THE EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

Claimant: **Miss W Suddes**

Respondent: **The British Horse Society**

Heard at: **Teesside Justice Hearing Centre** **On:** **Tuesday 19th February 2019**

Before: **Employment Judge Johnson**

Members:

Representation:

Claimant: **In Person**
Respondent: **Miss R Mathieson Solicitor**

JUDGMENT ON PRELIMINARY ISSUE

The claimant's complaint of unfair dismissal was not presented to the Employment Tribunal within the period of three months commencing with the effected date of termination of the claimant's employment. The Employment Tribunal is not satisfied that it was not reasonably practicable for the complaints to have been presented within that three-month time limit. The complaint is out of time. The Employment Tribunal does not have jurisdiction to hear that complaint. The complaint of unfair dismissal is dismissed.

REASONS

1. This matter came before me this afternoon by way of a public preliminary hearing to consider whether the Employment Tribunal has jurisdiction to hear the claim of unfair dismissal, which had been presented to the Employment Tribunal after the expiration of the three-month time limit applicable to such a complaint. The claimant attended in person and gave evidence herself. She also called to give evidence her friend Doctor Nicola Mason. The respondent was represented by

Miss Mathieson, Solicitor, who did not call any witness evidence, but did cross-examine the claimant and Doctor Mason.

2. The claimant had prepared a detailed witness statement and supporting bundle of documents, having been ordered to do so at an earlier private preliminary hearing which took place on 9th January 2019. Included in the bundle was a letter dated 28th January 2019 from Doctor Mason, which the Tribunal accepted as her witness statement. Part of the way through today's hearing, the claimant asked whether her sister (whom she described as a mental health nurse) could give evidence of her opinion as to the impact on the claimant's health and well-being as a result of the respondent's treatment of the claimant. From what the claimant told me, I was satisfied that the claimant's sister would be giving what was tantamount to expert evidence, in respect of which no prior notice had been given to the Tribunal or the respondent and in respect of which no permission had been given. No statement had been prepared for or on behalf of the claimant's sister. I was not satisfied that it would be appropriate to permit the claimant's sister to give evidence in those circumstances.

3. The undisputed chronology of the relevant facts in this case is as follows:-

29th March 2018	Claimant visits her GP, suffering from stress. She was prescribed beater blockers and given relaxation exercises.
29th May 2018	Claimant visits GP and is given a sick note from 29th May to 25th June for stress at work.
31st May 2018	Disciplinary hearing at which claimant is dismissed
21st June 2018	Letter from claimant's solicitor to respondent appealing against her dismissal
28th June 2018	Claimant issued with a sick note until 24th July 2018 because of stress
26th July 2018	Claimant's appeal against dismissal is heard
14th August 2018	Claimant commences ACAS early conciliation
17th August 2018	Letter from respondent to claimant confirming her appeal was dismissed
14th September 2018	ACAS early conciliation certificate
17th September 2018	Claimant's letter to ACAS "I will wait until the end of the month before submitting my application"
20th September 2018	Letter ACAS to claimant "I will therefore close your case. If you decide to proceed to an employment

	tribunal I will be allocated your case and I will contact you again."
5th October 2018	Letter claimant to ACAS "I just want to check what the deadline is for me to submit my application to tribunal"
5th October 2018	Letter ACAS to claimant "I cannot give a precise deadline when your claim has to be submitted by – please see the link below for further information"
14th October 2018	Date by which claim from should have been presented to the employment tribunal
15th October 2018	Claimant submits claim form ET1 to employment tribunal
20th October 2018	Date by which the claimant says she believed she had to submit her claim form to the Employment Tribunal
28th November 2018	Claimant attends GP suffering from abdominal pains and saying she was "significantly stressed"

4. It is common ground that taking into account the ACAS early conciliation procedure, the last date by which the claimant ought to have submitted her claim form to the Employment Tribunal was 14th October 2018. The claim form was therefore presented one day out of time. Miss Mathieson for the respondent quite properly conceded that, were the Tribunal to find that it was not reasonably practicable for the claim form to have been presented within the three month time limit, then presenting it one day thereafter would amount to presentation within a reasonable period of time thereafter. Accordingly, the only issue to be decided by the Tribunal today was whether or not it was reasonably practicable for the claim form to have been presented within the three-month time limit.

