the relevant statutory period.

21. For the assistance of the claimant, as an unrepresented party litigant, I highlighted to him that, in terms of the Tribunal`s overriding objective, under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, as the respondents were represented by a solicitor, and he was representing himself, one of the factors which I required to take into account, in ensuring that the case is dealt with fairly and justly, was to ensure that parties are on an equal footing.

22. Thereafter, by agreement with the claimant, and Ms Aldridge for the respondents, I took the claimant`s evidence in chief, by way of sworn evidence from him, through me asking him a series of structured and focused questions, and giving him the opportunity, at the end of my questioning, to add anything else he felt might be relevant to his time-bar argument, before he was cross-examined, in the usual way, by Ms Aldridge as the respondents` solicitor.

Findings in Fact

23. On the basis of the evidence heard by the Tribunal, from the claimant, and the information provided in the ET1 claim form, the ET3 response form, and the copy documents produced by both parties and lodged with the Tribunal at this Preliminary Hearing, I have found the following essential facts established or agreed:-

    (1) The claimant, aged 42 years at the date of the Tribunal Hearing, was previously employed by the respondents at a Satellite Engineer, and he worked from their premises at 2 Mackintosh Road, Livingston, Midlothian.

(2) His employment with the respondents, started on 13 July 1992, and ended on 8 April 2016, when he was dismissed by the respondents, following a disciplinary meeting conducted on 8 April 2016, by Colm Loftus, Team Manager, at which the claimant was accompanied by his uncle, Robert Pollock, a trade union official with the GMB, and employed by the Scottish Ambulance Service.

(3) A copy of the letter of dismissal dated 9 April 2016, issued by Mr Loftus to the claimant was produced to the Tribunal at pages 22 and 23 of the respondents` bundle of documents.

(4) In that letter of dismissal, Mr Loftus advised the claimant, as follows:-

> "***I confirm that you have been dismissed for some other substantial reason on the basis that due to your actions, the company is no longer able to allow you to carry out and continue in your role as a Specialist Engineer with Sky, nor can Sky continue to employ you in this or any other role given the nature of the offence and sentence***."

(5) The claimant`s dismissal by Mr Loftus was on the basis that he would receive payment up to 8 April 2016, together with 12 weeks pay in lieu of notice. He was advised of his right of appeal against Mr Loftus` decision, and that if he wished to appeal, he should write to Christine Croke, Regional Manager within 7 calendar days from his receipt of the letter, outlining his reasons for appealing.

(6) In accordance with his contractual right to appeal against the dismissal, the claimant exercised his right of appeal, and he intimated an internal appeal against dismissal. On 2 May 2016, as per copy letter produced to the Tribunal at pages 24 to 26 of the respondents` bundle, the claimant was invited by Mrs Croke to attend an appeal meeting on 5 May 2016 at the Hilton Garden Inn,

Glasgow, and her letter of invitation summarised the claimant`s grounds for his appeal, as previously intimated by the claimant to the respondents.

(7) The claimant attended that appeal hearing, on 5 May 2016, accompanied by his uncle, Robert Pollock, a GMB trade union official. Mrs Croke advised the claimant that she would endeavour to deliver the outcome of the appeal within 14 days. Thereafter, there was a delay in the outcome of the claimant`s appeal hearing being intimated to him by her.

(8) Copy correspondence from Christine Croke to the claimant, concerning further investigation, dated 19 May 2016, was produced to the Tribunal at page 27 of the respondents` bundle, as also email from the claimant to Christine Croke, on 11 June 2016, seeking information, as produced to the Tribunal at page 28 of the respondents` bundle.

(9) Further, by letter to the claimant dated 22 June 2016, Christine Croke again wrote to the claimant, as per copy letter produced to the Tribunal at page 29 of the respondents` bundle, regarding the delay to her investigations, and the claimant emailed her on 24 June 2016, having not heard from her, and not receiving her letter of 22 June 2016, until after despatch of his email to her of 24 June 2016, as per the copy email produced at page 30 of the respondents` bundle.

(10) Thereafter, by letter to the claimant dated 12 July 2016, a copy of which was produced to the Tribunal at pages 31 and 32 of the respondents` bundle, the claimant was invited by Mrs Croke to attend a reconvened appeal hearing to be held on 18 July 2016, again at the Hilton Garden Inn, Glasgow.

(11) The claimant's mother, Mrs Lynda Graham, e-mailed Christine Croke, on 14 July 2016, as per the copy produced to the Tribunal at page 33 of the respondents' bundle, saying that he was on holiday until 24 July 2016, and asking if the appeal could be changed to 25 July 2016, as his first available day after his return.

(12) Thereafter, by letter to the claimant dated 9 August 2016, a copy of which was produced to the Tribunal at page 34 of the respondents` bundle, the claimant was invited by Mrs Croke to attend the reconvened appeal hearing to be held on 11 August 2016, again at the Hilton Garden Inn, Glasgow.

(13) The claimant attended that reconvened appeal hearing, on Thursday, 11 August 2016, accompanied by his uncle, Robert Pollock, a GMB trade union official, as he had been similarly accompanied at the original appeal hearing held with Mrs Croke on 5 May 2016.

(14) At the conclusion of the reconvened appeal hearing on 11 August 2016, Mrs Croke advised the claimant that she had decided to uphold the decision made by Colm Loftus on 8 April 2016 to dismiss the claimant, as she believed that the process followed by Mr Loftus was a fair and reasonable process, and she was comfortable that the decision to dismiss the claimant was not preconceived, but she believed it to be a reasonable decision based on the claimant`s criminal conviction as had been reported to Sky.

(15) Mrs Croke handed to the claimant, at the conclusion of that reconvened appeal hearing, an outcome letter detailing her decision on the claimant`s appeal, and confirming that having exercised his right of appeal against the decision to dismiss him, her decision was final.

(16) A copy of her appeal outcome letter to the claimant, dated 11 August 2016, setting forth her decision and reasoning, was produced to the Tribunal at pages 36 to 43 of the respondents` bundle.

(17) Following termination of his employment by the respondents, effective 8 April 2016, the claimant was unemployed, and, as at the date of this Preliminary Hearing, he advised the Tribunal that he remained unemployed. He explained that, on account of illness on the part of his mother, Mrs Lynda Graham, he had now moved from his previous address, at the time of lodging his ET1 claim form, being Rigghead Cottage, Stewarton, to his mother`s address in Glasgow.

(18) In his evidence to the Tribunal, the claimant spoke to the terms of a typewritten 4 page statement, which the Tribunal received, and added to the case file, and the full terms of which are as follows:-

> "***Good morning your honour and thank you for allowing me this opportunity to present my case for the right to take my unfair dismissal case to a full Employment Tribunal.***
>
> ***I realise my application technically was late in its submission but I feel very strongly that I have a justified explanation and given that I worked for Sky for almost 24 years and that they have a monopoly in the satellite industry I have no prospects for alternative employment in this sector and have 2 children to maintain along with their place of residence and my own rental property.***
>
> ***The background to my case is as follows:-***

On the 17th December 2015 I informed my employers Manager Mr Danny Cain of a pending conviction as I wanted to be open and honest with them.

I was suspended on the 18th December 2015 pending a more detailed investigation to take place.

I had another meeting in Uddingston Call Centre on the 6th January 2016 and then again on the 10th February,

I heard nothing from Sky up until a letter of invitation to the Fenwick Hotel, Kilmarnock for the 8th of April 2016 that was chaired by Colm Loftus, Mr Loftus retired for 40 minutes before sacking me for a non conduct reason?

I am sure this was to dismiss the fact that they refused to supply myself with the employee conduct and grievance policy a fact accepted by Sky but explained it was not required as my dismissal was for a other reason? ie not conduct …

When I was dismissed I advised them I would be appealing as the decision was outrageous.

