



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss R Radcliffe

**Respondent:** North Cumbria Integrated Care NHS Foundation Trust

**Heard at:** Manchester (by CVP)

**On:** 1 December 2022

**Before:** Employment Judge Phil Allen (sitting alone)

## REPRESENTATION:

**Claimant:** Mr T Wood, counsel

**Respondent:** Mr M McKeever, solicitor

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's unfair dismissal claim was not presented within the relevant time limit as required by section 111 of the Employment Rights Act 1996.
2. It was reasonably practicable for the claim to have been entered within the relevant time limit.
3. The claim is accordingly dismissed as the Tribunal does not have jurisdiction to hear the claim brought.

# REASONS

## Claims and Issues

1. This was a preliminary hearing which was listed by the Employment Tribunal in a letter of 15 August 2022. That letter set out three questions which would be determined at the hearing (32). The three questions were:

- a. Whether the claimant's claim was presented within the relevant time limit; and

- b. If not, whether it was reasonably practicable for the claim to be presented within the time limit; and
- c. If not, whether the claim was presented within such further time as was reasonable.

2. At the start of this hearing, it was confirmed that those were the three issues to be determined. The claimant's representative confirmed that it was accepted by the claimant that the claim had not been presented within the primary time limit (if the relevant extension was not applied).

### **Procedure**

3. Each of the parties was ably represented at the preliminary hearing, the claimant by Mr Wood, counsel, and the respondent by Mr McKeever, solicitor.

4. The hearing was conducted by CVP remote video technology.

5. A bundle of documents was prepared in advance of the hearing. The bundle ran to 68 pages. The numbers in brackets in this Judgment refer to the page numbers in that bundle.

6. The claimant had prepared a witness statement, as she had been ordered to do.

7. Prior to the start of the hearing, I read the claimant's witness statement and the pages in the bundle to which she referred.

8. I heard evidence from the claimant, who was cross examined by the respondent's representative.

9. After the evidence was heard, each of the parties was given the opportunity to make submissions. The respondent's representative provided written submissions and expanded upon them orally. The claimant's representative provided copies of some authorities and made oral submissions which referred to passages from them.

10. The name of the respondent in the proceedings was amended by consent, to North Cumbria Integrated Care NHS Foundation Trust.

11. At the end of the hearing, the Judgment and reasons were delivered to the parties orally. Written reasons were requested at the hearing and, accordingly, the written reasons are provided together with the written Judgment.

### **Facts**

12. The claimant worked for the respondent as an Advanced Nurse/Paramedic Practitioner from 15 July 2019. She resigned on 28 September 2021. Her last day in employment was 10 October 2021. It is not necessary for this decision to address the dispute between the parties which led to the claimant's resignation, save to record that the claimant alleged that she had been constructively dismissed by the respondent.

13. The claimant spoke to ACAS about the issues she was having within her employment at some point in early to mid 2021.

14. The claimant has been a member of Unison for twenty years. Prior to early 2021 she had never utilised their services before. The claimant's first point of contact at Unison was Ms Dodd, who informed the claimant that she was not at a senior enough level to deal with the claimant's issues. That was in early 2021.

15. Between February and June 2021, the claimant was assisted by Mr Woddington of Unison. From June 2021 until October 2021 the claimant was assisted by Ms Walsh. It was accepted that they were two of the most senior Unison representatives in the area.

16. On 6 June 2021 (35) the claimant asked to access advice from a solicitor via her Union. The claimant's evidence was that she repeatedly asked Unison to give her access to a solicitor from June 2021 until March 2022. Unison did not give the claimant access to a solicitor as requested. The claimant said that she was repeatedly told that she did not need legal advice.

17. The claimant resigned on 28 September 2021 (37). The claimant was advised by Ms Walsh of Unison that she needed to submit a grievance before her employment terminated and so she did so, on 10 October 2021 (38). Her grievance was detailed and ended by confirming that the claimant would be seeking further legal advice, as a result of the way in which she had been treated.

18. The claimant was subsequently unhappy that the involvement of Ms Walsh appeared to be delaying the grievance hearing (45) and it was arranged that she be advised instead by Mr Kopetzki of Unison from 18 November 2021 (44). A grievance meeting took place on 22 November 2021 when the claimant was accompanied by Mr Kopetzki of Unison. The claimant and Mr Kopetzki spoke about the claimant's issues on that day.