5. The claimant's witness statement runs to eleven pages. Unfortunately, much of the statement deals with the nature of the dispute between the claimant and the respondent, including allegations of harassment by the respondent's HR department, the conduct of the investigation into the allegations against the claimant, and ultimately the disciplinary process which led to her dismissal. It is abundantly clear to me that the claimant genuinely believes that she is the victim of a grave injustice at the hands of the respondent and that their treatment of her has caused enormous frustration, stress and upset. The claimant's case before me today is that, as a result of the respondent's treatment of her, she became so stressed and anxious that she was unable to cope with the process of commencing Employment Tribunal proceedings within the appropriate time limit. The claimant further alleges that, because of her stress and anxiety, she mistakenly believed that the deadline for the presentation of her claim form was 20th October, being one month after the letter from ACAS dated 20th September stating, "I will therefore close your case. If you decide to proceed to an employment tribunal I will reallocate your case and I will contact you again.". I took time to carefully explain to the claimant that she has the burden of proving on the

balance of probabilities, that it was not reasonably practicable for the claim form to have been presented within the three-month time limit, which expired on 14th October 2018. It would therefore be for the claimant to satisfy the Tribunal that any alleged medical impairment was such that it made it not reasonably practicable for the claim form to be presented in time. Accordingly, the actual symptoms of any condition and their impact upon her ability to present the claim form within the time limit were likely to be more important than the cause of those symptoms.

6. The claimant accepts that throughout the relevant period she not only had access to a solicitor, but engaged a solicitor to act on her behalf. The claimant's evidence to me was that she has incurred legal costs of £14,000, with little if anything to show for that expenditure. The claimant accepted that she has been in regular contact with ACAS throughout the relevant period. The claimant accepted that she had access to the Employment Tribunal website and the ACAS website, both of which supplied information about the calculation of the appropriate time limits for claims such as the claimant's. It is not, and never has been part of, the claimant's case that she was unaware of the three-month time limit for presenting a complaint of unfair dismissal. The claimant further accepts that nothing done by the respondent, either deliberately, recklessly or negligently, has impacted upon her ability to present her claim form in the time limit. Whilst the claimant maintains that the respondent, by its conduct over many months, has caused a deterioration in her mental wellbeing, the claimant accepts that there is no particular act or omission by the respondent since her dismissal on 31st May 2018 which has impacted upon her ability to present the claim form in time.

7. The claimant's evidence to the Tribunal about her deteriorating mental wellbeing was that since she first made a protected disclosure in February 2017, the respondent's "constant barrage has cumulatively served to completely undermine my confidence and continues to place me under enormous stress. As a result I have sought advice and help and received medication.". In January 2018 the claimant underwent knee surgery which was followed by a prolonged period of recuperation, but which the claimant accepts did not impact upon her ability to commence these Employment Tribunal proceedings. She does say that in February 2018 and whilst on sick leave, she received a letter from the respondent's HR director telling her that she was suspended pending an investigation into her conduct. The claimant says, "at this very low point I felt my mental health was affected and couldn't cope alone any longer, with dealing with all of the trouble coming out from work.". Later in February 2018, the claimant also received an indication that the girl whom the claimant had recruited to assist her in riding her horses may be issuing court proceedings for negligence, following an injury sustained by that girl in a fall. That further increased the claimant's level of worry and stress. In March 2018, the claimant was interviewed by a barrister instructed by the respondent, following her whistleblowing allegations. The claimant describes the process leading up to the investigation as "highly disturbing to me and I started to feel anxious and panicky as it all seemed totally out of proportion.". The suspension was lifted in April 2018 which the claimant described as, "This was a huge relief as I was barely sleeping, suffering from severe headaches and some terrible migraines, feeling constantly anxious and experiencing waves of panic, usually at completely unexpected times and over

what would normally be trivial matters to be.". The claimant generally described this period as "a particularly stressful time for me".

