THE INDUSTRIAL TRIBUNALS

CASE REF: 2869/17

CLAIMANT: **James Richard McGerrigle**

RESPONDENTS: **1. Robert Barnett**
2. Elizabeth Barnett
3. Mark Barnett
4. Wendy Barnett

DECISION ON A PRE-HEARING REVIEW

The decision of the tribunal is that the claimant's claims in respect of unfair dismissal, notice pay and holiday pay were presented outside the prescribed three month time limit and were not brought by the claimant as soon as was reasonably practicable. The tribunal therefore dismisses these claims for want of jurisdiction. The claimant's claim for redundancy payment was brought within time and will therefore fall to be determined at the substantive hearing.

Constitution of Tribunal:

Employment Judge: **Employment Judge Wimpress (sitting alone)**

Appearances:

The claimant was represented by Ms Emma McIlveen, Barrister-at-Law, instructed by Babingtons Solicitors.

The respondent was represented by Ms Bobbie-Leigh Herdman, Barrister-at-Law, instructed by Messrs Dickson & McNulty Solicitors.

Preliminary Issue

1. This matter has been listed for the hearing of the following preliminary issue:

> Whether all or part of the claims brought by the claimant are outside the time-limitation of three months and, if so, whether time should be extended.

Sources of Evidence

2. The tribunal received a small bundle of documents and heard oral evidence from the claimant, Mrs Martha Elizabeth McGerrigle and Desmond Joseph Crudden.

The Claim and the Response

3. The claimant brought claims for unfair dismissal, failure to provide statutory terms and conditions of service, to provide pay slips, failure to pay holiday pay, and failure to pay notice pay. In the claim form the claimant also states that he was told that he was being made redundant and as noted in the Record of Proceedings dated 21 August 2017 a claim for statutory redundancy pay should be added to these proceedings. In its response form the respondent stated that the claimant was self-employed and denied that he was made redundant, unfairly dismissed or was entitled to notice pay, holiday pay or a redundancy payment. The issue as to whether the claimant was, at the relevant times, an employee or a self-employed worker is to be determined by the tribunal hearing the substantive case in the event that time is extended. Wendy Barnett should also be added to the proceedings on the basis of the statement in the response that she was a member of the farming partnership which engaged the claimant.

The Facts

4. The essential facts in relation to the time issue were not in dispute. The claimant and his wife were rather vague about some matters including relevant dates but it is possible to elucidate sufficient information to decide the preliminary issue.

5. The claimant worked for the respondents from 1995/1996 until 6 February 2017 as a farm labourer. For the purposes of this hearing it is not necessary to set out his duties, the history of the business or how the claimant's employment or self-employment came to an end. The focus rather is on what steps the claimant took or ought to have taken to bring his claims within time. It is material to note however that the claimant first learned that that he was going to lose his job during a conversation with Mr Mark Barnett on 1 February 2017 and this prompted him to send a message to his friends via Snapchat in the following terms – "new month, new boss and the low life that was my boss never had the balls to tell me the bastard". As is clear from this massage and the claimant's evidence to the tribunal he was distraught and angry about losing his employment.

6. The claimant gave evidence that following the loss of his job his priority was to get work and bring money into his home. The claimant said that he had a young daughter to look after and his head was all over the place. He was very angry about his dismissal and felt that it was wrong. The claimant succeeded in securing primary employment the following week on a three day week basis and also managed to find work with two other farms which gave him a six day working week in total.

7. A substantial portion of the booklet of papers prepared for the hearing comprised the claimant's medical notes and records. These included a letter from the claimant's general practitioner, Dr Fullerton, dated 21 July 2017 which stated that the claimant suffers from hypertension or high blood pressure and had been

under a lot of work related stress recently. The claimant's medication was increased on 20 June 2017 as his blood pressure was again elevated which the claimant blamed on losing his job. The only entries in the medical notes during the passage of the three month limitation period recorded lateral epiconditus of the elbow which appeared to be due to the heavy milking on a recently changed machine and had been ongoing for the past few weeks. The claimant's first attendance was on 23 March 2017 in respect of this and medication was requested on 28 April 2017.

8. The claimant's wife, Mrs McGerrigle, looked after all business matters for him. Mrs McGerrigle contacted the claimant's accountants, Crudden Dolan Ltd, on 30 March 2017 and made an appointment to see Mr Crudden on 11 April 2017. The purpose of the appointment was to discuss a tax bill that the claimant had received. Mrs McGerrigle duly attended the appointment on her own as her husband was working. Mrs McGerrigle told Mr Crudden that her husband had lost his job and asked him how they were going to pay the tax bill. Mr Crudden advised seeking a one month moratorium on the basis that the claimant's income was not sufficient to meet his mortgage payments and a second loan. Mrs McGerrigle didn't raise any issue about her husband's employment with Mr Crudden and wasn't thinking about legal recourse at this stage. Mr Crudden referred to the claimant's employment and mentioned a possible employment issue arising from the method of dismissal but said that he knew nothing about employment law. Mr Crudden said that as an accountant it was not his area but said that he would get someone in the office to investigate and said that he would look at it. Mr Crudden was not aware of time limits and had never dealt with an unfair dismissal claim before. Mr Crudden did not hold himself out as having legal expertise. Mrs McGerrigle did nothing further about it at this stage as Mr Crudden was looking into it. Mr Crudden went on holiday for ten days after this appointment and then received the sad news that his brother had been hospitalised and been sent home to die. Mr Crudden's brother sadly passed away on 5 May 201 and Mr Crudden failed to chase the matter up.