19. It was the claimant's evidence to me that none of the four Unison representatives told her about Employment Tribunal time limits. Whilst perhaps surprising and I should emphasise that I have not evidence from the representatives, I have no reason not to accept the claimant's evidence about this. The claimant appeared to me to be a genuine and truthful witness. She emphasised that she relied upon her Unison representatives. The claimant was however clearly mindful of the need to obtain advice from someone other than those representatives who were assisting her with the respondent's internal processes, which is why she asked throughout this period to be able to speak to a solicitor via the Union. It was the claimant's entirely understandable evidence that she could not afford a solicitor herself.

20. The last date by which the claimant should have started ACAS early conciliation in order to enter her claim within the primary time limit was 9 January 2022. It was the claimant's evidence that she had not googled what she needed to do to bring a Tribunal claim. She emphasised the reliance she placed on her Union.

21. On 10 January 2022 there was an outcome to the claimant's grievance (48). The claimant was advised by Mr Kopetzki to appeal the outcome. Her evidence was

that she understood from speaking to him that there was no further action she could take until completing the internal process, albeit there was no written document which confirmed or recorded that advice or what exactly the claimant was told.

22. The claimant appealed on 19 January (51). The appeal hearing was initially arranged for 21 February, but it was delayed at the claimant's request as she wished to seek further information and legal advice (62). The appeal hearing was also delayed for a period because the claimant obtained new employment and requested that the hearing was not rescheduled during the first nine weeks of that job. The appeal hearing went ahead on 10 June 2022 and an outcome was provided on 5 July 2022 (67).

23. On 29 March 2022 the claimant was advised by Unison that the time had passed for legal advice and Unison would not be putting her in contact with a solicitor (66). Mr Kopetzki informed the claimant in his email that they needed to focus on the appeal going forward.

24. After receipt of the appeal outcome, Mr Kopetzki suggested the claimant spoke to ACAS. She did so on the phone on 13 July, when she was advised for the first time about the relevant time limits for bringing an unfair dismissal claim and that she should submit a claim form "*imminently*", which she clarified in evidence as meaning immediately. The ACAS EC certificate was issued on 15 July 2022, which covered the period from 13-15 July 2022. The claimant submitted a relatively detailed claim to the Tribunal on 28 July 2022. The claimant's evidence was that the time between the 13 and 28 July was the time it took her to pull together the information she needed to, and to write what was required. She emphasised that she was in a low way at the time. She said she put her claim in as soon as she could and as soon as it was possible for her to do so.

### The Law

25. The starting point is the wording of section 111 of the Employment Rights Act 1996. Section 111 (2) provides:

- (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.*

26. The period in section 111(2)(a) is, of course, extended by any period of ACAS Early Conciliation.

27. Whether it was not reasonably practicable for the claim to be entered in time, is a question of fact for me to decide. Key to answering that question is why the primary time limit was missed.

28. I am required to apply the words of the statute (what it says in the law), that is whether it was not reasonably practicable. That does not mean: whether it was physically possible; or (simply) whether it was reasonable. Asking whether it was reasonably feasible to present the claim in time, is an alternative way of expressing the test.

29. The Judgment in **Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379** said:

*“In my opinion the words ‘not practicable’ should be given a liberal interpretation in favour of the man. My reason is because a strict construction would give rise to much injustice which Parliament cannot have intended.”*

*“Summing up, I would suggest that in every case the Tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the [time limit] to pass by without presenting the complaint. If he was not at fault, nor his advisers - so that he had just cause or excuse for not presenting his complaint within the [time limit] - then it was 'not practicable' for him to present it within that time. The Court has then a discretion to allow it to be presented out of time, if it thinks it right to do so...”*

30. The Judgment in **Dedman** also said the following:

*“But what is the position if he goes to skilled advisers and they make a mistake? The English court has taken the view that the man must abide by their mistake.”*

31. If an employee misses the time limit because she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time. In assessing whether ignorance or mistake is reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

32. Both parties relied upon **Marks & Spencer Limited v Williams-Ryan [2005] EWCA Civ 470** and cited passages from it. The respondent’s representative quoted the following from the Judgment of Lord Philips:

