EMPLOYMENT TRIBUNALS

Claimant: **Mrs Elizabeth Potts**

Respondent: **Tarmac Trading Ltd**

RECORD OF A PRELIMINARY HEARING

Heard at: Midlands West (in public - by video link) **On:** 14 April 2023

Before: **Employment Judge R S Drake**
Appearances
For the Claimant: Mr K Holt
For the Respondent: Mr D Stokes (Solicitor)

JUDGMENT ON PRELIMINARY ISSUES

1 The title of the Respondent is amended to describe them as Tarmac Trading Ltd.

2 the unfair dismissal claim following termination of employment on grounds of redundancy on 27 November 2020, having been presented on 20 May 2020, is out of time by 83 days uninterrupted by Early Conciliation which took place 20 May 2021 thus causing the expiry date for issuing proceedings to be 26 February 2021 (the ”Primary Period”).

3 The Claimant has not established it was not reasonably practicable for her to issue her unfair dismissal claim in time or that she issued within a reasonable time after expiry of the Primary period. The unfair dismissal claim is therefore dismissed for want of jurisdiction and the Tribunal may not hear it.

4 The age discrimination claim, based on the last date of any act alleged to be discriminatory, namely the date of termination of employment, was also presented at the same time as the unfair dismissal claim and is thus also out of time.

5 The Claimant has not established that she commenced the discrimination claim within such further period of time as the Tribunal can find just and equitable. Therefore it is also dismissed for want of jurisdiction and the Tribunal may not hear it.

6 The claims of breach of contract and unlawful withholding of pay are dismissed on withdrawal as the Claimant accepts that since presenting these claims the sums claimed have been discharged.

REASONS

1. I noted that this hearing was listed to consider preliminary issues as to jurisdiction as specified by the notice of postponement of a preliminary hearing originally constituted to consider case management. The claims relate to dismissal of the Claimant on grounds of redundancy which took effect on 27 November 2020. She alleges that the dismissal was unfair and was caused by her age – she was 65 at that time. The Respondents assert that the claim was issued outside of the time limits specified by Section 111(2) of the Employment Rights Act 1996 ("ERA") and Section 123(1) of the Equality Act 2010 (EqA") respectively. Both statutory bases specify a period of three months from the date of dismissal or last act of discrimination as a "Primary Period" for issuing such claims. They argue that the Claimant cannot show it was not reasonably practicable to present her unfair dismissal claim within the Primary Period, and nor that she issued within a time the Tribunal could find reasonable thereafter. Further they assert in respect of the age discrimination claim that it is also out of time and was not issued within such further period after the Primary Period as the Tribunal can find just and equitable.

2. I heard extensive oral evidence given in affirmed testimony by the Claimant. She was cross examined by Mr Stokes, responded to questions from me, and then clarified some of her answers when in effect re-examined by her friend Mr Holt who acted for her from the start of these claims, he being named as such in her ET1 claim form. I considered this evidence which included detailed reference to documents in a bundle prepared by the Respondents comprising 151 pages (to which I refer below as "RP1 – 151"), a separate bundle prepared for the Claimant comprising 26 documents (referred to below as "AP1-16") and hearing submissions from both representatives. After reflection I gave my decision in short form, but reserved full reasons to this written version of the Judgement and Reasons which takes precedence over the oral version.

3. The burden of proving in an unfair dismissal claim that it was not reasonably practicable to present a claim in time is a high threshold and rests firmly on the Claimant. The authority for this point is found in the Court of Appeal's decision in **Porter v Bandridge Ltd [1978] ICR 943**). In discrimination claims, the burden is just as high and also rests with the Claimant according again to the Court of Appeal's decision this time in **Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23**

4. I have concluded that I do not find that the Claimant's arguments are sufficiently persuasive to discharge the onus upon her as set out by the law outlined below, but that indeed the Respondent's arguments in response are more than persuasive and are compelling to the extent that I find myself bound by the Court of Appeal's decision in **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379**

Facts

5. I find the following: -

   5.1 The Claimant was furloughed during the Covid19 Lockdown from 1 April 2020 and later forewarned about the possibility of redundancy dismissal as long ago as 20 October 2020 when called by her immediate superior Mr Shuttlewood. There followed an "at risk" meeting the next day which led to further discussions and eventually to

termination of employment with effect from 27 November 2020. During this time, the Claimant sought advice from ACAS. RP14-21 refer;

5.2 The Claimant says ACAS were not helpful and never advised her about time limits for presenting of claims and she was not seeking advice on this nor specifically looking for such an issue. This is not a justifying explanation nor a good one because the evidence shows that at various points of access to ACAS, ET and HMG website materials online to which the Claimant was capable of gaining and to which she admitted she did gain access amongst other areas, there is frequent reference to time limits for presenting claims. RP69-132 refer, especially RP76, 79-80, 96-97, 119, 122, and 129;

5.3 The Claimant appealed her dismissal which led to an appeal meeting and its conclusion on 7 January 2021;

5.4 The last day for presenting any of her claims was 26 February 2021 given that the effective date of termination of employment was 27 November 2020. The Claimant says she had not been seeking specific advice on time limits on the basis that "it was not what I was looking for" but she does argues that she spent her time "soul-searching" whilst also caring for a seriously ill partner. I can accept that this is what she says but no evidence of this was put before me to corroborate this account despite the high burden of proof the Claimant faces. The claims were presented fully 83 days out of time.