9. Mrs McGerrigle also rang the Labour Relations Agency at some point and it sent out an information pack of some description. The claimant did not know what the pack contained as his wife dealt with everything. Mrs McGerrigle probably showed it to him but he did not take note of it. The evidence on this aspect of the case is far from clear.

10. Both the claimant and Mrs McGerrigle did not have a home computer, they both owned smart phones with internet access and could therefore have undertaken some basic research as to the claimant's legal rights.

11. At some point after the death of Mr Crudden's brother on 5 May 2017 Mrs McGerrigle spoke with a female member of staff in the accountant's Enniskillen office who told her that the action taken against her husband was unfair dismissal and mentioned the Industrial Tribunal to her. Mrs McGerrigle then phoned the tribunal office during the second week of May. The tribunal office sent the claimant a blank IT1 form together with a note which stated that the Tribunal Procedures Booklet which was normally included in the claim/response pack was currently out of print but that it was available in pdf format at the tribunal's website under publications. Mrs McGerrigle did not access the pdf booklet.

12. Around this time it was helpfully suggested to the claimant that if he needed a solicitor he should go to Ms Esme Hamilton. On seeing the material sent out by the tribunal office the claimant told his wife that she should take it to Ms Hamilton. An internal email in Babingtons Solicitors dated 16 May 2016 indicates that Mrs McGerrigle called in that day to arrange an appointment with Ms Hamilton about a new employment matter and that an appointment had been arranged on 18 May 2017 at 2.00 pm. When asked by his counsel why he had sought legal advice at this time he replied that Mr Crudden had told him that he might need to see a solicitor at some stage in the future. Mr Crudden did not recall offering this advice. The claimant was not aware of time limits until he saw Ms Hamilton and he had never had a claim before or been in an employment tribunal.

13. The claimant's claim form was lodged in the tribunal office on the following day - 19 May 2017.

THE LAW

14. The law in relation to the period for presenting a claim of unfair dismissal is set out in Article 145 of the Employment Rights (Northern Ireland) Order 1996 as follows:

> "145 (2) Subject to paragraph 3, an Industrial Tribunal shall not consider a complaint until this Article unless it is presented to the Tribunal:-
>
> (a) before the period of three months ending with the effective date of termination, or
>
> (b) within such further period as the tribunal considers reasonable in the 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 ...".

The other heads of claim save for redundancy payment fall to be considered against an identical statutory framework.

15. In claims where the test in Article 145 (2) is to be applied the employee must show that it was not reasonably practicable for him to present his claim on time and the burden of proving this rests firmly on the claimant. Secondly, if he succeeds in doing so, the tribunal must then be satisfied that the time within which the claim was in fact presented was reasonable.

16. The tribunal was referred to several cases in which this test was considered.

17. In ***Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379***, Scarman LJ indicated that if the claimant was saying he did not know his rights, relevant questions would be to consider the following:

> *"What were his opportunities for finding out that he has rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to*

moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."

18. In ***Wall's Meat Company Ltd v Khan [1979] ICR 52***, Brendon LJ gave the following guidance:-

> *"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 his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."*

19. In ***Palmer and Saunders v South-end-and-Sea Borough Council [1984] IRLR 119*** and Lord Justice May proposed a test of "reasonable feasibility" in the following passage:-

> *"We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand "reasonably practicable" means more than merely what is reasonably capable physically of being done - different for instance from its construction in the context of the legislation relating to factories ... perhaps to read the work "practicable" as the equivalent of "feasible" as Sir John Brightman did in **Singh v Post Office 1973 ICRF 437** and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three months?" - is the best approach to the correct application of the relevant sub-section."*

20. *Harvey on Industrial Relations and Employment Law, Volume 3, Section P1,* has emphasised:-

