



EMPLOYMENT TRIBUNALS

Claimant: Miss V Milnes

Respondent: Tarry Boutique Hotels and Serviced Apartments Limited

Heard at: Nottingham On: Friday 11 August 2017

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: Miss A Mutalib, FRU Volunteer

Respondent: Mr A Barnes, Premier Legal LLP

JUDGMENT

The Employment Judge gave judgment as follows:-

1. The application to amend the claim is withdrawn.
2. The Employment Tribunal does not have jurisdiction to hear the claim of unfair dismissal. The claim is dismissed.

REASONS

Background and Issues

1. This claim last came before me at a closed attended Preliminary Hearing on 11 July 2017. I decided at that hearing there would have to be a further Preliminary Hearing to consider whether:-

1.1 The Claimant should be allowed to amend her claim to add a claim of unlawful deduction of wages and also a claim of harassment on the grounds of her protected characteristic of disability as per the application made on 3 July 2017.

1.2 Whether the Tribunal had jurisdiction to hear the claims.

2. The Claimant's Representative had written to the Tribunal on 10 August 2017 to say that she wished to withdraw her claim of discrimination and is

seeking external advice on the merits of pursuing that claim in the County Court.

3. At the hearing today we discussed at its commencement whether the Claimant would be wise to withdraw that element of the claim at that stage. I had pointed out to the Claimant that the test for the Tribunal to have jurisdiction in an unfair dismissal case is far more stringent than the test in a claim of discrimination. It was agreed therefore that I should first of all deal with the issue of whether the Tribunal had jurisdiction to hear the claim of unfair dismissal/non payment of wages and I would then allow the Claimant to decide whether she still wished to proceed with her application to amend.

4. At the commencement we discussed also the relevant legislation, namely, in respect of the unfair dismissal claim, Section 111 of the Employment Rights Act 1996. The same test applies to the wages claim. It was agreed that what I would need to do would be to decide:-

- 4.1 Whether the claim was presented in time.
- 4.2 If it was presented out of time, was it not reasonably practicable for the complaint to be presented in time.
- 4.3 If it was not reasonably practicable was the claim presented within such further period as the Tribunal considers reasonable.

Evidence

5. I heard evidence from the Claimant and there was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

The Relevant Facts

6. The Claimant is 22 years old and commenced her employment for the Respondent on or around 14 April 2014. She was employed as an HR Assistant.

7. She also attended college. I have seen the Tutorial Action Plan dated 17 April 2014 (pages 28-31) and the Apprenticeship Agreement dated 1 October 2014 (page 33). Under the terms of the Apprenticeship Agreement the Claimant attended a course at Chesterfield College.

8. At no stage during her employment had the Claimant raised any formal grievance under the company's grievance policy,

9. The Claimant resigned from her employment on 16 September 2016. No explanation was given in that letter as to the reason (page 69). She had been interviewed in respect of an alternative position and started work with a new company for a higher salary on 19 September 2016.

10. On 26 September 2016 the Claimant submitted her grievance (pages 746). This letter gave her reasons for resigning. It complains of a number of matters, none of which have been raised in her employment; It included:-
 - 10.1 That she had been bullied and harassed by members of the team including Alex Shelton the Managing Director. She had been called "a fat bitch". It was referred to in the letter as disability discrimination by perception.
 - 10.2 Changing her shifts and making her work evenings in the bar.
 - 10.3 Her position had been threatened by a colleague Lydia Loscalzo who the Claimant believed was replacing her.
 - 10.4 Being accused of offering Mrs Shelton's personal assistant an increase in salary.
 - 10.5 The behaviour of Paul Stafford in making her feel incompetent.
 - 10.6 Being required to come in on a Saturday which was her day off and receiving on arrival a "detrimental and demeaning letter" which upset and embarrassed her.
 - 10.7 Not being paid for overtime.
 - 10.8 Being told in a demeaning way to pay her tab off. .
 - 10.9 Being spied upon through her computer.
 - 10.10 Being called out of hours and receiving abusive text messages.
 - 10.11 Being accused of not doing her work properly, spending her time on dating sites.
 - 10.12 Being invited to a disciplinary meeting for lateness and authorising her own holiday.
 - 10.13 Being accused unfairly in the disciplinary hearing.
 - 10.14 "The straw that broke the camel's back" was changing her rota for the week commencing 19 September 2016.
11. Mrs Shelton responded to the e-mail by way of letter of 29 September (pages 77-78) saying that she would investigate matters and come back to her within 7 working days.
12. Mrs Shelton did not comply with that and the Claimant wrote again on 31 October in respect of her grievances (pages 82-83).
13. Mrs Shelton finally replied on 10 November 2016 (page 81).
14. Also on 10 November the Claimant made her first contact with ACAS. On

that date she notified ACAS of a claim against a prospective Respondent:

"The Walton Hotel (Tarry Boutique Hotels and Serviced Apartments Limited)."