I appealed immediately and was given a date for the 5th of May 2016 chaired by Christine Croke at the Hilton Gardens Hotel, Glasgow the meeting wad adjourned and I was advised it may take 2 weeks before they come back with their decision.

I was sent another update on the 19th May (see letter, item 1) from Christine Croke stating she still had witnesses to interview and obtain a further statement fro, and that the

promise of a decision within 14 days from the 5th of May would not be met.

Around the start of June I spoke to Christine Croke regarding the delay and she advised the death of her Father and this would cause a further delay in my appeal date hearing, Mrs Croke stated as she was dealing with the case it was best if it I would allow more time as she was taking time off work. Given the circumstances I felt emotionally obliged to accept this delay although far from happy.

The next letter I received from Christine Croke was on the 22nd June 2016 to advise she was now back at work after the bereavement (see letter from Sky, Item 5) and that she would attempt to conclude the investigation and that she would be in touch soon to deliver her verdict on my appeal.

I heard nothing until a letter dated 12th of July inviting me to attend a meeting on the 18th, I asked for a postponement until the 25th as I was on holiday in Tenerife, I requested via an email (see letter dated 14th July, Item 4) Sky rescheduled for the 11th of August some 12 weeks after my appeal hearing.

Even allowing for the 1 week delay I requested this was still a delay of 11weeks from Sky.

The meeting on the 11th August confirmed my dismissal and I contacted the Tribunal and was given advice on procedures and time scales.

I was advised my application was late under current legislation and I felt shattered, I had contacted the Citizens Advice Bureau after my dismissal on the 8th of April and they stated I would have to exhaust my employers disciplinary procedure before applying to a Tribunal as it would not be looked upon favourably.

<u>To summarise</u> I feel strongly that Sky TV have deliberately set out to delay proceedings to ensure I would fall outwith the current timescales for application to a Tribunal.

I REFER you to items 2 and 3 within your info pack regarding no info or progress from Sky.

If Sky had not delayed my appear hearing by 11 weeks I would have made my application as early at 19th May i.e. 2 weeks after hearing.

The emotional request to delay due to the death of Christine Croke father was a request that no self respecting person could refuse and once again this allowed the time to expire a fact that they would be well aware of, I feel terrible but given all facts I am not even certain there was a death in the family.

I appeal to your Honour in the interest of natural justice to allow my case to be heard in the Tribunal given all facts detailed today.

I feel that a major organisation such as Sky TV who have hundreds of managers could or should have concluded my case in a reasonable time scale and within current guidelines set out by the ACAS Code of Conduct.

This horrendous delay coupled with the emotional request from Christine Croke is exceptional and I think justifies good reason to allow my case to be heard. "

(19) During the period from 8 April 2016 to 24 August 2016, when his ET1 claim form was presented to the Employment Tribunal, there was no physical impediment to the claimant presenting a complaint to the Employment Tribunal against the respondents, for he was broadly aware of his rights, and of the existence of the Employment Tribunal, and he had sought advice from the Glasgow Citizens Advice Bureau, shortly after his dismissal on 8 April 2016, which was to pursue his internal appeal with the respondents to a conclusion, albeit he stated to the Tribunal that he was not aware, at that early stage, that there was a 3 month time limit for raising an unfair dismissal complaint before the Employment Tribunal.

(20) In his evidence to the Tribunal, the claimant described his actings during the period from 8 April 2016 to 24 August 2016, as follows:-

(a) as the respondents had never provided him with any details of the procedures to be followed, he had looked at the ACAS Code of Practice on Disciplinary & Grievance Procedures, as referred to by his uncle, Robert Pollock, a GMB trade union official;

(b) he appealed internally to the respondents against his dismissal, and he attended appeal hearings on 5 May 2016, and 11 August 2016;

(c) he telephoned Glasgow CAB, shortly after his dismissal on 8 April 2016, and got some advice to pursue the respondents' internal process to an end, but he did not make arrangements

to set up a formal advice meeting with the CAB by arranging an appointment with them at their offices;

(d) he, like his uncle, knew generally of the existence of the Employment Tribunal, but not about time limits for making a claim against a former employer;

(e) he did not make any enquiries about his rights through an Employment Tribunal, as he understood that would start when the internal appeal concluded, and the Tribunal process then started;

(f) he did not take any legal advice until after his appeal was rejected, on 11 August 2016, when he contacted Alexander McBurney, solicitors, Glasgow, for legal advice about his position;

(g) he described himself to the Tribunal as "naïve obviously", but stated that he thought the time limit of 12 weeks only started after the internal process was completed;

(h) he was not working during this period, and he was helping his mother out, after she had had a stroke, hearty attack, and pacemaker fitted;

(i) he was staying at his mother's house in Glasgow more than his own house, and he was taking her to her work, as she could not drive;

(j) he did not look for a new job, as he stated he was hopeful of getting his old job back, and being reinstated on appeal;

(k) he had a one week holiday abroad, in Tenerife, in July 2016;

(l) his best friend, and 2 close family members, had died within 3 weeks of each other, at the end of May, and into June 2016;

(m) he could not afford to pay anybody for advice, and he just followed Sky's internal procedures to appeal against his dismissal; and

(n) other than his initial telephone enquiry with Glasgow CAB, he did not contact the CAB again for any further advice.

(21) Further, and as stated at Section 15 of his ET1 claim form, copy reproduced at page 12 of the respondents` bundle at this Preliminary Hearing, the claimant stated there that:-

> "***I contacted the Citizens Advice Glasgow and was advised I had to complete the company appeal process b4 lodging any complaint as I may still get my job back…***
>
> ***I then contacted ACAS …. I was told 3 months had expired from my P45 ? ? I have been misled and feel strongly used by Sky who allowed 7 months to elapse from the initial hearing and 3 months from appeal in a deliberate attempt to avoid a proper hearing given the strength of my case.***
> ***I appeal for a case of natural justice given all circumstances. A blue chip company should not be allowed to avoid justice by default and delaying tactics***."

(22) On Thursday, 11 August 2016, following the reconvened appeal hearing with Mrs Croke, the claimant sought legal advice from Alexander McBurney, Solicitors, Glasgow, following which he then

contacted the Employment Tribunal, seeking an ET1 claim form to complete, and thereafter he contacted ACAS.

(23) According to the claimant's evidence, the telephone advice he received from his employment lawyer at Alexander McBurney was that the time for lodging his claim was by, it was now too late, and it would be hard to proceed with it, and his best bet would be to try and do it by himself.

(24) The claimant spoke of being "***pretty shocked***", and that the legal advice came as a "***complete surprise***", to learn that the time limit of 3 months had passed, and he added that he felt Sky had played him, as well as his uncle, by delaying the appeal outcome.

(25) He further stated that this was the first time he had taken any legal advice about his rights as, as far as he was aware from previous telephone advice from Glasgow CAB, he had to follow the respondents' internal process to an end.

(26) Further, the claimant advised the Tribunal that he, by email from his mother`s office, sent Early Conciliation notification to ACAS on 11 August 2016, and, thereafter, on 17 August 2016, ACAS issued the Early Conciliation Certificate to the claimant, at his mother`s email address, by email, confirming that the claimant had complied with the requirements of Section 18A of the Employment Tribunals Act 1996 to contact ACAS before instituting proceedings in the Employment Tribunal.

(27) A copy of that ACAS Early Conciliation Certificate, reference number R170694/16/49, was produced to the Tribunal at page 21 of the respondents` bundle.

(28) Thereafter, having telephoned the helpdesk at the Employment Tribunal, and having requested an ET1 claim form, to complete, when that arrived, by post, the claimant duly completed the ET1 claim form, in his own handwriting, and he hand delivered it to the Glasgow Employment Tribunal, on 19 August 2016, as vouched by the Glasgow Employment Tribunal date stamp shown on the copy ET1, produced at page 1 of the respondents` bundle before the Tribunal.