> *"(207) So, whilst a claimant's state of mind is to be taken into account, it is clear that his mere assertion of ignorance either as to the right to claim, the time-limit or the procedure for making the claim is not to be treated as conclusive … moreover, as the courts pointed out, the widespread public knowledge of unfair dismissal rights, it is all the time becoming more difficult to an employee to plead such ignorance successfully …*
>
> *(208) [Given] if an employee is reasonably ignorant of the right to claim, it will inevitably follow that he will be unaware either of the correct mode of making a claim or the time within which it should be made. But if he knows in general about the availability of the remedy, he may still be ignorant of how and when to pursue it. In these circumstances, as Brendan LJ noted in the **Walls Meat** case, it may*

be difficult for him to satisfy a tribunal that he had behaved reasonably in not making suitable enquiries about these matters. Shaw LJ in the same case commented that 'mere ignorance' of the time-limit will not of itself amount to reasonable impracticability, save perhaps where the employee does not discover the existence of his right until a short time before the expiry of the time-limit. Pauler LJ took a similar view in ***Riley v Tesco Stores [1980] ICR 323*** *at 335."*

21. It was also established from the decision in ***Dedman*** that if an error arises as a result of delay by a legal advisor, then such delay or conduct will be attributed to the claimant with the result that he will not ordinarily be able to rely on the "escape clause" for reasonable practicability.

22. *Harvey* also summarises the position in respect of professional advisers as follows:

> *"(214)* *The issue here is whether a claimant is debarred from showing reasonable impracticability where it was not he, but his advisers, who were at fault. They may have misled him about the right to claim, or about the time limit, or about the method of making a claim, as a result of which he did not present his claim in time. Is their fault to be attributed to him, so as to prevent him from arguing that it was not reasonably practicable for him to present his claim in time? As will be seen below, the answer will primarily depend on the nature of the adviser who has given the advice.*
>
> *(215)-(223)* *If a professional adviser, such as a solicitor, has been instructed by the claimant to advise or act for him, then any wrongful or negligent advice or conduct on his part which results in the time limit being missed will be attributed to the claimant with the result that he will ordinarily not be able to rely on the escape clause. In* ***Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520 at 526****, Lord Denning MR stated:*
>
> > *"If a man engages skilled advisers to act for him — and they mistake the time limit and present the complaint too late — he is out. His remedy is against them."*

This principle was repeated in ***Wall's Meat*** case. There has been some criticism of what has become known as the 'Dedman principle' (***Riley v Tesco Stores Ltd [1980] IRLR 103*** *and* ***London International College v Sen [1993] IRLR 333*****)**. However, as stated in Paragraph 227 of *Harvey* any doubts about the status of ***Dedman***, in the light of ***Riley*** and ***Sen*** were removed by the decision of the Court of Appeal in ***Marks & Spencer plc v Williams-Ryan [2005] IRLR 562***, where Lord Phillips MR, having reviewed the authorities, upheld the ***Dedman*** principle as a proposition of law:

> *"*In Dedman the employee had retained his 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 discussion of this topic in *Harvey* then continues:

"(228) As in Riley, the question in Williams-Ryan was whether a claimant could rely on the escape clause where she had received advice from a CAB. Holding that there was no binding authority equating advice from a CAB with advice from a solicitor, Lord Phillips MR stated:

> "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."
>
> Although the Court of Appeal rejected the argument that fault on the part of a CAB must necessarily be treated as the fault of the employee, this was not a case where specific misleading advice was given by the CAB .....

(229) However, more recent authority has suggested that the reassertion of the Dedman principle by the Court of Appeal in **Williams –v- Ryan** does not mean that there must inexorably be a finding of reasonably practicability in every case where a claimant instructs solicitors and receives wrong advice. In **Riley** Waller LJ pointed out that there may be circumstances where there are special reasons why the solicitor's failure can be explained as being reasonable (1980) IRLR103 and in **Northamptonshire County Council v Entwhistle [2010] IRLR 740** Underhill J, as he then was, gave an example of such circumstances. The situation "where both the claimant and the advisor had been misled as to some material factor matter (for example something bearing on the date of dismissal, which is not always straightforward". In that case, he held it would be open to the claimant to argue that the escape clause should apply, but if the solicitor was negligent, such an argument would not be possible as the solicitor would not have given him the advice that he "should reasonably in all the circumstances have given him ....

(230) Where it is established that the adviser's fault should be attributed to the claimant, neither the extent to which the claimant relied upon that advice, but the quality of it, will be regarded as a relevant special reason justifying a finding of reasonable impracticability (**Creden Health Authority v Jaufurally [1986] ICR 4**)."

23. In the case of ***Ashcroft v Haberdashers' Aske's Boys' School [2008] IRLR 375***, where the claimant relied on certain advice from a person who

purported to be a solicitor but was not Burton J stated in the course of his judgment that the principle that lies behind the ***Dedman*** line of authorities is not dependent on the adviser in question being a solicitor, it is indeed not even dependent on his being skilled and the fact that this particular person was not a solicitor would have had no relevance to the ultimate result. The adviser in ***Ashcroft*** was however regarded by the court as an employment law consultant.

Submissions

24. The parties' representatives made very helpful oral and written submissions. The latter are appended to this decision. It was agreed that the claim in respect of a redundancy payment was brought within time being six months rather than the three month period that applies to the other heads of claim.