8. On 15th May 2018, the claimant was informed that she would be subject to formal disciplinary action which could lead to her dismissal. Her witness statement states:-

> "I became highly distressed at this point. I could not understand at all why they were accusing me and went into a melt-down. I couldn't function at all, didn't want to see or speak to anyone, stopped eating and felt abject despair. My sister, who is a mental health nurse intervened on my behalf and informed HR on 29th May that I was ill. My GP then signed me off with stress at work for four weeks. I received some medication at this time which helped a little. However my mental state did not improve significantly and I received a further four weeks.".

9. The claimant informed the respondent that she was not fit to attend the disciplinary hearing, but despite that, the hearing went ahead on the 31st May in the claimant's absence and at the end of the hearing the claimant was dismissed.

10. The claimant then instructed Womble Bond Dickinson, solicitors of Southampton, to represent her in her appeal. Their detailed letter of appeal dated 21st June 2018 appears as document 9 in the bundles. The letter comprises three closely typed pages of A4 paper, setting out in detail the nature of the claimant's whistleblowing allegation and the grounds for her appeal. There are nine separate grounds of appeal set out on the final page of the letter. It is clear from the letter that the claimant was able to give detailed and meaningful instructions to her solicitors about the entire process. The claimant then attended the appeal hearing on 26th July and thereafter received, checked and amended the minutes of that meeting, before returning them to the respondent on 5th August.

11. The Tribunal was satisfied that the claimant was at this time capable of engaging with her solicitors and providing them with meaningful instructions about her claim, the disciplinary process and the appeal process. The claimant accepted in cross-examination that she had already decided to commence Employment Tribunal proceedings if the appeal did not lead to her reinstatement. With that in mind, the claimant commenced ACAS early conciliation on 14th August, even though she had not by then received the outcome of her appeal. That outcome was received on 17th August.

12. The claimant then entered into negotiations via ACAS and made settlement offers via her solicitors. In her "Timeline" document, which is attached to her claim form ET1, the claimant states that on the 13th September 2018 "with no response from the respondent my conciliator sends a reminder. On 14th September 2018 my early conciliation certificate is issued.".

13. The Tribunal found that the claimant was capable of entering into meaningful negotiations with the respondent via both her lawyers and ACAS throughout this period of time.

14. In her witness statement the claimant states:-

> "At the end of June 2018 I received my DSAR information (requested in preparation for a tribunal). I did not open the box for nearly several weeks as the fatigue and emotional distress I felt was immense. I was very unwell at this time and continued lack of sleep meant that a debilitating headache was a daily occurrence. When I eventually opened the DSAR box in early August 2018, I found a chaotic mix of documents in no particular order, with many duplicates and pages of documents split up at random. This made it very difficult indeed to identify important documents."

The claimant accepted in cross examination that she was able to sort out the documents in the boxes and was able to extract from them examples which were referred to in her "Timeline" claim form.

15. By mid September 2018, the claimant was still hopeful of reaching a negotiated settlement from the respondent via ACAS or her lawyer. That is clear from her letter to ACAS dated 17th September at document 15 in the bundle. However, on 19th September, the claimant's father collapsed and was hospitalised. He required to have a pacemaker fitted and was in hospital for approximately seven days. The claimant's evidence was that this further added to her stress and anxiety at that time.

16. The claimant had said in her letter to ACAS on 17th September that she would "wait until the end of the month before submitting my application". In the same letter she states, "I sadly believe I have no choice now but proceed to industrial tribunal hoping that the truth will come out and justice will prevail.".

17. On 5th October, the claimant sent a further e-mail to ACAS stating, "I just want to check what the deadline is for me to submit my application to tribunal". ACAS replied the same day stating, "I cannot give a precise deadline as to when your claim has to be submitted by – please see the link below for further information.". The link provided was to the Citizens Advice Bureau website, which contains information about Employment Tribunal time limits.

18. The claimant completed the claim form ET1 together with the "Timeine" document, which itself comprises 11 sides of A4 paper. In answering questions from myself, the claimant readily accepted that the claim form ET1 is not a difficult document to complete and she further accepted that she was able to do so without any difficulty. I am satisfied that throughout the relevant period the claimant was perfectly capable of completing the appropriate claim form ET1.