(29) At section 2.3 of that ET1 claim form, as the ACAS certificate number was not fully completed, he added the last three digits ***"/49"*** in black ink to his form which was otherwise completed by him in blue ink.

(30) Thereafter, that ET1 claim form was rejected by the Employment Tribunal, on 19 August 2016, and returned to the claimant for completion, as no Tribunal fee or valid remission application with supporting evidence was provided.

(31) The claimant posted it back to the Employment Tribunal, and it was received at the Glasgow Employment Tribunal on 24 August 2016, as vouched by the Glasgow Employment Tribunal date stamp shown on the copy ET1, produced at page 1 of the respondents` bundle before the Tribunal.

(32) Thereafter, full remission of the £250 Tribunal fee being granted to the claimant, his claim against the respondents was then accepted by the Tribunal, and copy of that ET1 claim form was served on the respondents.

Tribunal`s Assessment of the Evidence

24. The claimant`s evidence to the Tribunal formed the only live evidence heard at this Preliminary Hearing. His narration of what he had done, in the period

between 8 April 2016, when he was dismissed by the respondents, and 24 August 2016, when his ET1 claim from was re-presented to the Employment Tribunal Office in Glasgow, by post, was elicited through his evidence in chief, arising from a series of structured and focused questions asked by me as presiding Employment Judge.

25. While, at least initially, his evidence appeared clear and coherent, as his evidence emerged, and particularly during cross-examination by Ms Aldridge, solicitor for the respondents, the whole tone of the claimant`s response, and his ability to recall matters, raised real issues about his evidence being confused, and confusing, and begged the question whether he was being not only defensive, but prevaricating, evasive and equivocal.

26. He raised, in his evidence in chief, and also in cross-examination, matters that had not been foreshadowed in his ET1 claim form, or in his written statement which he had handed up to the Tribunal at the start of proceedings, and in advance of him giving his sworn evidence to the Tribunal. His ET1 claim form stated that ACAS had advised him about the 3 month time limit, yet his oral evidence to me was that he was told that by the employment lawyer at Alexander McBurney. Indeed, in his cross-examination by Ms Aldridge, the claimant himself stated that, with so many things happening on 11 August 2016, ***"it was all a bit of a blur that day."***

27. The claimant was adamant, that notwithstanding he was generally aware of the existence of the Employment Tribunal, after he was dismissed by the respondents on 8 April 2016, he was unaware, until he took legal advice from Alexander McBurney, solicitor, on 11 August 2016, that there was a 3 month time limit for bringing Employment Tribunal complaints of unfair dismissal.

28. The whole basis of the claimant`s oral evidence to the Tribunal, and his written submission to the Tribunal, was that he had a right to take his unfair dismissal case to a full Employment Tribunal, as he regarded the

respondents decision to dismiss him as "***outrageous***", and he felt strongly that the respondents had deliberately set out to delay the internal proceedings to ensure that he would fall outwith the timescales for applying to the Tribunal. In particular, the claimant referred to "***this horrendous delay coupled with the emotional request from Christine Croke is exceptional and I think justifies good reason to allow my case to be heard***".

29. That said, in cross-examination by Ms Aldridge, the claimant stated that, after speaking to Mr McBurney, the lawyer, on 11 August 2016, he realised. At that stage, that the advice he had previously received from the CAB was "***not exactly correct"***, and that he was not pro-active enough between April and August 2016. While he accepted he could have made further enquiries about making a Tribunal claim during this period, into his next steps, if his appeal was rejected, he explained that he did not do so, as he did not know then that he needed to do that.

Closing Submissions

30. The claimant`s evidence having concluded, at around 12 noon, I invited Ms Aldridge, solicitor for the respondents, to address the Tribunal. She did so orally, rather than by use of any written skeleton submission, and, at least initially, without tendering to the Tribunal, or the claimant, any of the copy case law authorities that she was referring to, or relying upon, in the course of delivering her submissions to the Tribunal, in support of her submission that the claim was time-barred, and should be dismissed by the Tribunal.

31. In the course of her submissions, Ms Aldridge tabled, and provided to me, with a copy to the claimant, an index of 4 authorities for the respondents, together with relevant copy judgments, as follows:-

(1) ***Riley –v- Tesco Stores Ltd & Greater London Citizens Advice Bureaux Service Ltd [1980] IRLR 103 (CA);***

(2) ***Marks & Spencer Plc –v- Williams-Ryan*** ***[2005] EWCA Civ 470; [2005] IRLR 562 (CA);***

(3) ***Remploy Ltd –v- Brain*** ***[2011] UK/EAT/0465/10 (His Honour Judge Birtles, 2 March 2011);*** and

(4) ***Alliance & Leicester Plc –v- Kidd*** ***[2007] UK/EAT/0078/07 (Mr Recorder Luba QC, 13 April 2007)***

32. In the course of her oral submission, Ms Aldridge referred me to a number of other "***familiar***" authorities, which would be well known to an Employment Judge, but not to an unrepresented, party litigant. It was disappointing to have to note that, despite the usual protocol to be adopted when a professional agent appears against an unrepresented, party litigant, Ms Aldridge had not provided to the claimant a copy of these other "***familiar***" authorities. Her failure to do so required me, so as to ensure parties were on an equal footing, to provide that an adjournment opportunity was offered to the claimant.

33. That opportunity for an adjournment was accepted by the claimant, whereby he had the opportunity to read the 4 copy cases provided, hard copy, to me and him, by Ms Aldridge, and, following the luncheon adjournment, to also consider what, if anything, he wished to say to me, by way of reply, to the further hard copy authorities which she produced, at that stage, being (1) copy of the Court of Appeal`s judgment of 29 June 1999 as referred to by her in ***London Underground Ltd –v- Noel*** ***[1999] ICR 109 (CA)***; and (2) at my suggestion, copies of Lady Smith`s EAT judgment, of 15 October 2007, in ***Asda Stores Ltd –v- Mrs S Kauser*** ***[2007] UK/EAT/0165/07***; and the Court of Appeal`s judgment in ***Schultz –v- Esso Petroleum Co Ltd*** ***[1999] ICR 1202 (CA)***.

34. Finally, and also for the record, I note here that the following "***familiar***" authorities were referred to by Ms Aldridge, in the course of her oral submissions to the Tribunal, albeit no copy judgments were provided to me, nor more significantly, to the claimant, who stated that he was content to rely on my role as the Judge to facts and law, and to leave it to me to determine what is the relevant law on the matter of time limits, and their applicability to claims before the Tribunal.

35. Those further authorities cited by her were as follows:-

- ***Porter –v- Bandridge Ltd [1978] ICR 943 (CA);***
- ***Palmer –v- Southend-On-Sea Borough Council [1984] ICR 372 (CA);***
- ***London Underground Ltd –v- Noel [1999] ICR 109(CA).***
- ***Dedman –v- British Building & Engineering Appliances Ltd [1974] ICR 53 (CA);*** and
- ***Walls Meat Co Ltd –v- Khan [1979] ICR 52 (CA);***

Respondents` Closing Submissions

36. In opening her submission to the Tribunal, Ms Aldridge stated that the respondents sought to have the claim be dismissed for time-bar, as the claimant has failed to show that it was not reasonably practicable to submit his claim before the end of the 3 month period, with time starting to run from the effective date of termination of employment, on 8 April 2016, meaning, in terms of **Section 111(2)(a) of the Employment Rights Act 1996**, the 3 month period expired at midnight on 7 July 2016.

37. Further, Ms Aldridge stated that the Tribunal required to consider the impact of the claimant`s use of ACAS Early Conciliation, and she referred to the terms of **Section 207B of the Employment Rights Act 1996**, and how the claimant had notified ACAS on 11 August 2016, being "***Day A***", and he had received his ACAS Certificate, by email, on 17 August 2016, being "***Day B***". Taking account of **Section 207B(2)(a) and (3),** she submitted that the 6 day period from 12 to 17 August 2016 should be taken into account, and applying the "***stop the clock***" provisions, it was therefore appropriate to add 6 days on to 7 July 2016, and therefore extend the time limit to midnight on 13 July 2016.