25. On behalf of the claimant Ms McIlveen submitted that it was not reasonably practicable for the claimant to lodge his claim on time and put forward a number of reasons for this in her initial written submission. These materially included the manner of the claimant's dismissal, his occupation as a farm labourer, his ill-health, his priority in seeking alternative employment and Mr Crudden's role in the matter. In Ms McIlveen's further written submissions she reminded the tribunal that the claimant was a farm labourer with limited IT skills who had never been involved in any legal proceedings and that this was not a case where the claimant was wrongly advised by a legal adviser. Ms McIlveen accepted that ignorance of the law is no excuse but submitted that on the basis of the specific facts of the case the tribunal should take a generous view of the matter.

26. On behalf of the respondent Ms Herdman submitted that is clear that neither the claimant nor his wife gave any great thought to a tribunal claim following the claimant's dismissal. While there was some reference to health issues including an elbow injury these would not have had any impact on his ability to bring a tribunal claim within time. Ms Herdman pointed out that although the claimant said that "his head was not right" he had the presence of mind to quickly seek and find new employment and it is stressful for anyone to lose a job**.** Although Mrs McGerrigle appears to have contacted the Labour Relations Agency one would have expected them to offer advice about time limits if such contact had occurred. As to the contact with the tribunal office Ms Herdman pointed out that it is not its job to advise on time limits. Ms Herdman accepted that the claim form was submitted very swiftly once legal advice had been sought.

Conclusions

27. It is important to examine what steps the claimant took immediately following the loss of his employment. It is clear that despite being angry about the matter the claimant took absolutely no steps to investigate what legal options might be open to him.

28. The claimant adopted a rather hands off or passive approach to the whole matter and largely left it to his wife to deal with. In the early portion of the three month time limit no steps were taken by either the claimant or his wife to look into any possible legal recourse. Mr Crudden was consulted about a tax matter on 11

April 2017 and in the course of the meeting offered to look into a possible employment issue but for the reasons set out above failed to do so. It was not unreasonable in my view for a man in the claimant's position to leave the matter with Mr Crudden to investigate but this is only one of the material circumstances at play in this matter.

29. The claim form ought to have been lodged by 6 May 2017. The claimant's wife obtained a blank IT1 form in and around the second week in May 2017. Legal advice was belatedly sought on 16 May 2017 some 10 days after the 3 month time limit had expired with an appointment being made to see a solicitor on 18 May 2017. The claimant's solicitor acting with commendable promptitude then lodged the claim form in the tribunal office on 19 May 2017. However, this was 13 days after the expiry of the three month limit.

30. This is not a case in which there was an impediment of some nature that prevented the claimant from presenting his claim within time. The suggested ill-heath issue did not amount to anything that might have been properly regarded as an impediment. The only medical condition that the claimant received treatment for at the material time was an elbow injury and the references to work related stress and hypertension come much later.

31. While the claimant has provided an explanation why he did not lodge proceedings within time he has not demonstrated that it was not reasonably practicable for him to have done so. The claimant's approach to the matter was characterised by passivity and a failure to look after his own interests notwithstanding his anger at losing his employment. The claimant at no stage actively sought legal advice and it was only by chance that the issue of his dismissal came up during a meeting that Mrs McGerrigle had with Mr Crudden on 11 April 2017. Subsequently it was only a matter of good fortune that a comment by a member of Mr Crudden's staff alerted Mrs McGerrigle to the role of industrial tribunals.

32. Mr Crudden certainly ought to have referred the claimant to a solicitor or other competent adviser straightaway but as emphasised by the Burton J in ***Ashcroft*** the ***Dedman*** line of authorities is not dependent on the adviser in question being a solicitor or the adviser being skilled. Nor is it dependent upon the availability or otherwise of a legal remedy against the adviser. While the tribunal has criticised Mr Crudden that does not in any way imply that he would be legally liable on the basis of either the limited advice given or the failure to pursue enquiries more diligently.

33. As stated in the ***Walls Meat*** case, ignorance or mistaken belief must be reasonable in order to render it not reasonably practicable to lodge a claim within time and it may be difficult for a claimant to satisfy a tribunal that he had behaved reasonably in not making suitable enquiries. It is clear that the claimant in the present case did not make suitable enquiries and it is difficult having regard to all the circumstances to regard his failure to do so as reasonable. In addition to failing to consider what legal remedies might be open to him there were also missed opportunities in particular the failure to act on receipt of the Labour Relations Agency pack as referred to by Mrs McGerrigle in her evidence and the absence of any attempt to use the internet to conduct research. Even after receiving the blank tribunal claim form from the tribunal office and the advice that

the Tribunal Procedures Booklet was available on the Tribunal's website no effort was made to access this document online.

34. The tribunal also considered the leading case of **Palmer and Saunders v South End-on-Sea Borough Council (1984) IRLR 119** as referred to above. This case held that the meaning of words "reasonably practicable" lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. It further held that the best approach is to read "practicable" as the equivalent of "feasible" and ask "was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three months?" On a careful consideration of this refinement of the test the tribunal is not satisfied that it was not reasonably feasible for the claimant to have presented the claims which fall to be considered under the three month time limit within time.