19. In her evidence to the Tribunal, the claimant said that she genuinely believed that the deadline for presenting the claim form was 20th October, that being a date one month after the last letter from ACAS. The claimant was unable to give any meaningful explanation as to how she could have arrived at that conclusion. She had never been told that by ACAS or anyone else. The claimant could have checked with her solicitors at any time as to the correct deadline. In fact she did so on the 15th October, and was told by her solicitors that they believed the claim

was already out of time. I do not accept that it was reasonable for the claimant to come to the conclusion that she had until 20th October in which to present the claim form. I do not accept that any such conclusion which may have been reached by the claimant was in any way related to the stress and anxiety which she was undoubtedly faced with at the time. The early conciliation certificate is dated 14th September and the one-month period would therefore run from that date and would expire on 14th October. The client has not said in her evidence that she mistook the date on the early conciliation certificate for the date on the letter from ACAS.

20. The claimant's GP provided a letter dated 24th January 2019, which appears in the bundle. It states as follows:-

> "I can confirm that Wendy presented to a GP colleague of mine on 29th March 2018. Wendy was extremely stressed. She stated she had blown the whistle on bad practices at work over a year ago. She stated to the GP that the CEO had been trying to get rid of her since and now there is an external investigation going on and it should be resolved in six weeks. She told the GP she had been suspended from work via disciplinary procedure as a result of this. She told the GP she had a solicitor and there would be multiple meetings in the next few weeks. She told the GP she had family and friends support but was struggling. She was not sleeping, her hair was falling out, she was feeling frequently sick and had low-grade headaches which she told the GP were stress related. She was feeling very anxious but not depressed. After discussing her GP and Wendy decided to try beater-blockers to cope with the anxiety and was given relaxation exercises. Wendy was given a sick note from 29th May to 25th June for stress at work after telephone discussion with another GP colleague. On 28th June 2018 Wendy had another phone call with a different GP colleague and was issued with a further sick note because of stress at work until 24th July 2018 she had a discussion with the GP about her stress. Wendy was seen on 28th November 2018 by myself with abdominal pains. Wendy admitted being significantly stressed at that point.".

21. The claimant accepts from the contents of this letter, that there was no diagnosis of depression and that she was not in fact depressed. The claimant's case was that she was feeling stressed and anxious and that this stress and anxiety impacted on her ability to function to the extent that it was not reasonably practicable to meet the three-month deadline. The claimant accepted in her evidence that many, if not most, people faced with dismissal from work would feel stressed and anxious. The claimant's case is that her level of stress and anxiety was such that it impacted on her ability to function to such an extent that she was unable to meet time limits.

22. The claimant, albeit somewhat reluctantly, accepted in answering questions in cross-examination and from myself, that she was able to address her mind to the process relating to instructing her solicitors, dealing with the appeal, dealing with the DSAR paperwork, negotiations about settlement and the preparation of the detailed "Timeline" document to be attached to her claim form. The claimant

could not explain why she could attend to those matters, but not the presentation of the claim form within the time limit. The factors which the claimant said did impact upon that ability were her father's illness and the mistaken belief that the time limit ran from the date of the ACAS letter, rather than the date of the ACAS early conciliation certificate.

23. Doctor Wendy Mason gave evidence on behalf of the claimant. Doctor Mason is a veterinary surgeon who has been acquainted with the claimant for a number of years. Doctor Mason accepted that her evidence could not be treated as expert evidence on behalf of the claimant with regard to her mental health. Doctor Mason's evidence was that she had seen a gradual deterioration in the claimant's wellbeing over the period of time covered by these proceedings. Whilst the Tribunal found Doctor Mason to be honestly and genuinely concerned for the claimant, the Tribunal was not satisfied that Doctor Mason's evidence was of any particular value in deciding whether or not it was reasonably practicable for the claim to have been presented in time.

24. The Tribunal found that the claimant had been stressed and anxious about her situation and about the Employment Tribunal proceedings throughout the relevant period of time. However, the Tribunal was not satisfied that the level of stress and anxiety in this case was such that it impacted upon the claimant's ability to function to the extent that it was not reasonably practicable for her to present the claim form in time. The claimant's father's collapse on 19th September was something which the Tribunal accepted was likely to be given more priority by the claimant, than the need to submit the claim form in time. However, it was not the claimant's case that following his discharge from hospital, the claimant was required to attend to her father to the extent that she was unable to deal with her Employment Tribunal claim. The Tribunal found that there was still sufficient time following the claimant's father's discharge from hospital for her to complete and present the claim form within the time limit.