*“The first principle is that s.111(2) should be given a liberal interpretation in favour of the employee”*

*“In accordance with that approach it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances.”*

33. The claimant's representative referred to the following passage from later in the **Williams-Ryan** Judgment, which addressed what had been said in **Dedman** and also in the subsequent cases of **Wall's Meat Co Ltd v Khan** [1978] IRLR 499 and **Riley v Tesco Stores Ltd** [1980] IRLR 103:

*"In **Riley v Tesco Stores Ltd** the employee sought to excuse failure to make a complaint to the employment tribunal in time by alleging that she had given bad advice by a Citizens' Advice Bureau. By the time the matter reached the Court of Appeal, the CAB had been joined and the employee's allegations against the CAB were disputed. There was much debate as to how, if at all, Lord Denning's comments in the **Wall's Meat** case applied to a CAB, which Stephenson LJ did not receive with enthusiasm. He expressed the view that it was immaterial whether an adviser was skilled or unskilled, engaged to give advice or casually consulted. But when his judgment is read in full and with care it becomes apparent that all of this was obiter, and that Stephenson LJ deprecated the application of Lord Denning's observations rather than the simple application of the words of the statute. Speaking of the burden of proof on the employee to show that it had not been reasonably practicable to make his complaint in time, he said: "I would hesitate to say that in every case where an adviser is consulted a tribunal is bound to hold that the burden of proof has not been discharged. Every case must depend upon its own facts."*

34. What Lord Philips went on to conclude was:

*"What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in **Dedman** was part of the ratio. There the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment tribunal. The observations of Stephenson LJ in **Riley** were, as I said, obiter. There is no binding authority which extends the principle in **Dedman** to a situation where advice is given by a CAB. 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."*

35. I have considered what was highlighted by both parties. The claimant's representative submitted that a Union official is comparable to someone at the CAB in terms of what I must take into account, or in any event that the Union advisors in this case were comparable. I agree and accept that a Trade Union official is not comparable to a professional legal representative, who would be a skilled adviser for whom the position as outlined in **Dedman** would apply (and that the advisers in this case were not such skilled advisers). That means that taking advice from them did not, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable.

36. The claimant's representative also relied upon passages from **Palmer v Southend-on-sea Borough Council** [1984] WLR 1129 and **Pazkowski v Sieradzka** UKEAT/0111/16, which I have taken into account. In **Palmer** May LJ referred to the importance of knowing not only whether an employee was being advised at a particular time and by whom, but also the extent of the adviser's knowledge of the facts of the case and the nature of the advice being given. In **Pazkowski** HHJ Eady KC said that (based upon the **Williams-Ryan** Judgment) when the adviser was from an organisation such as the CAB, it might be relevant to know something of the status of the advice and the adviser. HHJ Eady KC concluded in the **Pazkowski** judgment by highlighting that it is the language of the statute which must prevail.

37. The respondent's representative also relied upon **Bodha v Hampshire Area Health Authority** [1982] ICR 200 in relation to the impact of an internal appeal on the test and submitted that the fact of an internal appeal did not prevent it being reasonably practicable to present a claim in time.

38. The respondent's representative also referred to **Fishley v Working Men's College** UKEAT 0485/04, **Beasley v National Grid Electricity Transmission** UKEAT/0626/06 and **Miller v Community Links Trust Limited** UKEAT/0486/07 but those authorities did not assist me in the decision which I needed to make in this case as those authorities were focussed on the time when the claim was entered, and whether it was in time, which was not an issue in this case.

39. I have not reproduced in this Judgment the parties' submissions in full, but everything which they raised was considered in reaching this decision.

### **Conclusions – applying the law to the facts**

40. It was not in dispute that the claim was not entered within the primary time limit required by section 111 of the Employment Rights Act 1996. The claimant's employment terminated on 10 October 2021. Her claim was not entered until 28 July 2022. It was entered well outside the three-month time period. The ACAS early conciliation period between 13-15 July 2022 did not alter that position. That was the first question I was asked to decide.

41. For the second question, the test to be applied in this case is whether it was reasonably practicable for the claim to be presented within the time limit, that is for it to have been entered (or at least ACAS early conciliation to have commenced by) 9 January 2022. As I have outlined, another way of asking that question is whether it was reasonably feasible for the claimant to have done so.