35. Having regard to the tribunal's conclusions as set out above the claimant's claims in respect of unfair dismissal, notice pay and holiday pay are dismissed for want of jurisdiction. The claimant's claim for redundancy payment was brought within time and will therefore fall to be determined at the substantive hearing.

Employment Judge:

Date and place of hearing: 20 October 2017, Belfast.

Date decision recorded in register and issued to parties:

CASE NO: 2869/17IT

INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS (NORTHERN IRELAND) 2005

BETWEEN

JAMES RICHARD MCGERRIGLE

CLAIMANT

and

ROBERT BARNETT
ELIZABETH BARNETT
MARK BARNETT
WENDY BARNETT

RESPONDENTS

CLAIMANT'S WRITTEN SUBMISSIONS FOR A PRE HEARING REVIEW ON 20.10.17

INTRODUCTION

1. This submission is prepared on behalf of the Claimant in advance of the pre-hearing review listed on 20th October 2017.

ISSUES

2. The pre-hearing review has been listed to determine the following issue:

    a. Whether all or part of the claims brought by the Claimant are outside the time limitation of three months and, if so, whether time should be extended?

BACKGROUND

3. This is a claim for unfair dismissal, failure to provide statutory terms and conditions of service, failure to provide pay slips, failure to pay holiday pay, failure to pay notice pay, failure to pay statutory redundancy payment.

4. The Claimant alleges he was dismissed on the 6th February 2017. An ET1 was subsequently lodged on the 19th May 2017.

5. The Claimant accepts that his claim is out of time. However, the Claimant argues that it was not reasonably practicable for him to lodge his claim on time. The Claimant therefore respectfully asks the Tribunal to extend time in the circumstances and accordingly allow his substantive claim to be heard before a Tribunal.

LAW

Unfair Dismissal

6. Article 145 of the Employment Rights (Northern Ireland) Order 1996 (ERO) states:

> "145.— (1) A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (2) Subject to paragraph (3), an industrial tribunal shall not consider a complaint under this Article 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."

7. There are two limbs to this formula. Firstly, the employee must show that it was not reasonably practicable to present his claim on time. The burden of proving this rests firmly on the Claimant (***Porter v Bandridge Ltd [1978] ICR 943, CA***). Second, if he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

8. The question of what is or is not reasonably practicable is one of fact for the employment Tribunal to decide. In making this assessment, the Tribunal must address its mind to the question of reasonable practicability and must make a precise finding as to the nature of the complaint in question and the relevant starting date of the limitation period governing it before proceeding to consider whether any extension is appropriate (***Taylorplan Services Ltd v Jackson [1996] IRLR 184, EAT***).

9. The leading authority on this issue is the decision of the Court of Appeal in ***Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372, CA.*** In that case, May LJ undertook a comprehensive review of the authorities and proposed a test of "reasonable feasibility". He explained his reasoning as follows:

> *"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done--different, for instance, from its construction in the context of the legislation relating to factories: compare Marshall v Gotham Co Ltd [1954] AC 360, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic--"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"--is the best approach to the correct application of the relevant subsection."*

10. The possible factors are many and various, and, as May LJ stated in ***Palmer and Saunders***, cannot be exhaustively described, for they will depend on the circumstances of each case. The learned judge nevertheless listed a number of considerations, collated from the authorities, which might be investigated. These included the manner of, and reason for, the dismissal; whether the employer's conciliatory appeals machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical

impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

11. More detailed guidance on how to deal with the question of a claimant's expressed ignorance of his rights is to be found in the judgments of Scarman LJ in the ***Dedman case ([1974] ICR at 64),*** and of Brandon LJ in the ***Walls' Meat case ([1979] ICR 52 at 60, 61).*** In ***Dedman*** Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the claimant is saying that he did not know of his rights, relevant questions would be:

> *"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'.'*

12. In the ***Wall's Meat case***, Brandon LJ 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'.'*

13. A lenient attitude towards the extension of time was demonstrated in the case of ***Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] IRLR 562***, where the claimant, although she knew of the right to claim for unfair dismissal, was ignorant of the time limit. That ignorance was excused by a tribunal on the grounds that the employer's post-termination advice to her as to her rights, whilst referring to the right to make a claim to an employment tribunal, did not mention the time limit, and was thus misleading, and that the claimant was under personal pressure to complete a teacher training course. The tribunal duly gave her the benefit of the escape clause. In doing so, it stated:

> *"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 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"***

APPLICATION

14. The Claimant alleges he was dismissed on the 6th February 2017. His claim should therefore have been lodged on or before the 6th May 2017. The Claimant did not however lodge his

claim until the 19th May 2017. It is therefore accepted that his claim is therefore 13 days out of time.

