



# EMPLOYMENT TRIBUNALS

**Claimant**  
Ms C Conn

**Respondent**  
Bestway Panacea Holdings Ltd  
t/a Well Pharmacy

**Heard at:** Exeter

**On:** 27 March 2018

**Before:** Employment Judge Fowell

## Appearances

Claimant: Unrepresented  
Respondent: Mr Gorasia of Counsel, instructed by TLT LLP

# JUDGMENT

The Claimant's complaint of unfair dismissal is dismissed as out of time.

# REASONS

1. A number of preliminary issues fall for determination at this hearing:
  - a. On 4 January 2018 the Tribunal gave notice to the claimant that it was considering striking out her claim of constructive unfair dismissal on grounds that she had less than two years' continuous service.
  - b. In her response, by email dated 18 January 2018, she stated that she had now been advised by a solicitor that her case could be treated as a whistleblowing complaint that she did not need two-year service. I regard that as an application to amend her claim to include an allegation of automatically unfair dismissal under section 103A Employment Rights Act 1996, i.e. that she had been dismissed for raising a protected disclosure.
  - c. There is an application by the respondent to strike out her claim or claims on grounds that they have no reasonable prospect of success; alternatively for a deposit order on grounds that there is little reasonable prospects of success.
2. I heard evidence at today's hearing from Ms Conn, largely in the form of open questions from me as to the background to her submitting the claim. I was also assisted by bundle of 71 pages and some further correspondence

provided by Ms Conn today. Having considered this evidence I make the following findings.

3. Ms Conn was employed with the respondent pharmacy from 19 December 2016 until 12 May 2017 so it is common ground that she had less than two years' continuous service.
4. Her employment came to an end when she resigned on 13 April 2017. She worked her notice and so the effective date of termination was 12 May 2017.
5. The background facts were, in brief, that she worked as a Health Care Assistant for the pharmacy and, in March 2017 came back from a period of ten days absence and had a disagreement with her manager, Kathryn. (Her surname was not mentioned and so I shall use her first name only). Ms Conn says she found that the administration was in a state of disarray, that Kathryn had not properly understood the process for getting medication ready for the next customer, and that Kathryn rounded on her and said that *she* had left the system in a state of confusion and had made mistakes in labelling medication. There was then a period of about three days during which Ms Conn says she was ostracised, until on 15 March 2017 she made a complaint to HR about Kathryn, indicating that she would have to resign. There were essentially three elements to the complaint; firstly that she was unfairly blamed for her manager's own mistakes, secondly that she was then ostracised at work for the next few days, and finally that her manager was guilty of what she described as "job abandonment" by working from home very often and leaving other staff to cover for her.
6. On her account, she was assured by HR that there would be an investigation by an area manager, Lewis Purchase. Kathryn was away for the next few weeks and he too was then away, so it was not until mid-April that she had a meeting with him. At that point, she says, instead of investigating the matter he told her that her first decision to resign was probably the best one, and so she did resign.
7. Since the resignation took effect on 12 May 2017 the normal time limit for presenting a claim to the Tribunal expired on 11 August 2017. By section 18A Employment Tribunals Act 1996, such a complaint cannot be presented until early conciliation through ACAS has been completed. Ms Conn has no experience in such matters and took advice from the Professional Support Unit at Exeter County Court, which assists witnesses with court hearings. A lady there helped her to complete the form ET1, which she lodged in person at the Exeter offices of the Employment Tribunal Service on 3 August 2017, before the deadline expired.
8. She had not however contacted ACAS, being unaware of that requirement. I attach no blame to the PSU adviser for that. She was simply assisting potential claimants with the paperwork. And I accept not only that Ms Conn did not know about this requirement but that it was not reasonable to expect that she would know. She could not afford to take legal advice. Had she gone to Citizens Advice she might have become informed but she felt that the PSU adviser was in a position to know and so – reasonably in my view – did not make any further enquiries.

9. The claim form was therefore rejected on 17 August 2017 with a notice advising her of the reason.
10. At that point she contacted ACAS and obtained a reference number. They wrote to her on 21 August 2017. It is not clear whether she made it clear whether she was seeking early conciliation or simply general advice from ACAS about the best way to proceed. It seems to me likely that they would have advised her that without two years' service she was unable to pursue a complaint of unfair dismissal. In any event, the claim form was not presented again until 7 November 2017.
11. In the meantime there had been a number of events. In mid-October Ms Conn happened to meet a former colleague who told her that Kathryn had been relieved of her duties. This, she felt that this made a very great difference to her prospects of success. She telephoned a firm of solicitors, although she could not afford to pay for a consultation, and was advised that she could bring a claim as a whistleblower, without two years' service.
12. Shortly afterwards, on 20 October 2017 she wrote to the respondent explaining that she now knew that Kathryn had been removed or relieved of her duties. That letter did not however make any express reference to whistleblowing. In fact, it repeated her side of the story that she felt that she had been unfairly treated and that Kathryn's removal had vindicated her position.
13. Ms Conn accepted that had she not found out about this dismissal, she would not have felt able to pursue her original complaint any further. For that reason, I conclude, no steps had been taken through ACAS to complete the early conciliation process following the initial contact in August. When she found out about Kathryn's removal she contacted ACAS again and was given a new reference number. This was on 24 October 2017. The EC process was completed on 3 November 2017 and she duly lodged the ET1 again on 7 November 2017.
14. Now that it had an EC certificate the claim was accepted although it was noted that it may have been submitted outside the normal time, something for a Tribunal to consider in due course. The claim was in exactly the same form as the original one submitted in August and has the original stamp with the word "rejected" on it, together with the subsequent stamp marking it is received on 7 November 2017. It does not mention whistleblowing or any protected disclosure even though by that stage Ms Conn had received this brief legal advice to the effect that she could pursue a claim on that basis, and on that basis alone.
15. The relevant test is set out in section 111(2) Employment Rights Act 1996:

"an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

  - (a) before the end of the period of three months beginning with the effective date of termination, or
  - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the

complaint to be presented before the end of that period of three months.