15. The ACAS EC reference number in respect of that notification was RI 98226/16/96 and the date of issue by ACAS of the certificate was 10 December 2016.
16. The Claimant sent a second notification to ACAS, this time naming two separate Respondents namely:-
 - 16.1 Tarry Boutique Hotels and Serviced Apartments Limited.
 - 16.2 The Walton Hotel.
17. The ACAS EC reference numbers in respect of these two notifications were respectively R201769/16/25 and R201767/16/43. Both of these certificates were issued on 23 December 2016.
18. Despite having the certificates the Claimant did not present her claim to the Tribunal until 22 January 2017. The claim was for unfair dismissal only. The Respondent was named as "The Walton Hotel". She submitted with the claim an EC certificate R201769/16/25 which was the certificate with the prospective Respondent named as Tarry Boutique Hotel and Serviced Apartments Limited. She made no mention of that company in the claim form. She said that she had been employed as an HR Assistant from 14 April 2014 until her resignation on 16 September 2016,
19. As the Claimant had only presented the EC certificate which named Tarry Boutique Hotels and Serviced Apartments Limited as Respondent and named The Walton Hotel as Respondent in the ET 1, I rejected the claim on 31 January 2017.
20. Notification of that rejection was sent to the Claimant on 16 February 2017. The letter confirmed that the reason for that decision was that the name of the prospective Respondent on the EC certificate was not the same as the name of the Respondent named in the claim form.
21. The Claimant replied on 2 March 2017. The letter asked me to reconsider my decision about rejecting the claim. The Claimant now provided me with the EC certificate in respect of The Walton Hotel which is certificate number R201767/16/43. The Claimant apologised for the mistake and asked me to reconsider the rejection.
22. The matter was referred to me on 21 March 2017 and I instructed the Tribunal to accept the claim at that point. The claim was then served on the Respondents by way of letter dated 3 April 2017.
23. The Respondents filed their response (ET3) on 5 May 2017. They asked for the claim to be struck out or the case to be listed for a Preliminary

Hearing to consider a strike out or depositor order. At that stage they had not seen the

second EC certificate and pointed out there was a substantial defect in the presentation of the claim which meant it should be struck out.

24. The case was then reviewed by my colleague Employment Judge Heap. A letter was sent by the Tribunal to the parties on 19 May 2017. She pointed out that despite the fact the Claimant had not completed Section 8.1 of the claim form she had made reference in the body of the claim form to "disability discrimination by perception". The Claimant was asked to confirm whether she was seeking to bring a complaint of disability discrimination or whether the claim was limited to unfair dismissal only.
25. Employment Judge Heap declined the Respondent's application to strike out the claim on the basis of the matters raised at paragraph 4 of the grounds of resistance at that stage. She pointed out that the claim form was initially rejected on the basis that the name on the EC certificate did not match that on the claim form. The Claimant had subsequently on 2 March 2017 provided the EC certificate naming The Walton Hotel and that was accepted by me. There had therefore been no "substantial defect" as the Respondent suggested that had not been remedied.
26. She went on to point out though that the circumstances of the matter may well bring into play the provisions of Rule 13(4) of the Employment Tribunal Rules of Procedure 2013 which states the claim is only to be taken as presented as at the date of rectification of the defect. This would appear to make the claim "out of time". She ordered that that matter should be discussed at the case management hearing.
27. That hearing was listed to take place by telephone on 26 June 2017 but at the Claimant's request and by agreement with the Respondent, the hearing was converted to an attended Preliminary Hearing for case management. No final determination would be made at such a hearing as ruled by Employment Judge Heap. Subsequently on 26 May 2017 the Claimant indicated that she wished to proceed with a claim of disability discrimination by perception and that she also wished to pursue an equal pay claim.
28. Subsequently she also said that she wished to add the claims of breach of contract and sex discrimination.
29. Employment Judge Britton decided that the hearing should be converted to an attended hearing so that the Tribunal could consider the amendment application as well as giving directions about the possible out of time point.
30. That hearing could not take place on 26 June because of a lack of judicial resources and the hearing was rearranged for 1 1 July 2017.