38. She added that, in her view, **Section 207B(4)** was not applicable in this case, where the ordinary limitation date, of 7 July 2016, does not fall between Days A and B, i.e between 11 August 2016 and 17 September 2016, being one month after Day B. As 7 July 2016 is before "***Day A***", in terms of **Section 207B (4),** she submitted that the claimant`s ET1 claim form had to be submitted to the Tribunal before midnight on 13 July 2016 to be in time. At best, she accepted, it was submitted on 19 August 2016, but a fully complete ET1 was not submitted until 24 August 2016, over one month outside the normal time limit.

39. Recognising that the Tribunal must be satisfied that it was not reasonably practicable to submit the claim within the relevant period, and that the claim was then submitted within a further reasonable period, Ms Aldridge referred to the terms of the claimant`s ET1, and the reasons given there for his late claim, including his contact with the Glasgow Citizens Advice Bureau, and being advised to complete the respondents' internal appeal process first.

40. She stated that the claimant had been advised, on 11 August 2016, that his internal appeal had been dismissed, following which he contacted ACAS, that day, and he was advised that the 3 month time limit had expired since his P45 was issued. At this Preliminary Hearing, she stated that the

claimant had told the Tribunal that he had instructed a lawyer on 11 August 2016, and he had also contacted the Employment Tribunal on that date.

41. While, Ms Aldridge submitted, the claimant says that he relied on advice from the Citizens Advice Bureau from April 2016, when they told him he needed to complete the internal appeals process, and so he did not realise he needed to do anything else, his further action was only triggered by the appeal being rejected by the respondents on 11 August 2016.

42. In her submission, Ms Aldridge stated that that cannot be said to establish that it was not reasonably practicable for the claimant to have submitted the claim within the relevant period, and she stated, under reference to ***Porter –v- Bandridge Ltd,*** that the onus of proving it was not reasonably practicable rests with the claimant, and the claimant must show precisely why it was not reasonably practicable to do so, and he had not done so at this Tribunal.

43. Further, she referred to ***Palmers & Saunders –v- Southend-On-Sea Borough Council***, and to how there are a number of factors to be considered, and while the answer to the question will depend on the circumstances of the individual case, the claimant has to point to some impediment, or hindrance, and the respondents submit that the claimant`s explanation to this Tribunal does not go far enough.

44 Ms Aldridge then referred to the Court of Appeal's judgment in ***London Underground –v- Noel***, and its narration of the power to disapply the statutory time limit being very restricted, and that the "***not reasonably practicable***" test is a strict, statutory test, and the circumstances to be relied upon by the claimant need to be "***exceptional".***

45. It was at this point, during her oral submissions, that I raised with Ms Aldridge that the claimant, as an unrepresented party litigant, could not be expected to be familiar with some of the case law authorities that she was

referring me to, and when I asked if she had copies of the authorities she had been citing to provide to me, and more specifically, to the claimant, in order that he might be in a position to meaningfully reply to her submissions, she apologised that she had only brought some of the "***non-familiar***" case law authorities on which she intended to rely.

46. I stated that, once her submissions had concluded, and before hearing from the claimant, I would require to revisit this matter, and whether the claimant had had sufficient fair notice and would be in a position to reply to the Tribunal there and then, or whether he would require some time and an opportunity to consider whether he wished to make any reply to her legal submissions.

47. Continuing with her oral submissions, Ms Aldridge then stated that the Tribunal required to take into account the claimant`s ongoing internal appeal against dismissal, and she reminded the Tribunal that the existence of an internal appeal does not, of itself, establish that it was not reasonably practicable for a claimant to present their ET1 claim form to an Employment Tribunal.

48. She referred again, to the Court of Appeal`s judgment in ***Palmer & Saunders,*** and stated that it was at the claimant`s risk to await the outcome of his internal appeal when there was no physical, or legal, barrier stopping him from lodging his ET1 claim form on time. While the claimant had submitted, in his evidence at this Preliminary Hearing, that the respondents had deliberately allowed time to elapse, and while had been vehement and robust in that assertion, she stated that he had produced no evidence whatsoever to support that assertion and for him to suggest, as he had done, at this Preliminary Hearing, that Christine Croke had made up a bereavement to delay the whole procedure, Ms Aldridge submitted that that shows that the claimant is prepared to make extreme accusations with no other evidence in support of his position.

49. Further, contrary to what the claimant alleges about the respondents' deliberate attempts to avoid Employment Tribunal proceedings, the bundle lodged with the Tribunal includes an amount of documents updating the claimant in connection with his appeal process, and, further, she submitted, that the claimant was engaged in that appeal process in that he had twice enquired to check on progress, and that the reasons for the appeal decision maker's delay were valid reasons, and there was no suggestion of any deliberate attempt by the respondents to delay the outcome being intimated to the claimant.

50. Turning then to the matter of the advice received by the claimant from the Citizens Advice Bureau, Ms Aldridge stated that, from the claimant`s evidence at this Preliminary Hearing, in essence, the claimant was saying that he was not aware of time limits until 11 August 2016, when he obtained legal advice, and he relied on the advice from the Citizens Advice Bureau to follow internal appeal, which he had done to its conclusion on 11 August 2016, and only then, had he looked into what to do next.

51. Commenting that it seemed to her the claimant was seeking to lay the blame for the delay at the door of the Citizens Advice Bureau, she referred to the well known judgment of Lord Denning in ***Dedman –v- British Engineering***, and that if a man engages skilled advisors, then if those advisors are at fault, the man must take the consequences.

52. Further, added Ms Aldridge the Tribunal should have regard to the Court of Appeal`s judgment in ***Riley –v- Tesco Stores Ltd & Greater London Citizens Advice Bureaux***, particularly the judgment of Lord Justice Stephenson, at paragraph 16, that what matters is that the employee cannot of necessity prove reasonable impracticability by saying I took advice, and a third party, skilled or unskilled, only comes to be considered a possible excuse for the employee`s delay if he gives advice or is authorised to act in time and fails to act or advise acting in time.

53. In addition, Ms Aldridge also referred me to paragraph 22 of His Honour Judge Birtles` EAT judgment in ***Remploy Ltd –v- Brain***, and that it is always essential to go back to the words of **Section 111 of the Employment Rights Act 1996** itself, and there is no requirement to distinguish between the cases of skilled, and unskilled advisors, or where the claimant acts for himself, but gets one-off advice from somebody.

54. Further, Ms Aldridge then referred me to the Court of Appeal's judgment in ***Marks & Spencer Plc –v- Williams-Ryan***, and, unlike that case, this was not a case where an employee had been misled by their employer, but this was a case where the claimant had had support from his uncle, who was a GMB trade union official, and she highlighted how trade union representatives also count as advisors for the purposes of the ***Dedman*** approach.

55. Even if Mr Pollock was only the claimant`s companion, rather than his representative at the various meetings with the respondents, and he was not the claimant`s official representative, Ms Aldridge submitted that the fact was that he was a GMB trade union representative meant he was a person who the claimant could have asked about time limits, and running Employment Tribunal proceedings, but the claimant`s evidence is that he did not make any such enquiries of his uncle.

56. In these circumstances, Ms Aldridge submitted, it would have been reasonably practicable for the claimant to have asked his uncle, and the claimant did not have reasonable ignorance of the time limits, because of this factor. She referred, in this regard, to the Court of Appeal`s judgment in ***Walls Meat Co Ltd –v- Khan***.

