EMPLOYMENT TRIBUNALS

Claimant: **Mrs Margaret Hanson**

Respondent: **Turning Point**
(Registered Charity & Company Limited by Guarantee)

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (in public - by video link) **On:** 11 April 2024

Before: **Employment Judge R S Drake**
Appearances
For the Claimant: Ms C Isaac
For the Respondent: Mr R Mitchell (Solicitor)

JUDGMENT ON PRELIMINARY ISSUES

1 The title of the Respondent is amended to describe them as Turning Point.

2 The unfair dismissal claim is out of time for the purposes of section 111(2) of the Employment Rights Act 1996 ("ERA") following termination of employment on grounds relating to conduct on 14 July 2023. The ET1 was presented on 13 November 2023, and is out of time by 2 days, Early Conciliation having commenced on 26 September 2023 and having ended on 11 October 2023. This extended the expiry date for issuing proceedings to 11 November 2023 (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.

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 summary dismissal of the Claimant on grounds relating to conduct (alleged gross misconduct) which took effect on 14 July 2023. She alleges that the dismissal was unfair pure and simple. The Respondents assert that the claim was issued outside of the time limits specified by Section 111(2) ERA. This statutory basis specifies a period of three months from the date of dismissal 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.

2. I heard extensive oral evidence given in affirmed testimony by the Claimant. She was cross examined by Mr Mitchell, responded to questions from me, and then clarified some of her answers when in effect re-examined by her friend Ms Isaac who represented her with great competence and sympathy, and who acted for her from the start of this claim, being named as such in the ET1 claim form. The Claimant accepted that she had spoken to and nominated Ms Isaac long before the presentation of her claim and indeed at the time when she consulted ACAS during the Early Consideration process. 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"), 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**).

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** . Thus, I have no alternative but to dismiss the claim.

Facts

5. I find the following: -

   5.1 The Claimant ("C") started employment with the Respondent ("R") at its Wakefield operation on 14 June 2021 as a trainee Cognitive Behavioural Therapist; Her employment was summarily terminated by R on 14 July 2023 on grounds of alleged gross misconduct – for the purposes of this Preliminary Hearing the merits or otherwise of this are not examined; I do however note that if the matter were to have proceeded beyond today, both sides take issue with each other as to the cause of the alleged misconduct and its effect; Suffice to note here is that it is common ground and accepted that the Effective Date of Termination of C's employment was 14 July 2023;

   5.2 The ACAS EC Certificate (RP1) establishes that C approached ACAS on 26 September 2023 and they issued their certificate of completion of the Early Conciliation process on 11 October 2023; C said in evidence that she took advice from ACAS about how to and when to issue a claim and during this period she also nominated and in effect instructed a friend Ms Isaac to represent her;

5.3 C also accepted in evidence that she had attended an Investigative Meeting representing herself on 20 April 2023, that she attended representing herself again a Disciplinary Hearing on 29 June 2023 and resumed on 14 July 2023, and lastly that she lodged an Appeal and attended a Hearing on 17 August 2023; She does not appear to argue any debility preventing her from representing herself or making representations of any kind and preparing for these meetings;

5.4 C says and I accept that in January, she was diagnosed as suffering an eye complaint which affected her vision and for which her medical advisors could not offer an immediate solution but advised her to avoid stress in the hope that the condition would resolve – I am pleased to note that it did resolve by the end of 2023; The condition had not required and was not subject to any other formal medical intervention or treatment, but I recognise it was distressing for C; There is however no evidence before me to show independently that the eye condition caused any kind of meaningful debility which had the effect of preventing C from addressing attention to and completing her ET1 (PP2-13), and indeed I find quite the contrary;

5.5 C accepted in evidence that she acted as representative of several friends who together incorporated a company by which they seek to trade/practice and that C acted as the main point of contact dealing with the complex process of making an application to Companies House (PP93-95) to register/incorporate a CIC, a corporate body not common compared with companies limited by shares of guarantee; I know this to be not a simple process;

5.6 The primary limitation period having expired on the 11th November 2023, on her own evidence C was prevailed upon by her partner to get on with the task which he had already begun but not completed and to complete and file her ET1, which she did 13 November 2023, and thus 2 days out of time; She had been able to address her mind to the commencement of drafting her ET1, but says that the stress she was facing at the time because of her eye condition and because she was awaiting the outcome of negotiations for settlement through ACAS, despite being able to deal with the process of incorporating a company, she was not able to complete the process of lodging an ET; I cannot find this explanation satisfactory;

5.7 C had access at all relevant times to advise from ACAS and from her current representative; I accept it on the evidence she accepts that she was under a duty to launch her claim by 11 November 2023; She merely argues that her physical and mental condition militated against her being able to complete and lodge the form in time, but in the light of the evidence of what she was able to do, what access she had to advice, and the fact that she was ultimately able to lodge her ET1, I find that there was nothing of any kind whatsoever which was sufficiently serious to amount to a debility preventing presentation of the claim in time.

5.8 C presents to me as a sophisticated intelligent person and she faced no physical or medical barriers (such as, non-exhaustively, hospitalised absence from normal life) to issuing her claim and certainly nothing put in her way by R so as to prevent her being able to take advice and act upon it within due time;

5.9 If the claims proceeded, R 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

6. 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.*

.

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**). The Claimant's burden is "to show precisely why it was that she did not present her complaint" and why it was both out of time and not reasonably practicable to present it in time. If the Claimant is unable to establish that it was not reasonably practicable to present the claim in time the tribunal will (my emphasis) find that it was reasonably practicable – **Sterling v United Learning Trust {2014] EAT 0439**.

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 again) 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" (my emphasis).

10. I accept that it is trite law that where a Claimant is misadvised on limitation by a skilled advisor (such as ACAS), 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 ACAS 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. well before 11 November 2023. **Williams-Ryan** does not therefore support the Claimant's arguments that it was not reasonably practicable to advance her claim in time. If the Claimant was wrongly advised by ACAS, then his claim rests there in the words of Denning MR in **Dedman**.

Conclusions

13. The Effective Date of termination of employment and thus the starting point for the running of time for the purposes of both was 14 July 2023. This is common ground for both parties. The Primary Time Limit (extended by ACAS consultation) expired 11 November 2023.

14. Further, I find that an unexplained or at best an unsatisfactorily explained delay occurred. 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.**

15. 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 or by 11 November 2023. She relied on advice available from ACAS and other similar sources such as CAB and HMG. She relied on support of a willing and experienced friend in Ms Isaac. She has to live with that fact and accept the consequences.

16. 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 (ACAS). In any event I am still bound by **Dedman** on ordinary principles of the law of precedent.

17. The Claimant's domestic ill health and stress related 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.

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

19. 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.

20. The claim is time-barred and in the absence of a basis to establish a S111(2) ERA argument, it is and has to be therefore struck out for want of jurisdiction.

Employment Judge R S Drake

Date: 13 April 2024