42. That test is a relatively stringent one and is not the same as the more flexible just and equitable test which applies to the time limits in discrimination claims. Had I been considering a test which considered what was just and equitable, the outcome may well have been different. As highlighted by her representative, I do have to interpret the test with a liberal interpretation in the claimant's favour, but nonetheless the test which I have to apply is whether it was reasonably practicable for the claim to have been entered in the time required.

43. I must take into account that there is generally available information which sets out the time limits which apply to Tribunal claims and what needs to be done when someone wishes to claim unfair dismissal. The claimant chose not to use a search engine such as google to find that information, but had she done so such material would have been readily available. There was no physical impediment which stopped the claimant from entering her claim in time or stopped her from seeking and finding the information she needed to know about when a claim needed to be entered.

44. Taking that into account, I have found that it was reasonably practicable or feasible for the claimant to have found out about what she needed to do to enter an unfair dismissal claim and when she needed to do it, had she chosen to look. It was reasonably practicable or feasible for her to have entered her claim by 9 January 2022 (or to have commenced ACAS early conciliation by that date).

45. To some extent, the fact that the claimant could feasibly have entered her claim in time is illustrated by her own interaction with ACAS. She spoke to ACAS in early or mid 2021 so she knew of the availability of the service. She spoke to ACAS in July 2022 and was advised about the time limits and the process to follow. It was reasonably practicable for the claimant to have spoken to ACAS in the period between 28 September 2021 when she resigned, and the 9 January 2022 when the primary time limit expired, and had she done so she would have been able to enter her claim in time.

46. I accept that the claimant could not afford to seek the advice of a solicitor directly. I also accept that she repeatedly requested that her Union provided her with access to a solicitor. It is unfortunate for the claimant that the Union failed to provide her with that access when such advice would have assisted her. The fact that she could not access a solicitor does not mean it was not reasonably practicable or feasible for her to have entered her claim at the Tribunal in the time required; many claimants enter claims in time without legal assistance.

47. Much of the argument in this case focussed on the claimant's Union advisers and their advice. I have certainly not taken the view that the failure of the Unison advisers to inform the claimant about the Tribunal time limits was something which was determinative of the arguments about reasonable practicability. Whether or not the claimant has a claim in another forum against the Union is also not for me to determine. She may do, based upon the evidence which I have heard. However, I have accepted her representative's submissions that the approach to skilled advisers outlined in **Dedman** does not mean that the apparent fault of the Union advisers means that the claimant's arguments must fail. I have considered what I know about the status of the advice and the advisers which was, in summary, that they were industrial relations advisers advising primarily on addressing issues within the NHS Trust. I have considered all the relevant factors in this case, including the reliance which the claimant placed on the advice from her Union advisers. I have noted: the claimant's constant requests to access legal advice through her Union; the ongoing grievance process; and the evidence the claimant has given about what she was told by the Union advisers. My decision is that the claimant was reasonably able to seek and obtain advice or information about when and how to bring a Tribunal claim. The access she had to Unison advisers did not mean that it was not reasonably practicable for her to enter a claim in time. It also did not mean that it was.



48. The final question asked (see paragraph 1(c) above) is not one I need to determine, as a result of the decision I have reached. Nonetheless as I heard arguments about it, I will confirm what I would have decided. I am entirely satisfied that the claimant presenting her claim on 28 July 2022, was a claim which was presented in such further time as was reasonable after she was advised of the deadline for entering such a claim by ACAS on 13 July 2022. Whilst I have heard the respondent's representative's submissions about that delay. and I would have considered it a relatively long period of time if a professional representative had taken that long to enter a claim, for the claimant who was unrepresented and, as I accept, in a low way at the time who did so as soon as she could, the relatively short period of time taken to prepare a claim form with detailed information and to submit it, was such further time as was reasonable.

**Summary**

49. For the reasons explained above, the Tribunal does not have jurisdiction to consider the claimant's unfair dismissal claim and therefore the claim is dismissed.

Employment Judge Phil Allen  
5 December 2022

JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
6 December 2022

FOR THE TRIBUNAL OFFICE

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