57. In seeking to summarise the respondents` position, Ms Aldridge stated that the respondents' primary point, per ***Riley –v- Tesco Stores Ltd***, is that it is not enough from the claimant to say that he had taken advice from the Citizens Advice Bureau, and it was not reasonably practicable to lodge his

Tribunal claim as a result. If, however, the Tribunal were to find that the claimant took misleading advice from the Citizens Advice Bureau, then the respondents submit that the ***Dedman*** approach applies, and if the claimant`s case is considered to be similar to that of the employee in ***Williams-Ryan***, the respondents submit it is necessary for the Tribunal to look beyond the Citizens Advice Bureau, and decide whether it was reasonably practicable for the claimant to submit his claim in time, and consider whether the claimant was ignorant of time limits and, if so, whether that ignorance was reasonable.

58. From the evidence led at this Preliminary Hearing, Ms Aldridge submitted that it appears the claimant was ignorant of time limits, but the respondents say that ignorance was not reasonable, and there was nothing to stop him asking the Citizens Advice Bureau, in or around 8 April 2016, when he was dismissed, and while he failed to make an appointment with the Citizens Advice Bureau, to discuss his case, at a meeting, rather than by telephone, he could have spoken to his uncle, but he did not do that.

59. Further, while the claimant had referred to the ACAS Code, the claimant could, she submitted, have checked about that in or around 8 April 2016, and got a further enquiry of ACAS at that period. On 11 August 2016, when he contacted a lawyer, there was no evidence that he had made any enquiry about legal advice prior to that date, and when he contacted the Employment Tribunal Office on 11 August 2016, although he says that he had known of the existence of the Employment Tribunal in April 2016, and that he could bring a claim, he did nothing as a follow up on that until 11 August 2016, when he was advised that his internal appeal had been rejected, and he also contacted ACAS on that same day, 11 August 2016.

60. Continuing with her submissions, on behalf of the respondents, Ms Aldridge then stated that the claimant`s evidence to the Tribunal was that there was no physical impediment preventing him making such enquiries in the period April to August 2016, although the claimant had stated that he does not use

computers, yet he appears to have had access to email, through his mother`s work, and he did use email, through his mother, to contact the respondents, at Sky, during the internal appeal process, so, Ms Aldridge submitted, the claimant has taken some proactive steps in this case, but nothing beyond the initial enquiries, with the Citizens Advice Bureau in April 2016, before lodging his Tribunal claim.

61. For all these reasons, Ms Aldridge submitted that the respondents state that it was reasonably practicable for the claimant to have lodged his Tribunal claim on time, and that the factors relied upon by the claimant are not sufficient to get him past the time limit point taken by the respondents here, as it was reasonably feasible for him to have submitted his claim by 13 July 2016.

62. If, however, the Tribunal agrees that it was not reasonably practicable for him to have done so on time, then Ms Aldridge submitted that the Tribunal must consider whether the presentation was within such further period as may be considered reasonable by the Tribunal, and that required the Tribunal to look at the 49 day period of lateness, between 13 July 2016, and 24 August 2016.

63. In her submission, if the claimant was only on notice of a time limit from 11 August 2016, the claimant still had a further 13 days delay before he submitted his claim form, allowing for the fact that he did try to do so on 19 August 2016. The delay in submitting his claim to the Tribunal was, she submitted, unreasonable, and as such the claimant has not discharged the burden of showing that 24 August 2016 is a further reasonable period.

64. As the ET1 claim form had been submitted outwith the usual 3 month time limit, and the claimant had not shown that it was not reasonably practicable to have submitted it in time, she submitted that the Tribunal should dismiss the claim, and if the Tribunal felt that it was not reasonably practicable, then

it was not submitted within a further reasonable time, and accordingly the claim should still be dismissed.

65. Ms Aldridge's oral submissions having concluded, I asked her whether she was intending to say anything about the EAT judgment in ***Alliance & Leicester –v- Kidd***, included in the bundle of authorities handed up to the Tribunal.

66. She stated that that was a case where the claimant had been represented by a trade union official, and she had included it in her index of authorities for the respondents as she understood that the claimant had been represented at the internal meetings by his uncle, Robert Pollock.

67. However, she then stated, as the claimant`s evidence at this Tribunal was that his uncle was his companion, rather than his representative, she had not felt it appropriate to refer to this EAT judgment, but she still invited the Tribunal to take on board the fact that the claimant was accompanied by an uncle who was a trade union representative, and that factor should be taken into account in the round in considering the claimant`s claim for his case to proceed to a Final Hearing, even if presented outwith the normal time limit.

Claimant`s Closing Submission

68. Having heard Ms Aldridge`s submissions for the respondents, I then called upon the claimant to make whatever closing submission he felt appropriate, recognising that as an unrepresented, party litigant, and not a qualified solicitor, such as Ms Aldridge, acting for the respondents, I appreciated he might not necessarily be familiar with the relevant statutory provisions, or case law authorities, referred to by Ms Aldridge, in her submissions to the Tribunal.

69. In reply, the claimant stated that he was happy for me, as the presiding Employment Judge, to look at the relevant law, and he sought to make only

a few comments by way of reply to Ms Aldridge`s oral submissions to the Tribunal. Firstly, he stated that the Citizens Advice Bureau had not given him any information about time limits, notwithstanding what Ms Aldridge had stated in her own submissions to the Tribunal, and that he only got that information about time limits after his appeal had been rejected on 11 August 2016, when he had received advice from his lawyer, Mr McBurney.

70. Secondly, as regards the advice given by his uncle, Robert Pollock, the claimant stated that Mr Pollock is a trade union official with GMB, but working with the Scottish Ambulance Service, and that while Mr Pollock`s employers were known to use procedures which were reasonable in time, and to do things quickly, that contrasted with the respondents' procedures in this case, where things were done later than anticipated. While the claimant accepted that a trade union official is a good person to ask about your rights if you are a worker, the claimant stated that his uncle was not a specialised employment lawyer, nor an expert.

71. Thirdly, on the matter of the time limit, the claimant stated that he was told that the respondents were going to answer his internal appeal within two weeks of the original appeal hearing, but the outcome was not given until 11 August 2016, and, in his view, that was not a reasonable time for them to reach judgment on his appeal some 12 to 13 weeks later than the original appeal hearing.

72. Fourthly, as regards the ET1 claim form submitted by him, the claimant stated that he never knew that it was required until after 11 August 2016, when his appeal was rejected, and he took it into the Glasgow Employment Tribunal Office on 19 August 2016, but he had had to wait for it being posted out to him, and following his receipt, and him filling it in, in his own handwriting, he delivered it directly to the Tribunal Office. He added that nobody had ever told him that it was possible to submit an ET1 claim form online, and he had just got sent the ET1 claim form pack by the Tribunal, without being advised of an online facility.

73. The claimant`s submissions having concluded, and it then being around 12.45pm, I adjourned for 20 minutes, to allow him to consider the bundle of authorities produced by Ms Aldridge. When proceedings resumed, at around 1.10pm, the claimant stated that if the respondents had reasonably dealt with the appeal process quicker, then he would have had his claim form in on time to the Tribunal, and so within the 3 months allowed. He added that he had nothing further to say about the case law authorities provided by Ms Aldridge, and that he was happy to leave consideration of the relevant law up to me as the presiding Employment Judge.

Clarification of the Respondents' Submissions

74. That being so, I clarified some matters with Ms Aldridge, about the appropriate citation for ***London Underground –v- Noel***, and also as regards the ***Days A and B*** referred to by her, which she clarified as Day A being 11 August 2016, and Day B being 17 August 2016, stating that under the "***stop the clock***" provisions, it was appropriate to add 6 days to the ordinary limitation period, so that 7 July 2016, plus 6 days, produced 13 July 2016. Further, she clarified that she had no case law authorities to cite to the Tribunal about the "***stop the clock***" provisions, and how they applied in a case such as the present case.

