EMPLOYMENT TRIBUNALS

Claimant: Miss N Mical

Respondent: Hospitality First Limited trading as Holiday Inn Express Preston South

Heard at: Manchester **On:** 23 August 2018

Before: Employment Judge Feeney

Representation:

Claimant: Miss M Dabrowska, Lay Representative
Respondent: Mr T Shepherd, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

The judgment of the tribunal is that :

(1) It was not reasonably practicable for the claimant to present her claim of unfair dismissal in time, however she did not present it within a reasonable time thereafter. Accordingly the tribunal does not have jurisdiction to t consider the claimant's unfair dismissal claim.

(2) It is just and equitable to extend time in relation to the claimant's claims of harassment on the bases of sex and race under the Equality Act 2010

(3) The claimant's application to amend to add claims of breach of contract regarding notice pay and unlawful deductions regarding unpaid holiday is allowed

REASONS

Pre-Amble

1. This Preliminary Hearing was listed following a case management discussion on 17 May, the minutes of the case management discussion set out the issues to be decided today as follows:-

1.1. Whether the claim is amended to include holiday pay and notice pay;

1.2. Whether the claimant's unfair dismissal claim was presented in time or if not, whether it was not reasonably practicable to present it in time but it was presented within a reasonable period thereafter having regard to the effective date of termination she contends for;

1.3. Whether the claimant's harassment claims were presented in time or if not, whether it had been just and equitable to consider them at a final hearing nonetheless;

1.4. Whether any of the claimant's claims should be struck out as having no reasonable prospect of success;

1.5. Whether the claimant should be ordered to pay a deposit as a condition of being permitted to continue with any of her claims if her claim has little reasonable prospect of success.

2. The claimant gave evidence. There was an agreed bundle to which a number of documents were added, namely the decision of the respondent from 28 March 2018 in relation to appeal hearing. A letter of 31 May purporting to contain details of a claim for unlawful deduction of wages in respect of holiday pay and a claim for notice pay. A letter of 15 February 2018 setting out the rejection of the claimant's claim and a letter from the claimant of 9 May setting out the details of the claimant's discrimination and unfair dismissal claims.

Tribunal's Findings of Fact

3. The claimant submitted a claim form that was registered with the Tribunal on 9 March 2018. As she now contends that she was dismissed on 11 October the claimant is ostensibly out of time. The claimant applied to ACAS on 12 December and received her ACAS certificate on 12 January, therefore her claim form should have been received by the 12 February as it was emailed to her rather than sent by post (in which case it would have been slightly longer before her deadline for submitting her claim ran out).

4. I find that the claimant had a conversation on 11 October with her boss "Andrew" (this is an anglicised version of his name) and at that meeting an issue arose as to whether he was dismissing the claimant, accordingly she texted him on 11 October asking him "what is the reason I was dismissed/sacked", she received no reply. On 12 October she texted him "Andrew, how does our work relationship look like contact me please thank you". Andrew replied, "invited you for a talk at 10 am tomorrow" claimant "ok I'll be there thank you".

5. The claimant attended a meeting on 13 October which she recorded, at the end of the meeting the position appeared to be that Andrew was saying that the claimant could choose to leave voluntarily with immediate effect and nothing would be taken any further but also said I will not let you come back to work to the hotel". He said, "you can choose yourself I am simply giving you a choice" and she replied, "ok so I will contact my solicitor I will talk to him and I will call you back if that's ok". He said, "please and then goodbye".

6. On 16 October the claimant texted Andrew and said, "Good morning I am unable to come to work because I don't feel so well and I have a doctor's appointment at 5pm today" and Andrew replied, "I have received a sick note until 30 October".