15. The burden of proving that an unfair dismissal claim could not have been submitted on time rests upon the Claimant. The test to be applied by the Tribunal is whether it was reasonably practicable for the claimant to submit his claim on time.

16. The Claimant submits that it was not reasonably practicable for the Claimant to submit his claim on time for the following reasons:

    a. The Claimant worked for the Respondent for over 20 years.
    b. The Claimant has not received any redundancy payment from the Respondent and is also owed holiday pay and notice pay.
    c. The Claimant was absolutely distraught by the manner in which he was treated.
    d. At the time of dismissal, the Claimant was suffering from hypertension and work related stress.
    e. Following dismissal, the Claimant's key priority was seeking alternative employment in order to support his family. He did so on the 28th February 2017.
    f. Prior to the 18th May 2017, the only person that the Claimant had spoken to about his claim was his accountant, Des Crudden of Crudden Dolan Limited. Des Crudden is not legally qualified, had no knowledge of the 3 month time limit and therefore had not discussed same with the Claimant.
    g. The Claimant's wife made contact with the Tribunal and an ET1 form was accordingly sent to the Claimant. The Tribunal Procedures Booklet was not included with this letter. The Claimant did not access the information online.
    h. The Claimant sought legal advice on the 18th May 2017. A claim form was lodged with the Tribunal the following day.
    i. Prior to seeking legal advice, the Claimant had no knowledge of the 3month time limit.
    j. The Claimant enjoys a reasonable prospect of success in respect of his claim.

17. Finally, the Claimant submits that once he was aware of the time limit, his claim was submitted within a reasonable period as it was submitted the day after he sought legal advice.

CONCLUSION

18. In conclusion, the Claimant contends that it was not reasonably practicable for him to submit his claim on time. The Claimant respectfully asks the Tribunal to extend time and accordingly allow his substantive claim to be heard.

Emma McIlveen
Barrister at Law
19 October 2017

CASE REF. NO. 2869/17IT

IN THE OFFICE OF INDUSTRIAL TRIBUNALS & THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

JAMES RICHARD MCGERRIGLE

Claimant

and

ROBERT BARNETT
ELIZABETH BARNETT
MARK BARNETT
WENDY BARNETT

Respondents

RESPONDENT'S WRITTEN SUBMISSIONS
FOLLOWING A PRE-HEARING REVIEW
ON 20TH OCTOBER 2017

INTRODUCTION

1. This written submission is filed on behalf of the Respondents in the above matter and pursuant to the direction of Employment Judge Wimpress. They summarise the position of the Respondent as outlined in oral closing submissions on 20th October 2017 and refer to evidence heard by the Tribunal on that date.

ISSUES FOR CONSIDERATION

2. The Claimant's claims for unfair dismissal, failure to provide statutory terms and conditions of service, failure to provide pay slips, failure to provide holiday pay and failure to pay notice pay were submitted to the Tribunal outside the 3 month time limit. It is accepted that the Claimant's claim for statutory redundancy pay was submitted within the 6 month time limit for claims of that nature.

3. The Claimant applies to have his late claims admitted out of time. It is uncontroversial that the relevant legal test is that outlined in Article 145 of the Employment Rights (Northern Ireland) Order 1996 i.e. in order for the claim to be admitted out of time the Claimant must satisfy the Tribunal that is was not reasonably practicable for the complaint to have been presented before the expiry of 3 months. In this case the Claimant claims that he was ignorant of the time limit and that it was therefore not reasonably practicable for him to have submitted his claim on time.

4. The leading authorities on the issues before the Tribunal are ***Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 94, Walls' Meat [1979] ICR 52*** and ***Dedman (1974) ICR.***

THE EVIDENCE

5. The Tribunal heard evidence from the Claimant, his wife and his accountant, Mr Crudden.

6. The Claimant gave evidence that he felt angry at the termination of his employment position and felt wronged. He accepted that he felt he must have a remedy of some kind for his treatment. He stated that his health was poor after his employment came to an end and that his blood pressure was high.

7. The Claimant gave evidence that he went to see his accountant about an unpaid tax bill and that his accountant told him that he may have a legal remedy in respect of the termination of his employment. The Claimant stated that he was told by Mr Crudden, "You may need to go and see a solicitor at some stage in the future." It became clear in the evidence of the other witnesses that the only meeting between Mr Crudden and the Claimant was on 11th April 2017 and any advice given directly to the Claimant by Mr Crudden had to have been given on that date. The Claimant gave evidence that Mr Crudden told him that he would look into any legal remedy he might have. The Claimant's wife later requested a pack from the Tribunal. The Claimant accepted that he, "never even looked at it". Legal advice was ultimately sought by the Claimant and a claim form was lodged out of time.