75. Finally, I referred her to Lady Smith`s judgment from the EAT in ***Asda Stores Limited –v- Kauser***, and while I did not have a copy of that judgment to hand, nor its full citation, I recalled that it also dealt with another fairly well known authority, being ***Schultz –v- Esso Petroleum Ltd***. I asked her to consider both those authorities, over the lunchtime adjournment, from 1.20pm, until the Hearing was to resume at 2.15pm.

76. When proceedings resumed after that lunchtime adjournment, Ms Aldridge provided to me, with copy to the claimant, copy of the Court of Appeal`s judgment in ***London Underground –v- Noel***, the EAT judgment in ***Asda***

Stores Limited –v- Kauser, as also a copy of the Court of Appeal`s judgment in ***Schultz –v- Esso Petroleum Ltd***.

Further Submissions for the Respondents

77. When proceedings resumed after the lunch adjournment, Ms Aldridge, having provided the further 3 copy case law authorities, stated that the circumstances in the ***Kauser*** case are very similar to the current case, although the delay there was due to a Police investigation, rather than the internal appeal by the claimant in this case. Nonetheless, she stated that Lady Smith in ***Kauser*** had found that there was no impediment to the claimant in that case presenting her claim within the time limit, and similar to here, the claimant there had taken a number of steps to make some enquiries, and proceeded on the basis of assumptions.

78. Further, added Ms Aldridge, the claimant in that case had been relying on stress, but Lady Smith had found that to be insufficient, and the claimant in the current case had said he had suffered bereavements in May and June 2016, and while unfortunate, she submitted that that was not sufficient to prevent the claimant from having lodged his claim within the normal time limit, as he had until 7 July 2016 to lodge his ET1 claim form, and so there were still some weeks still left after those unfortunate events.

79. Ms Aldridge further stated that the claimant here had known about Employment Tribunals, since his dismissal in April 2016, but he stated that he did not know about time limits, whereas Ms Aldridge submitted that the fact the claimant knew about the Employment Tribunal was enough to put him on notice to make further enquiries, and yet he failed to do so.

80. Looking at paragraph 25 of Lady Smith`s judgment in ***Kauser,*** referring to Lord Justice Potter`s judgment in ***Schultz***, Ms Aldridge stated that in assessing whether or not something could or should have been done within

the limitation period, while looking at the period as a whole, attention will in the ordinary way focus upon the closing rather than the early stages.

81. She submitted it was appropriate to look at the whole period from April to August 2016, and that the claimant`s appeal had been ongoing in the period up to 7 July 2016. In her submission, there was no evidence led by the claimant that prevented him lodging his claim even if in April 2016 he had hoped his appeal would have run quicker than it did, and, in the meantime, while he suffered some family bereavements, there was nothing particular which hindered him around 7 July 2016 to make his claim then, and in time.

82. In clarification of the respondents' position, Ms Aldridge then referred to the statutory provisions which she was relying upon, and submitted that the claimant was out of time under **Section 111(2) (a) of the Employment Rights Act 1996,** and that the ACAS Early Conciliation Certificate was issued even although the claimant contacted them only on 11 August 2016, as he needed to get that Certificate to raise his Tribunal claim. Even if the Tribunal understood **Section 207(3) (b)** applies, which the respondents say it does, the effect is to extend the time limit to 13 July 2016, and it makes no difference in this case anyway.

Claimant's further Reply

83. Having heard from Ms Aldridge, by way of further submissions, I then invited the claimant to advise me whether he had anything further to say, in final reply, to which enquiry he advised that he referred me to his letter of 12 July 2016 as produced at page 31 of the respondents' bundle, when he was told that there was to be a reconvened appeal hearing, and he felt that it was coincidental that the appeal outcome was issued to him just after the time-bar period was over, but that otherwise he had nothing further to say to me about the case law authorities additionally cited by Ms Aldridge, and he simply sought a green light from me to take his case forward to a Final Hearing for judgment on its merits.

Reserved Judgment

84. Having heard the evidence led before the Tribunal, and closing submissions from both parties, I indicated to both the claimant and Ms Aldridge that I would reserve my judgment, which would be issued later, in writing, and with reasons, hopefully within the following 3 to 4 weeks.

85. I have now carefully considered the whole evidence led, documents produced in the bundles lodged with the Tribunal, as well as the closing submissions made at the Preliminary Hearing held on 27 February 2017, and come to my final determination.

Relevant Law

86. The claimant's claim of unfair dismissal against the respondents constitutes a complaint to the Employment Tribunal under **Section 111 of the Employment Rights Act 1996** alleging that he has been unfairly dismissed by his former employer contrary to his right, under **Section 94**, not to be unfairly dismissed by his employer.

87. In terms of **Section 111 of the Employment Rights Act 1996,** an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, agreed as being **8 April 2016** in the present case.

88. Where an Employment Tribunal is satisfied that it was "***not reasonably practicable"*** for a complaint to be presented before the end of the relevant period of three months, **Section 111(2) (b)** provides that the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

89. Further, **Section 111(2) (A)** provides that **Section 207B** (extension of time limits to facilitate conciliation before institution of proceedings) applies. **Section 207B** inserted with effect from 6 April 2014, by the **Enterprise and Regulatory Reform Act 2013,** provides as follows:-

"207B Extension of time limits to facilitate conciliation before institution of proceedings.

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of Section 207A.

(2) In this section -

Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of Section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

Discussion and Deliberation

90. Early conciliation through ACAS has an important implication for the time limit for making a claim to an Employment Tribunal, as it "***stops the clock***" so that time is suspended while parties are in the early conciliation process. The early conciliation period starts on the day after a claimant contacts ACAS ("***Day A"***), and ends on the date they receive their Early Conciliation Certificate ("***Day B***"). Here, the claimant notified ACAS on 11 August 2016, and so "***Day A"*** is 12 August 2016

91. Early conciliation can be as short as one day, if a claimant does not wish to take part in early conciation, or it can last up to one month starting on the date on which a claimant notifies ACAS of their potential claim, and this one-month period can be extended by up to 14 days if, towards the end of the month, ACAS thinks that there is a reasonable prospect of settling the case within those extra 14 days.

92. While parties are taking part in early conciliation, this extends the time a claimant has to make their claim, but if negotiations fail, the clock starts running again from the date the claimant is deemed to have received their Early Conciliation Certificate ("***Day B***"). Time is added to the original time limit for making a claim to make up for the pause during the early conciliation period.

93. However, a claimant will not know the exact new time limit until early conciliation has ended and they have received their Early Conciliation Certificate from ACAS. Here, the claimant's Early Conciliation Certificate was sent by e-mail on **17 August 2016**, and so he is treated as having received it on the same day as it was sent ("***Day B***").

94. Even if a claimant is making a claim out of time, they will still need their Early Conciliation Certificate to complete the ET1 claim form. Provided a claimant contacts ACAS before the original time limit expires, they will sometimes have more, but they will never have less, than one month from the date they receive their Early Conciliation Certificate to present their ET1 claim form to the Employment Tribunal.

95. In the present case, however, the original time limit for the claim expired before the claimant contacted ACAS to start the early conciliation process. This is not therefore a situation where the original time limit fell between Day A and one month after Day B, where the new time limit is one month after Day B, nor is it a situation where the original time limit fell more than one month after Day B, where time would then be extended by a period equivalent to the early conciliation period.

96. In **Porter –v- Bandridge Limited [1978] ICR 943**, the Court of Appeal held that the onus of proving that presentation of a Tribunal claim in time was not reasonably practicable rests on the claimant, and imposes a duty on him to show precisely why it was that he did not present his claim within three months. He also needs to demonstrate that his claim was presented within a reasonable time after the expiry of the statutory time limit.

97. The following specific issues arise for determination in this case:-

(a) Was the claimant's complaint presented before the end of the period of three months beginning with the effective date of termination?

(b) If not, was presentation in time not reasonably practicable?

(c) If so, was the complaint presented within such further time as the Tribunal considers reasonable?

98. These three issues will now be considered in turn in the following sections of these Reasons.

Was the claimant's complaint presented before the end of the period of three months beginning with the effective date of termination?