5.5 Throughout the period immediately preceding dismissal and presentation of the claims, the Claimant sought and took advice and was represented by a perspicacious and supportive friend in Mr Holt who has some experience of Tribunal proceedings according to him. She has not pleaded that any unlawful act followed her dismissal and she does not plead that the appeal process was defective, but even of it were, if the promulgation of the appeal outcome were the starting date for the Primary period, the claims are still extensively out of time in relation thereto;

5.6 The Claimant cannot argue or establish that ignorance of time limits accounts for delay or justifies it. In the absence of medical or similar evidence, she has not established in her testimony that she suffered any form of physical, mental or practical impairment restricting her ability to pursue claims. Moreover, she has not argued nor established that the Respondents caused or contributed to her delay by any means whatsoever;

5.7 RP68 establishes that the Claimant was consulting ACAS as early as 27 October 2020. This led to the trail of materials she accessed or could gain access to from RP69 to 132; She was not ignorant of time limits or at worst she was fixed with knowledge of them by the serial references to time limits noted above;

5.8 It is not clear from her testimony why when advised by ACAS specifically about time limits on 11 March 2021 the Claimant did not immediately commence Early Conciliation nor present her claims. She waited fully 70 days before issuing and her explanation is unclear and not sufficiently weighty to discharge the burden of proof. I note that in any event by 11 March 2021, she was already out of time;

5.9 The Claimant is a sophisticated intelligent person and she faced no physical or medical barriers (such as, non-exhaustively, hospitalised absence from normal life) to issuing her claims and certainly nothing put in his way imposed upon him by the Respondents so as to prevent her being able to take advice and act upon it within due time;

5.10 If the claims proceeded, the Respondent would have to call many witnesses and require them to recall events and oral statements after a long passage of time in relation to the matters complained of, and would face greater difficulty in defending the Claimant's testimony than the Claimant herself would face if the claims proceeded;

The Law

S.111 ERA provides as follows:

> *(1) An employee may present a complaint to an Employment Tribunal that he/she was unfairly dismissed;*
>
> *(2) An Employment Tribunal* **shall not** *(my emphasis) consider a complaint under this section unless it is presented—*
>
> > *(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.*

6. Section 123 EqA provides that:-

(1) *Proceedings on a complaint …(of unlawful discrimination) … may not be brought after the end of -*

(a) the period of 3 months starting with he date of the act to which the complaint relates - or

(b) such other period as the employment tribunal thinks just and equitable.

7. The burden of proving that it was not reasonably practicable to present a claim in time is a high threshold and rests firmly on the Claimant **Porter v Bandridge Ltd [1978] ICR 943**).

9. In **Palmer v Southend BC [1984] ICR 472** the Court of Appeal held that I am to consider the substantial cause (if shown) of the Claimant's failure to issue within the Primary Period, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of her right to issue a claim, whether the Respondent had done anything to mislead or impede the Claimant issuing her claim, whether the Claimant had access to advice (my emphasis) and lastly whether delay was in anyway attributable to that advice. The Court of Appeal also held that "reasonably practicable" does not mean reasonable, and does not mean physically possible, but means something like "reasonably feasible". This is later elaborated by the EAT in **Asda Stores Plc v Kauser [2007] EAT 0165/07** by saying "the relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found, it was reasonable to expect that which was possible to have been done".

10. I accept that it is trite law that where a Claimant is misadvised on limitation by a skilled advisor, the Claimant will be fixed with his advisor's default. As Lord Denning expressed in **Dedman v British Building and Engineering Appliances Ltd [1974]**

ICR 53 at para 18, (authoritatively approved most recently as a proposition of law by Lord Phillips MR in **Marks & Spencer Plc v Williams-Ryan [2005] ICR1293** with my emphasis added):

*" … **What is the position if (s)he goes to skilled advisers and they make a mistake? The English Court has taken the view that the man/woman must abide by their mistake**. There was a case where a person was dismissed and went to their **trade association** for advice. They acted on that person's behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was 'practicable' for it to have been posted in time. He was not entitled to the benefit of the escape clause.* [*See* **Hammond v Haigh Castle & Co Ltd [1973] IRLR 91**]. *I think that was right. **If a person engages skilled advisers to act for or advise them – and they mistake the time limit and it is presented too late – he/she is out. His/her remedy is against them** … "*

11. I am aware of the following paragraph from **Williams-Ryan**, where at Paragraph 47, Lord Justice Keene said (again emphasis added) referring to the CAB but which I infer could just as appropriately be said of Unison in the present case:

" … *I would emphasise the importance of recognising that this is not a case … where the employee received advice from the CAB to await the outcome of the internal appeal procedures before making a complaint to an Employment Tribunal. The Employment Tribunal, in its Extended Reasons, records that in the short telephone conversation Ms Williams-Ryan had with someone at the CAB, there was, so far as she could remember, no discussion about taking a complaint to an Employment Tribunal. Nor does one know what questions the CAB staff member was asked during the course of that conversation. **This, therefore, is not one of those cases where an employee has been wrongly advised by a skilled adviser, nor one where it seems likely that the employee had a remedy against that adviser**".