31 . I conducted that hearing. At that stage I was only told of the two EC certificates which had been issued on 23 December 2016. I had not been told about the earlier EC certificate which was dated 10 December 2016.

32. I ordered that an open Preliminary Hearing should be conducted to consider two matters:-

32.1 Whether the Claimant should be allowed to amend her claim to add claims of unlawful deduction of wages and harassment as per her application made on 3 July 2017.

32.2 Whether the Tribunal had jurisdiction to hear the claims.

The Hearing Today

33. The parties were represented as before with Ms Mutalib, a Free Representation Unit Volunteer from the University of Nottingham representing the Claimant and Mr Barnes from Premier Legal LLP representing the Respondent. Yesterday afternoon Ms Mutalib had written on behalf of the Claimant to say that she wished to withdraw the part of her claim on discrimination so that she could pursue the claim in the civil court. She was concerned that the claim should not be dismissed.

34. We discussed this at the commencement of the hearing. It was agreed that I would deal with the jurisdictional point in respect of the current claim of unfair dismissal first. The Claimant could then decide whether she wished to add the claims of non payment of wages or discrimination as these claims could then be pursued separately in the County Court if she so wished to do so. There would not be the time issues in the County Court that there are in the Tribunal. It was agreed that if I decided that I had jurisdiction to hear the unfair dismissal claim, the Claimant could then proceed with her application to amend by adding her two other claims.

35. I heard evidence from the Claimant. There was a statement that she had prepared for the previous hearing and a further supplemental statement that had been filed with the Tribunal on 25 July. The supplementary statement dealt with a number of matters that she said had prevented her from making a claim before 22 January 2017. These were:-

35.1 She was financially unstable and did not have the funds to lodge her claim. She needed to obtain a loan from someone to pay the fee.

35.2 She had difficulties with internet connection at her home between 19 January and 23 January and had to travel to a friend's house to complete her ETI application.

35.3 She was struggling with anxiety and depression and exhibited a letter from a Dr Thompson. She also explained in respect of her deduction of wages claim was that the reason that she did not present it before was that she was concerned about further abuse and harassment from her employer.

36. She also attached to the supplemental statement details of her financial status. That showed that she had a net monthly income of E1,441.25. Her main outgoings were her rent of 2350.00 and car loan of 2271.67.

37. In neither of her statement or supplemental statement did she refer to the earlier EC certificate.

38. In her original statement she had said in paragraph 8 that she had been advised by the ACAS helpline that she had 3 months from the date from which ACAS would issue a certificate to commence proceedings. She said that it was only brought to her attention that her claim may be out of time when she received the letter from Employment Judge Heap.

39. Although she worked as an HR Assistant she said that she was not trained and had no experience with regard to bringing a claim to the Employment Tribunal.

40. She also prayed in her aid that she was only 22 years old and was not aware that she had made the error with the ACAS EC certificates as "1 had two different ones". What she didn't say was in fact that she had 3 ACAS EC certificates.

41. I heard submission from Ms Mutalib on behalf of the Claimant. I told Mr Barnes that I did not need to hear from him. The burden of proof is on the Claimant in these cases. I would only need to hear from Mr Barnes if I was satisfied that the Claimant had raised a prima facie case.

The Law

42. Section 11(1) of the Employment Rights Act 1996 provides as follows:

"(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.

(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."

43. Employment Tribunal proceedings under this section are "relevant proceedings" for the purposes of the conciliation provisions contained in the Employment Tribunals Act 1996, Section 18-18c.

44. In such cases when determining whether the time limit has been complied with, the period beginning the day after the EC request is received by ACAS up to and including the day when the EC certificate is received or deemed to have been received by the prospective Claimant

is not counted. The clock will stop when ACAS receives the EC request and start to run again the day after the prospective Claimant receives the EC certificate.

45. If a time limit is due to expire during the period beginning with the day that

ACAS receives the EC request and one month after the prospective Claimant receives the EC certificate, the time limit expires instead at the end of that period. This gives the prospective Claimant one month from the date when he or she receives (or is deemed to have received) the EC certificate to present the claim.

46. Ms Mutalib presented me with a bundle of authorities and a skeleton argument for the Claimant. I am not going to recite all the cases that she sought to rely on. In particular, she referred me to the leading case of *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372.

She also referred me to in particular:-

- *University Hospitals Bristol NHS Foundation Trust v Williams* UK EAT/0291/12
- *John Lewis Partnership v Charman* UK EAT/0079/1 1
- *Norbert Dentressangle Logistics Limited v Hutton* UKEAT001 1/13/BI

47. In all those cases the Employment Appeal Tribunal refused to overturn decisions made by an Employment Judge that on the particular facts of the cases decided that it was not reasonably practicable for the claim to be presented in time.