99. The effective date of termination of the claimant's contract of employment with the respondents was **8 April 2016**. That is a matter of agreement between the parties. To comply with **Section 111(2)(a) of the Employment Rights Act 1996** , the unfair dismissal complaint should have been presented by not later than **7 July 2016**, using the method of calculation approved by the Employment Appeal Tribunal in **Pruden v Cunard Ellerman Ltd** [**1993] IRLR 317** . The complaint was presented on **24 August 2016**, some **49 days** later. Accordingly, on the face of it, the complaint is out of time. It was accepted by both parties that the claim was presented out of time.

Was presentation in time not reasonably practicable?

100. This is a question of fact and the onus is on the claimant. The concept of what is reasonably practicable is broadly similar to ***"reasonably feasible***", being somewhere between "***reasonable***" and "***reasonably physically capable of being done"***, per **Palmer v Southend-on-Sea Borough Council** [**1984] ICR 372.** In this respect, the claimant will ordinarily have to

be able to point to some impediment or hindrance which made compliance with **Section 111(2)(a)** not reasonably practicable.

101. In **Palmer**, the Court of Appeal held that whether it was reasonably practicable for a complaint to be presented in time is pre-eminently an issue of fact for the Employment Tribunal, taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie.

102. Depending upon the circumstances of the particular case, an Employment Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a post strike or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee.

103. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the adviser's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases of the Employment Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit.

104. The Employment Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. However, the mere fact that an employee was pursuing an appeal

through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time.

105. In **Schultz v Esso Petroleum Co. Ltd [1999] ICR 1202**, the Court of Appeal held 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. The surrounding circumstances will always include whether or not the claimant was hoping to avoid litigation by pursuing alternative remedies, such as an internal appeal.

106. In that context, the end to be achieved is not so much the immediate issue of proceedings as issue of proceedings with some time to spare before the end of the limitation period. Accordingly, in assessing whether or not something could or should have been done within the limitation period, while looking at the period as a whole, attention will in the ordinary way focus upon the closing rather than the early stages.

107. In the present case, it was submitted, by the claimant on his own behalf, that it was not reasonably practicable for him to submit his Tribunal claim form within the prescribed period, for the following reasons: - (a) he had been advised by the CAB to pursue the employer's internal appeal procedure first; (b) some family bereavements, and attending to his mother, given her poor health; and (c) the respondents should not be allowed to avoid justice by default and delaying tactics. These were the factors on which the claimant relied in the narrative provided in his ET1 claim form, and/or in his evidence before me at this Preliminary Hearing.

108. By way of considered comment upon each of the claimant's stated reasons, I have to say that I have not found them to be compelling or convincing as to why it was not reasonably practicable for him to present his ET1 claim in time. They do not, in isolation, or combination, provide any adequate or

proper basis for the Tribunal to find that, in all the circumstances, it was not reasonably practicable for the claimant to present his Tribunal claim within the statutory 3 month period.

109. Throughout that whole period, from 8 April 2016 to 24 August 2016, it is clear from the evidence before the Tribunal that the claimant, as an unemployed person, and not employed in any new job, was able to consider his position, and write correspondence to the respondents stating that he was appealing against his dismissal, as well as enquiring about delay in the appeal outcome, while still able to conduct family life, including attending upon his mother who was in poor health. There was no evidence presented to the Tribunal of any physical or other impediment to him lodging his own ET1 claim form within the statutory period of 3 months, as he ultimately came to do when lodging it on 24 August 2016, well after expiry of the statutory time limit.

110. The claimant's actings throughout the process post his dismissal from employment with the respondents appears to the Tribunal to have been somewhat *laissez faire*, and evidencing an informal approach to the pursuit of what he clearly seems to have felt then, and still now, was an injustice perpetrated upon him by his former employers. By his failure to raise proceedings against the respondents timeously, the claimant has not shown himself to have properly and diligently attended to prosecution of his unfair dismissal complaint.

111. In my opinion, the claimant here is, very much, the author of his own misfortune, for throughout the statutory period to make a claim timeously, he was aware of the existence of the Employment Tribunal, albeit, he says, he was not aware of the three month period for lodging a claim, yet he took no steps to proactively protect his interests, or indeed even to enquire what steps he might have been able to take to do so at that stage.

112. His attempts in evidence to this Tribunal to suggest that it was not reasonably practicable to do so within the original time period were wholly disingenuous and unconvincing. He led no evidence before the Tribunal from the Glasgow CAB to confirm what advice he had sought, and when, and likewise, while his uncle, Robert Pollock, featured in the background as his companion at various meeting with the respondents, the claimant did not lead him as a witness either, to explain his role and, given his trade union official background, to clarify what advice he had been asked for and / or given to the claimant.

113. Given the very vague nature of the claimant's oral evidence about taking advice from the CAB, I have been unable to make any specific findings about who it was who gave him the advice, the status of that CAB adviser, and the circumstances in which that advice was given at whatever date it was sought.

114. In his evidence in chief, the claimant stated that if he had received his appeal outcome letter in a reasonable time, then he would have lodged his ET1 claim form in time, but he further stated that the Glasgow CAB had told him, on the telephone, as he needed an appointment to go and see them, and they were extremely busy he added, he needed to exhaust Sky's internal procedures, and that any Employment Judge would look on him unfavourably if he did not follow the internal process until the end.

115. The claimant could not recall the date of this telephone enquiry of Glasgow CAB, nor the name of the adviser there, but he was adamant that this is what he was told by the CAB. While, initially, he spoke of phoning the CAB, in the first couple of days after 8 April 2016, when he had been dismissed by the respondents, he later on stated it might well have been when he received the first appeal invite letter from Mrs Croke dated 2 May 2016. However, he later reverted to thinking it was shortly after his dismissal.

116. While his uncle, Robert Pollock, had accompanied him to the appeal hearings, the claimant stated that his uncle never advised him, but simply told him to follow the internal procedures of Sky, and that Sky should get back to him within a reasonable time. He did not recall discussing with his uncle what options he might have had, if his appeal against dismissal was rejected, but he did say that his uncle mentioned the ACAS Code of Practice to him before, and he had given him the ACAS Code and practical guidelines for a reasonable employer to follow, before the formal disciplinary meeting on 8 April 2016.

117. Given the claimant acknowledged that he involved his uncle, as he knew he was a GMB trade union official, albeit employed elsewhere, it did not ring true to me that the claimant would not have tapped his uncle as a valuable information resource about his legal rights after dismissal. Equally, as the claimant acknowledged that he and his uncle were aware of the existence of the Employment Tribunal, it did not ring true to me that they would not have made further enquires about how to bring a claim against the respondents.

118. In his evidence at this Preliminary Hearing, the claimant stated that he did not have access to a computer, although he had asked his mother to use her work computer, at Artma Ltd, Glasgow, to send e-mail enquiries to Christine Croke about the appeal. Lack of access to a computer is an explanation as to why a person might not make enquiry by that medium, but it is not an acceptable excused as to why a person, aware of the existence of the Tribunal, would not make any enquiry to see how they could, if needs be, seek to vindicate their legal rights by making a claim against their former employer at the Employment Tribunal.

119. It has repeatedly been held by the appellate courts that, when deciding whether it was reasonably practicable for an employee to make a claim to an Employment Tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the Tribunal and of the time

limit for making such a claim. Ignorance of either does not necessarily render it not reasonably practicable to bring a claim in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had the employee acted reasonably in all the circumstances.

120. One of the leading cases in this area is **Walls' Meat Co Limited -v- Khan [1979] ICR 52**. In this case it was emphasised that the question whether it is reasonably practicable for a complaint to be presented on time was essentially one of fact for the Employment Tribunal to determine. Lord Justice Brandon dealt with the matter as follows:-

> *"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. 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. Either state of mind will, further, not 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'.'*

121. In **Riley –v- Tesco Stores [1979] ICR 323**, it is provided that it may be easier to infer ignorance of one of the lesser known rights than of the right to complain of unfair dismissal, which can almost be regarded as within

common knowledge. This case relates specifically to a claim of unfair dismissal.