16. It is common ground that this complaint was not submitted before the end of the three-month period. The next question is whether it was reasonably practicable for the complaint to be submitted within that period. Given my conclusion that Ms Conn was, quite reasonably in her situation, unaware of the requirement to go to ACAS, I conclude that it was not reasonably practicable to have submitted the ET1 within the normal time limit.
17. But the claim was not presented until 7 November 2017. In my view, even allowing for the time required by early conciliation, that is not within a further period which I can accept as reasonable. Although ACAS were contacted promptly in August to rectify the defect, that effort was abandoned shortly afterwards, and a further effort was made in 24 October 2017 on discovery of the dismissal of Kathryn.
18. It is not quite clear to me why Ms Conn attached such importance to the fact that Kathryn was removed or relieved of her duties. That cannot affect the reason why Ms Conn's employment came to an end. She may have felt that this proved her right, that it showed that Kathryn, not her, had been at fault over the administrative disarray, and that she had been blamed unfairly as a result, but that itself does not show that the reason for Ms Conn's dismissal was because of any disclosure she made about Kathryn. I cannot therefore regard this as the same as some new piece of evidence casting previous events in a different light, or where a claimant would not otherwise have known of her right to bring such a claim. Accordingly it does not amount to sufficient grounds to excuse what is nearly a further three month delay after the expiry of the normal time limit.
19. I conclude therefore that the claim of unfair dismissal was not presented in time, applying the test in section 111 Employment Rights Act 1996. As already noted, the claimant did not have two years' continuous service and so there is no jurisdiction for that claim in any event. The above considerations are however relevant to her application to amend her claim.
20. In considering that application I have had regard to the guidance in the case of *Selkent Bus Company v Moore* 1996 ICR 836. Without setting out that guidance at any length, the main three considerations are:
  - a. The nature of the amendment, i.e. whether it is a minor amendment or the addition of factual details on the one hand, or on the other hand raises entirely new factual allegations;
  - b. The applicability of time limits to the new claim or cause of action; and
  - c. The timing and manner of the application to amend.
21. The nature of the amendment here is something between the two extremes set out in the first of these categories. It is more than a factual detail. It involves the making of a new complaint altogether. On the one hand, the dispute with Kathryn and the concerns she raised are referred to in the ET1, and it is clear that she left as a result of this dispute with her. On the other hand, allegations of whistleblowing require the claimant to meet a number

of tests, and would require the respondent to set out a detailed response on those issues.

22. The second point relates to the applicability of time limits. Again, regard must be handed to the lateness of the application. That was made on 18 January 2018. It is not in fact expressed as such an application but even though treated as one, that is the first reference to whistleblowing. The time limit for presenting that complaint also expired on 11 August 2017 (subject to an extension of time for early conciliation). It follows, for the reasons set out above, that this new complaint is substantially out of time.
23. The final issue concerns the timing and manner of the application. Here I accept that Ms Connor is not familiar with tribunal procedures and did not realise that she needed to raise this new basis of her claim squarely at an earlier stage, but there is inevitably some prejudice to the respondent and the extra delay. One inevitable difficulty is now caused by the departure of Kathryn.
24. More generally however I also have regard to the fact that the complaint which was submitted (unfair dismissal) was one which the tribunal had no jurisdiction to entertain and this is not simply the addition of a new claim, but is essentially a substitution for the original complaint, and has been made many months outside the normal time limit.
25. For those reasons therefore, the claim of unfair dismissal must be struck out, and the application to add or substitute a claim under section 103A Employment Rights Act 1996 is also struck out, largely for the same reason. It is clear that at the time the claim form was presented the claimant was aware of her right to bring a claim under section 103A but did not do so.
26. Having formed that conclusion it is not necessary to consider any further the application for a strike out or deposit order on the merits. But I note that there would still be a further difficulty for Ms Conn if her claims were allowed to proceed in that she would need to show that the complaints she raised met the "public benefit" test and were not simply related to her own circumstances.
27. There was also an application by the respondent for costs against the claimant in the sum of £3250. This followed a letter written to her threatening that application on 19 March 2018.
28. I considered the applicable provisions of the Employment Tribunal rules. By rule 76 a Tribunal *shall* consider whether to make such an order where (broadly) a party has acted unreasonably in bringing or conducting proceedings, or where a claimant has no reasonable prospects of success.
29. I do not find that the claimant has acted unreasonably in bringing or conducting the proceedings. It is true that the original claim had no reasonable prospect of success given the length of service but at a relatively early stage this was identified by the Tribunal, she was given the opportunity to respond, and then raised the alternative possibility that it be treated as a whistleblowing claim. That application has been considered. As already noted it has been rejected largely because of the lateness of the original application, compounded by the lateness in raising this alternative

possibility, and that application had to be explored in evidence in order to understand the reasons behind the delay. It cannot in my view be said to have had no reasonable prospect of success despite the unsuccessful outcome for the claimant.

---

Employment Judge Fowell

---

Date 27 March 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

.....  
FOR THE TRIBUNAL OFFICE