48. As was said in the case of *Palmer* the test of reasonably practicable relies on the Employment Judge using his knowledge and common sense to determine in the circumstances of each particular case whether it was reasonably practicable for the Claimant to present the claim in time.

49. A case which I was not referred to but I raised with Ms Mutalib was the case of *HM Revenue and Customs v Garau* UKEAT/2017/3048/16/LA.

50. That case stated that the early conciliation certificate provisions introduced from 6 April 2014 do not allow for more than one certificate of early conciliation per "matter" to be issued by ACAS. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period.

My Conclusion

51. The Claimant resigned with immediate effect on 16 September 2016 and that therefore was the effective date of termination of her employment,

52. The date of receipt by ACAS of the EC notification was 10 November 2016 and the date of issue by ACAS of the certificate number RI 98226/16/96 was 10 December 2016.
53. The subsequent certificates under reference number R201767/16/43 and 201769/16/25 issued by ACAS on 23 December 2016 are outside the statutory scheme and have no impact on the limitation period.
54. The Claimant attempted to present her claim of unfair dismissal on 22 January 2017. By my calculation she was 12 days late in presenting her claim at that stage. In any event the claim was rejected and Rule 13(4) of the Employment Tribunal Rules of Procedure apply. Rule 13 states as follows:

"(1) The Claimant whose claim has been rejected (in whole or in part) under Rule 10 or 12 may apply for reconsideration on the basis that either: —

- (a) The decision to reject was wrong or;
 - (b) The notified defect can be rectified.
- (4) If the Judge decides that the original rejection was correct but the

defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

55. In this case the original decision to reject was not wrong. The Claimant had presented her claim with an EC certificate that was for a different named Respondent and no mention of any claim against Tarry Boutique Hotels and Serviced Apartments Limited was referred to. The notified defect had only been rectified on 2 March and that therefore was the date of presentation of the claim.
56. The claim was therefore presented more than 6 weeks late.
57. I have considered the various reasons given as to why the Claimant should say that it was not reasonably practicable to present the claim in time and I find as follows:-
- 57.1 The Claimant's financial; circumstances as presented do not lead me to the conclusion that she could not have afforded to pay the fee of 250.00 for presentation of her claim prior to 22 January 2017. The Claimant remained in full time employment from the time that she resigned her employment with the Respondent. She is a single woman with few obligations and after the payment of her rent and car loan there was no reason why she could not afford to pay the fee prior to 10 January 2016.
- 57.2 Whilst the Claimant asserts that she had health issues and was depressed and anxious during her employment and following her dismissal she has provided no medical evidence that could lead me to the conclusion that she could not present her claim before she did so. I have seen the note from her doctor who simply says that she had recently had problems with anxiety and depression and had been put on antidepressant drugs due to this. That letter is dated 18 July 2017 and no further information is provided. I am not satisfied that that prevented her from presenting her claim in time.
- 57.3 The Claimant also prays in aid her age and lack of knowledge and being misled by ACAS. I do not accept the evidence of the Claimant that she was misled by ACAS. Her evidence is not reliable. In it she says that she first notified ACAS on 23 November 2016 when in fact she notified them on 10 November 2016. She says that she was told by ACAS that she had 3 months from the date that ACAS issued the certificate. I do not believe that she was told that by ACAS. In any event the Claimant is at college and is training in HR and could have asked people that she had met through college as to what the true position was. I believe that she thought that she did have one month after, the date of the certificate of 22 December 2016 to lodge her claim and that she did so. She made an error by submitting that together with the wrong EC certificate. In fact because of the earlier EC certificate she was already out of time as at 22 January 2017. The Claimant is an intelligent young woman and I am satisfied that she simply made a genuine mistake in submitting her claim and that she has not been misled by anyone about the time limits.

58. for these reasons I am satisfied that it was reasonably practicable for the Claimant to present her claim in time and having failed to do so or establish it was not reasonably practicable to do so I do not have jurisdiction to hear the claim of unfair dismissal which is dismissed.

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The Amendment Application

59. In view of my findings in respect of the jurisdiction on the unfair dismissal claim, the Claimant withdrew her application to amend the claims to add claims of non payment of wages and disability discrimination so I have not dealt with those matters at all.

Employment Judge Hutchinson Date

6 *Sept* 20(?)

JUDGMENT SENT TO THE PARTIES ON

8 September 2017