8. The Claimant accepted in cross-examination that he did not make any effort to research any legal remedy he may have had, even after being made aware of same by Mr Crudden on 11th April 2017. The Claimant stated that he did not have computer skills but later gave evidence about his use of the social media app Snapchat. The Claimant stated that he had no idea that a time limit would apply to his claim and stated, "I never even thought on it." The Claimant accepted in cross-examination that any health issues outlined in his evidence related to a timeframe at least a number of months after the date of the termination of his employment and after the expiry of the time limit of 3 months.

9. The Claimant's wife gave evidence that she attended the meeting of 11th April 2017 with Mr Crudden and her husband. She said that the meeting was originally to deal with an unpaid tax bill but that on discussion of the manner in which the Claimant's employment came to an end, Mr Crudden stated that employment law was not his area but that he would look into it for the Claimant. She stated that no time limit was discussed at this meeting. Mrs McGerrigle said that she rang Mr Crudden's office at the end of April or early May when she heard his brother had died. No efforts had been made to follow up with Mr Crudden prior to this. A staff member at that office told Mrs McGerrigle that she should contact the employment tribunal. This was done and an application pack was sent out to Mrs McGerrigle. When this was received, the Claimant told his wife to, "take everything to Esme". This was a reference to the solicitor now on record for the Claimant. Mrs McGerrigle said that her husband knew of Esme via his friend who had recommended her to him.

10. Mr Crudden gave evidence that he met the Claimant on 11th April 2017 with his wife. Mr Crudden stated that on discussion of the Claimant's employment position it became clear that he was "clearly not self-employed". Mr Crudden stated that he told the Claimant that due to the means of his dismissal that there may be an "employment issue" and that "the dismissal may have been unfair". He said that he asked if the Claimant had a solicitor and that the Claimant told him that he did not. He said that he was not aware of the time limit at that time and told the Claimant that he would investigate the matter further. Mr Crudden stated that he was "not familiar with the legalities of employment law". Mr Crudden was off on annual leave and then his brother sadly died. He did not investigate matters further for the Claimant.

11. On questioning by the Judge, Mr Crudden accepted that he had been involved in legal proceedings previously and that he was familiar with the concept of time limits in legal proceedings.

12. The above is a summary of some relevant parts of the evidence. The Tribunal has a detailed note of the entirety of same.

APPLICATION OF THE LAW TO THE EVIDENCE

13. This is a case where the claimant relies on his ignorance to claim that it was not reasonably practicable for him to submit his claim on time. It is submitted that it is important to distinguish between a situation where a Claimant has no knowledge of his employment rights and a situation where the Claimant has knowledge of employment rights but not of the time limit pertaining thereto. This is clearly a case where the Claimant became aware of his rights on 11th April 2017 at the latest, although he accepted that he immediately was angry at his treatment and had a sense that there must be a remedy open to him at the time of the termination of his employment.

14. I refer to the judgment of ***Dedman*** and to page 11 of the copy before the Tribunal. The following excerpt is instructive in relation to this matter:

"But what if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting...he will be out of court."

15. The ***Walls' Meat*** case is also of assistance at page 8 of the copy before the Tribunal as follows:

"...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...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 reasonable 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."

16. The Claimant relies on the fact that his accountant did not return to him to provide advices on his employment claim. It is respectfully submitted that this is not a circumstance which made it not reasonably practicable for him to submit his claim in time. The Claimant had all means at his disposal to discover the applicable time limit for his case. Both he and his wife accepted having smartphones with internet access. Neither took the opportunity to do a simple internet search to enlighten themselves on the matter. Mrs McGerrigle was capable of finding the telephone number of the Tribunal and contacting them to obtain an application pack but unfortunately did so too late. Mr McGerrigle was told by Mr Crudden that he may need to see a solicitor at some stage in the future but did not take any steps to do so until it was too late. The

Claimant was aware of solicitors he could seek advice from and had been recommended Esme Hamilton at Babingtons. The Claimant was entirely passive in his attitude to his employment rights and left responsibility to his accountant who had advised both the Claimant and his wife that he was not an employment law expert.

17. The Tribunal may consider it unfortunate that the Claimant did not seek more appropriate advice at an earlier stage but it is submitted that it is clear that there was no impediment in place either, physical or mental, which made it not reasonably practicable for the Claimant to submit his claim on time.

18. The Claimant refers to ***Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470*** as authority for a more lenient approach being taken. Unlike the above-mentioned cases which are cited in support of specific legal principles, this case is cited by the Claimant due to its factual circumstances. The assessment that the Tribunal is required to undertake is fact-specific and each case must be decided on its own specific facts. It is submitted, therefore, that it is not helpful to compare and contrast the factual circumstances of this case with that in ***Marks.*** That case involved circumstances where the Claimant was given actively incorrect advice by the Citizens Advice Bureau in respect of time limits.

19. The case of ***Marks*** should also be viewed in light of the test applied by the Court of Appeal in such cases, namely that a decision of the Tribunal will only be interfered with if it is 'perverse'. This is clearly a very high threshold. The Court of Appeal in ***Marks*** acknowledged that the findings were, "generous...but they were not outside the ambit of conclusions that the tribunal could properly reach on all the facts before them."