122. The relevant legal test is not whether a claimant knew of the right to bring Tribunal proceedings, or the applicable time limits, but whether they ought to have known of them. In this day and age, with various sources of advice readily available to former employees as to their employment protection rights, it is most unfortunate for the claimant that he appears not to have accessed and read that advice.

123. Had he done so, he would have been appropriately advised in clear and unequivocal terms, for relevant guidance is available from a variety of sources, including, as the claimant took advantage of in his own case, the Citizens' Advice Bureau. Advice is also available via solicitors, trade unions, the Employment Tribunal, and ACAS.

124. While the actual advice given to the claimant by Glasgow CAB is less than clear, as also the actual date of provision of such advice to him, on the basis of the claimant's vague evidence to the Tribunal, it does not seem likely, or possible, to the Tribunal, that any CAB would have misled, or incorrectly advised, the claimant as to the applicable time limit for bringing a claim.

125. It seems to the Tribunal far more likely that the claimant did not fully understand the implications of the advice which he was given. However, if he was not clear, he did not seek to clarify with direct contact with the Employment Tribunal office. Against this background, the claimant here is very much the author of his own misfortune.

126. As regards the family bereavements, and attending to his mother given her poor health, I have some doubt as to the veracity of his evidence, in the absence of any other independent verification of what he has stated to the Tribunal.

127. It was stated in **Asda Stores Limited –v- Kauser** that it was not enough for a claimant to ignore the statutory time limits on account of being "***stressed***" or even "***very stressed***" in order to demonstrate that it was not reasonably practicable to submit the claim within the requisite timescale. The EAT overturned the ET's decision to allow the late presentation of Mrs Kauser's claim in circumstances where she submitted that she was very stressed.

128. Lady Smith stated, at paragraph 24 of her judgment in **Kauser**: - ***"It cannot be sufficient for a Claimant to elide the statutory time limit that he or she points to having been "stressed" or even "very stressed". There would need to be more."***

129. In the present case, after his dismissal, the claimant was unemployed, and his points about family bereavements, and his mother's ill-health, were I felt, the last attempt of a desperate man to try and present an argument that he felt would be sympathetically received by the Tribunal. However, a suggestion alone is not enough, and if any party is to rely upon being stressed, as a reason for not doing something within a particular timeframe, then it is necessary to prove before the Employment Tribunal that there was something more.

130. In a case where a claimant wishes to rely on a medical condition as reason for their failure to submit the claim in time there is an expectation that medical evidence should be led, and fair notice given of the point to be relied upon in the ET1 claim form, or at least by further and better specification provided to the respondents, and the Tribunal, in advance of any time-bar Preliminary Hearing.

131. No medical evidence, or GP's report, for example, was produced to vouch the claimant's submission in that regard. More importantly, however, as I have already highlighted above, he was able to write to his former

employers, and engage in support to his mother and family during bereavements and her ill-health, as well as go on one week's holiday, so in my view he was clearly not subject to any physical or other impediment preventing him from presenting his ET1 claim to the Tribunal timeously.

132. In all the circumstances, I am not satisfied that it was not reasonably practicable for the claimant to present his Tribunal claim within the statutory 3 month period. The submissions made to the Tribunal by the respondents' solicitor, Ms Aldridge, are well founded in fact and in law, and I have had no difficulty in preferring her submissions to those made to me by the claimant.

133. I am not satisfied that it was not reasonably practicable for the claimant to have brought these aspects of his claim far earlier than he actually did. Time limits are jurisdictional rather than procedural. They cannot be waived by the parties or by the Tribunal.

134. As the Court of Appeal held, in **Porter v Bandridge Ltd [1978] ICR 943,** the onus of proving that presentation in time was not reasonably practicable rests on the claimant, and that imposes a duty on him to show precisely why it was that he did not present his complaint within the statutory time limit.

135. It is important to recall that the relevant statutory provisions found in **Section 111(2) of the Employment Rights Act 1996,** as quoted above, are a well tried and tested statutory formula applied within the Employment Tribunal system for many types of employment complaints, including complaints of unfair dismissal.

136. As was stated by the former President of the Employment Appeal Tribunal, Mr Justice Burton, in **Royal Mail –v- Smith (EAT/0078/04),** on 28 April 2005 (at paragraphs 6 to 9): ***"The test for an extension of time for the presentation of an unfair dismissal application, which is out of time, is not a straightforward one… An extension of time for a delayed application for unfair dismissal requires proof by the applicant that it***

was not reasonably practicable for him or her to present the application within the 3-month period."

137. I would also wish to refer to the judgment from Lady Smith handed down on 10 January 2007 in the unreported case of **The Royal Bank of Scotland plc v Theobald** (EAT/0444/06/RN). The facts and circumstances in that case, and the present, are different. What is relevant, however, for present purposes, is Lady Smith's comment (at paragraph 17 of that judgment) that:-

> "***The reasonable practicability requirement has to be given some meaningful content. It would appear to import an objective standard and it is certainly not to be seen as a synonym for the conferring of a wide unfettered discretion to allow a late claim".***

138. Against this background, the claimant here has not fulfilled the onus of proof on him to explain to this Tribunal why it was not reasonably practicable to present his unfair dismissal claim by 7 July 2016 at latest, being the expiry of the 3 month time limit. The inevitable outcome is that this claim must be dismissed as time-barred.

139. In all the circumstances, I am satisfied that his claim is out of time, and as such it cannot proceed any further. As stated above, at paragraph 99 of these Reasons, I have held that the claimant's ET1 claim form was presented **49 days** late, running from 7 July 2016 to 24 August 2016.

Was the complaint presented within such further time as the Tribunal considers reasonable*?*

140. Even if I had been satisfied that it was not reasonably practicable to have presented his claim by 7 July 2016, I would have had to go on and consider whether it was then presented within such further period as the Tribunal considers reasonable.

141. While, in light of my finding that it was reasonably practicable to present timeously, that follow on question does not strictly speaking arise for determination, for the sake of completeness, I think it right to record that a delay of a further 49 days until 24 August 2016 is excessive, and that further period cannot be regarded as reasonable. As such, I would still have dismissed his claim as time-barred.

142. The claimant sought to explain part of that period by reference to his use of the ACAS Early Conciliation procedure, between 11 and 17 August 2016, but sight should not be lost of the fact that he started that procedure after the original 3 month period had expired, and thus the 6 days period between ***"Day A"*** and "***Day B***" does not give a further period extending the original statutory time period of 3 months. Put shortly, "***stop the clock"*** does not apply to the circumstances of the present case.

Disposal

143. It was agreed by both parties that the claimant's complaint of unfair dismissal by the respondents was presented to the Tribunal outwith the statutory three month period provided under **Section 111 of the Employment Rights Act 1996.** The "***stop the clock***" provisions do not apply, as the claimant only contacted ACAS after the expiry of the original time limit. In these circumstances, I find that the claim lodged by the claimant was not presented timeously.

144. For the reasons given above, I am not satisfied that it was not reasonably practicable for the claimant to do so within that period and, in these circumstances, I further find that the Employment Tribunal does not have jurisdiction to hear the claimant's complaint of unfair dismissal, and for that reason, I have decided to dismiss the claim as time-barred.

145. Further, and in any event, even if I had been satisfied that it was not reasonably practicable for the claimant to do so within the statutory three

month period, I am not satisfied that he presented his complaint within a further reasonable period. Accordingly, I have issued this Judgment dismissing his claim against the respondents.

Employment Judge: G. Ian McPherson
Date of Judgment: 16 March 2017
Entered in register and copied to parties: 21 March 2017