The Law

25. The relevant statutory provision engaged by the issue in this case is set out in section 111 of the Employment Rights Act 1996.

111 – Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(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 it was not reasonably practicable for the complaint to be presented before the end of that period of three months

26. In a case where the claim is presented outside the time limit, the onus is upon the claimant to satisfy the Tribunal that it was not reasonably practicable for the complaint to have been presented in time. If the claimant can discharge that burden, he must then show that the claim form was presented within a reasonable period of time after the time limit had expired.

27. It is now generally accepted from the decision of the Employment Appeal Tribunal in **ASDA Stores Limited v Kauser (EAT/0165/07)** that 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. A helpful summary of the relevant authorities in a case such as the claimant's, was provided by Her Honour Judge Eady QC in **Paczkowski v Sieradzka (UKEAT/0111/1/BA).** The leading cases are:-

- Dedman v British Building and Engineering Appliances Limited – 1973IRLR379
- Walls Meat Company Limited v Kahn – 1978IRLR499
- Marks and Spencer Plc v Williams – Ryan – 2005ICR1293
- Northamptonshire County Council v – Entwhistle 2010IRLR740

28. Her Honour Judge Eady referred to those authorities as "a body of case law which has developed in respect of the test of reasonable practicability laid down by Section 111(2)(b)". The principles that may be extracted from those authorities were set out by Mr Justice Underhill in **Northamptonshire County Council v Entwhistle**, as follows:-

- Section 111(2)(b) should be given a liberal construction in favour of the employee

- It is consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was reasonably in ignorance of that time limit.

- The Court of Appeal held in **Dedman** that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a schooled advisor, even if that advisor failed to advise him correctly.

29. Ultimately the language of the statute must prevail. The question of reasonable practicability is largely one of fact for the Employment Tribunal and will fall to be determined in the particular circumstances of each case.

30. In the claimant's case, I am satisfied that she was throughout the entire process (from the dismissal to the submission of the claim form) aware she could bring a complaint to the Employment Tribunal. That was clearly in her mind from the time when she first instructed solicitors to represent her in presenting her appeal against dismissal. I am satisfied that the existence of the time limit must have been within the minds and contemplation of the claimant and her solicitors throughout the relevant period. This is not a case where the claimant was ignorant of any facts which form the subject matter of the proceedings. At no

stage was the claimant misled by any act or omission of the respondent or any misrepresentation by the respondent. The ongoing appeal process did not affect the effective date of termination, nor did it alter the requirement to present the claim form in the three-month time limit. This is not a case where any conduct of the respondent could be said to have had any adverse impact on the claimant's ability to present the claim form in time.

31. I accept the claimant's evidence that throughout the period she was stressed and anxious about both the manner of her treatment at the hands of the respondent, the ongoing appeal process and Employment Tribunal process. However, I am satisfied that the medical evidence submitted on behalf of the claimant does not go so far as to say that she was suffering from any form of depression or other mental impairment to the extent that it adversely impacted upon her ability to deal with these matters. It is clear from her own evidence that the claimant was more than capable of dealing with appeal process, negotiations with ACAS, providing instructions to her lawyers and completing the claim form itself.

32. **In Robertson v Bexley Community Centre** – 2003IR:R434, the Court of Appeal reminded the employment law community that time limits are of considerable importance in this jurisdication.

> "It is of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule.".

Whilst that case dealt with three-month time limit in discrimination cases (where there is no need for an employee to satisfy the tribunal that it was not reasonably practicable to meet the time limit) the principles remain the same. Time limits are there to be observed, unless it was not reasonably practicable to do so. As the court of appeal said in **Chief Constable of Lincolnshire v Natasha Caston** – 2010IRLR327:-

> Time is not at large. There are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law – it is a question of fact and judgement to be answered case by case by the Tribunal in the first instance which is empowered to answer it.".

33. Having carefully considered all the facts in this case, I am not satisfied that the claimant has discharged the burden of showing that it was not reasonably practicable for her claim form to have been presented within the three-month time limit. The claim is out of time. The Employment Tribunal does not have jurisdiction. The claim is dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 22 February 2019