20. It is not accepted that ***Marks*** is an authority which should be relied upon by the Tribunal in order to grant the Claimant's application in this case.

CONCLUSION

21. The Claimant has submitted that by taking advice from an accountant and waiting for a response without taking any steps himself, he did everything that was reasonable in the circumstances. Submissions are also made in respect of what it was reasonable to expect Mr Crudden to have done in the circumstances. This is not the test which the Tribunal must apply.

22. It is submitted that it was reasonably practicable for the Claimant to submit his claim form on time. The Claimant's failure to be pro-active in discovering the time limit either by himself or by seeking appropriate professional advice i.e. from a legally qualified person and not an accountant, led to his claim form being submitted late. This is not a case in which the legal test for extension of time is met and it is submitted that the Tribunal should decline jurisdiction in

respect of the late claims. It is accepted that the Claimant's claim for statutory redundancy pay is in time and will proceed.

Bobbie-Leigh Herdman
Bar Library
2nd November 2017

INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS (NORTHERN IRELAND) 2005

BETWEEN

JAMES RICHARD MCGERRIGLE

CLAIMANT

and

ROBERT BARNETT
ELIZABETH BARNETT
MARK BARNETT
WENDY BARNETT

RESPONDENTS

FURTHER SUBMISSIONS ON BEHALF OF THE CLAIMANT FOLLOWING A PRE HEARING REVIEW ON 20.10.17

HEADS OF CLAIM/TIME LIMITS

1. This submission is prepared on behalf of the Claimant following a pre hearing review on the 20th October 2017.

2. For clarity, this is a claim for unfair dismissal, failure to provide statutory terms and conditions of service, failure to provide pay slips, failure to pay holiday pay, failure to pay notice pay, failure to pay statutory redundancy payment.

3. Save for the failure to pay statutory redundancy payment, all heads of claim have a 3month time limit. The time limit for failure to pay statutory redundancy payment is 6months.

4. As a result, the Claimant accepts that his claim for unfair dismissal, failure to provide statutory terms and conditions of service, failure to provide pay slips, failure to pay holiday pay and failure to pay notice pay are out of time. However, the Claimant argues that it was not reasonably practicable for him to lodge such claims on time as a result of the reasons advanced at the pre hearing review, in the Claimant's written submission and as outlined below.

5. On the other hand, it is respectfully submitted that the Claimant's claim for failure to pay statutory redundancy payment is in time as his claim was lodged on the 19th May 2017.

ADDITIONAL ISSUES ARISING FROM PRE-HEARING REVIEW

6. Following the pre hearing review before Judge Wimpress, the Claimant wishes to reiterate the following points:

a. It was not reasonable for the Claimant's accountant to be aware of the 3month time limit. He had never dealt with an Employment Tribunal before and had received no legal training. Any delay on the part of the accountant can be attributed to the fact that he had suffered a family bereavement and/or was on annual leave.

b. As soon as Mrs McGerrigle became aware that their accountant had suffered a bereavement, she immediately took steps to contact the Tribunal and receive the relevant paperwork. Mrs McGerrigle became aware of the existence of the Tribunal following a conversation with a member of staff from Crudden Dolan Ltd. This conversation took place at some point after the death of their accountant's brother on the 5th May 2017.

c. It is unlikely that Mr McGerrigle would have a remedy against his accountant. Indeed, the accountant did not hold himself out to have any specialist knowledge in employment law and did not misled the Claimant in anyway. This is not a case where the Claimant was wrongly advised by his legal adviser.

d. For accountancy purposes, the Claimant was initially designated as self-employed. It was not until his accountant asked questions about this that it became clear that the Claimant was not self- employed. It was not until this point that the Claimant became aware that he might have employment rights.

e. It is highly relevant that the Claimant is a farm labourer from Strabane. He has limited IT skills and has never been involved in any kind of legal proceedings. This should be taken into consideration when considering whether it was reasonably practicable for the Claimant to lodge his claim on time.

f. It is accepted that each case like this must be decided on the specific facts on the case. That being said, the ***Marks & Spencer*** case referred to at the pre hearing review demonstrates that there is room for the Tribunal to demonstrate generosity in this regard. In my respectful submission, this is a case where generosity should be shown.

CONCLUSION

7. In conclusion, with regards to the claims which are out of time, it is my respectful submission that (i) it was not reasonably practicable for the Claimant to lodge such claims on time (ii) as soon as the Claimant became aware of the 3month deadline, he lodged his claims within a reasonable period.

8. Accordingly, in the circumstances, the Claimant respectfully asks the Tribunal to extend time for all claims with a 3month time limit, and accordingly allow <u>all</u> claims to proceed to a substantive hearing before a Tribunal.

Emma McIlveen
Barrister at Law
29 October 2017