12. By contrast, Claimant in the present case was advised at a relevant time, i.e. on 9 August 2018. **Williams-Ryan** does not therefore support the Claimant's arguments that it was not reasonably practicable to advance his claim in time. If the Claimant was wrongly advised by ACAS, then his claim rests there in the words of Denning MR in **Dedman**.

13. In respect of the discrimination claim, I am further guided by case law listed below:

13.1 **British Coal v Keeble [1997] IRLR 336** from which I note inter alia that I am to consider the length and reasons given for delay, the extent to which delay may affect cogency and recollection of evidence, any promptness of action by the Claimant once, after the Primary Period had expired, she became aware of the alleged facts which gave rise to his cause of action, the steps she took once she knew of the possibility of taking action, and lastly the balance of prejudice to the Claimant of not allowing the claim to proceed and to the Respondent in allowing it to do so;

13.2 **Robertson v Bexley Community Centre [2003] IRLR 434** from which I note that application of S123(1)(b) EqA involves the exercise of a discretion which is an exception rather than the rule; this point is augmented by the EAT's decision in **Simms v Transco [2001] All ER 245** which is authority for the proposition that whilst the fact a fair trial is impossible will most likely preclude extension of time, it does not follow that merely because a fair trial is still possible time should be extended – each case is fact specific; In short the guidance in **Bexley** incudes the point that time limits are to

be construed strictly and there is no presumption in favour of extension. However, it is argued by the Claimant that this does not mean he has always to advance a good reason for delay or that time cannot be extended in the absence of an explanation; this latter point is reinforced by supporting findings by the CA in **Abertawe Local Health Board v Morgan [2018] EWCA Civ 640.**

13.3 In **Adedeji** (referred to above) the CA also held that the factors " … almost always relevant to consider when exercising discretion are (a) length of and reasons for delay and (b) whether the delay has prejudiced the Respondent by for example preventing or inhibiting it from investigating the claim while matters were afresh … " (my emphasis showing that it is both length and reasons for delay construed together, not disjunctively);

Conclusions

14. The Effective Date of termination of employment and thus the starting point for the running of time for the purposes of both was 27 November 2020. This is common ground for both parties. The Primary Time Limit expired 26 February 2021 and could not be in this case by Early Conciliation sought via ACAS which post-dated expiry of the Primary Period.

15. Further, I find that an unexplained or at best an unsatisfactorily explained delay occurred after the 11 March 2021, let alone 26 February 2021, or 7 January 2021 or 27 November 2020. All the Claimant can say is that she did not look for and examine the advice which is clearly available in all the materials to which she had access on the subject of time limits. I do not find that this was a case of being incorrectly advised but that even if it were, that this would be a fact making no difference given the strict approach to this point as advised in **Dedman.**

16. There is no other explanation given by the Claimant and no change in circumstance which made ability to take action, advice, and act for herself into an inability to do so such that it was not reasonably feasible to issue proceedings before 20 May 2021. She relied on what was available form ACAS and other similar sources such as CAB and HMG. She relied on support of a willing and experienced friend in Mr Holt. She has to live with that fact and accept the consequences. No evidence is available to show that a delay beyond 26 February 2021 meant that issuing on 20 May 2021 was within a reasonable time thereafter.

17. The case of **Willams-Ryan** supports the Respondents' arguments today: that the Claimant had a skilled adviser and that it was therefore reasonably practicable for her to lodge her claims in time. Though the Claimant in **Williams-Ryan** (where she had CAB advisors) succeeded, the facts in that case are clearly distinguishable from the present case (Unison). In any event I am still bound by **Dedman** on ordinary principles of the law of precedent.

18. The Claimant's domestic distress causing a diversion of attention from the time limits is not supported by evidence and is therefore also insufficient to render it possible to find that it was not reasonably practicable for her to have lodged his claim in time. She is further handicapped in this respect by an absence of cogent medical evidence.

19. I judge the balance of prejudice to favour the Respondents as is clear from my factual finding above.

20. In the unfair dismissal claim, the Claimant faces the burden of proof and she must (1) prove to the Tribunal that it was not reasonably practicable for her to have brought her claim in time; and (2) persuade the Tribunal that there are exceptional reasons justifying the extension of the time limit for bringing the claims. I find there is no valid basis for the Tribunal to accede to any of these applications for the reasons given above having taken all evidence and submissions into account.

21. In the age discrimination claim, the Claimant faces the burden of establishing that she presented her claim within a further period of time which I can find just and equitable. In considering all the evidence I have to fins she fails to discharge that burden.

22. The claims are time-barred and in the absence of a basis to establish a S111(2) ERA and S123(1) EqA argument, they are therefore struck out for want of jurisdiction.

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Employment Judge R S Drake

Signed 14 April 2023

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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