7. The claimant meanwhile had been to see the CAB on 13 October and they had drafted a letter for her to the respondent which said: -

> "I am writing to seek your help in resolving a problem that I am experiencing at work, it is a problem that is causing me some concern and that I have been unable to solve without bringing to your attention. I have therefore decided to raise a grievance, I hope we can deal with the issue quickly and amicably. I have been employed as a Housekeeper since 16 April 2015, I enjoy working in the hotel and have always performed my duties as required. I have decided to raise a grievance because of a number of incidents with my line manager Andrzej. Unfortunately, I do not know his surname. On many occasions Andrezej uses derogatory and abusive language including a number of swear Polish words he harassed me and threatened I would be sacked and told me to shut up on many occasions. I was shouted at and bullied in front of colleagues on many occasions I was do distressed I burst into tears, I had to take medication prescribed by my GP to calm down. On a number of occasions Andrezej said that he had the power to sack me and I should know he could do it. I am extremely upset about this as I have been in this job for over two years and I enjoy my work. I cannot understand Andrezej's attitude and it has caused me a lot of distress and upset, it has come to the point where I will have to go to my GP and seek advice as at the moment I am unable to return to work due to anxiety and stress. I have contacted my local Citizens Advice Office and a Solicitor to seek further advice. I am also planning to contact ACAS hoping that we will be able to resolve this issue quickly and amicably, I would welcome the chance to talk this through with you at a convenient time and place as I would like to return to my job".

8. This letter is obviously inconsistent with the position that the claimant was dismissed on 11 October.

9. The claimant then submitted a sick note starting on 16 October, a grievance meeting was arranged and took place on 1 November 2017, on 8 December the respondents wrote to the claimant and stated, "Andrew did not terminate your employment with the company, Andrew has assured me that he also tried to invite you to a meeting to discuss any concerns regarding this however this meeting is yet to take place". The claimant however advised them that she had a recording where Andrew stated that she would be sacked or she could leave the job voluntarily straight away, he also said if she decides to leave it would not be taken any further and there would be no

other consequences" and a further meeting was arranged for 10 January, this was an appeal.

10. In the meeting which took place on 15 February the claimant queried why she had not received her wages in January by which she is referring to her SSP. In this meeting she said she would like to come back to work but not to work with Andrew. The respondent said that they had taken appropriate action against Andrew but could not discuss it further with her. She was invited to a further meeting on 22 February, she was then sent a letter confirming the situation and saying that if she wished to resign she needed to give them written notice and the claimant appears not to have replied to that.

11. The claimant continued to receive sick pay until May when her sick pay entitlement ended but the respondents still sent the claimant pay slips. The claimant submitted a claim on 9 March, in that claim she ticked unfair dismissal and sex and race discrimination. In relation to her employment details at 5.1 she was asked " is your employment continuing ?" and she put a cross in the box that said "yes". The form also asked she was asked" if your employment has ended when did it end" and she put a line through that. She was asked "if your employment has not ended are you in a period of notice, if so when will that end" and she put a line through that box as well.

12. The ET1 that was submitted was filled in partly by the CAB and partly by a friend Kamil. This did record that Andrew stated that "Magda hadn't been doing her job properly" and gave her two options, one dismissal on disciplinary grounds, two, leaving the job voluntarily with no further action taken against her, but he also said he would not allow her to come back to work in the hotel. The claim form then detailed the grievance meetings and appeals.

13. The claimant had applied to ACAS on 12 December under the conciliation process and her certificate was discharged on 12 January. The claimant had also spoken to the CAB and agreed that she had been told that the 12 January was her deadline, presumably this is based on the claimant possibly being dismissed on 13 October (rather than the 11th as the claimant contends for). However this deadline did not take into account the extra month under the ACAS conciliation extension and therefore the claimant had arguably (arguably as it depends on the date of dismissal) until 12th February to submit her claim .

14. The claimant submitted a claim but it was returned by the Leicester Processing Centre by letter dated 15 February which stated that it was not on the prescribed form, that she needed to contact ACAS and that the ACAS number was incorrect. On the basis that we know the claimant went to ACAS and had a certificate it appears that the claimant submitted an incorrect ACAS number. There are two ACAS numbers, one that is received when a claimant first applies to ACAS and secondly, the same number with additional numbers added at the end of the conciliation period when the certificate from ACAS is received at the end of the consultation period. It is possible therefore that the claimant submitted this claim before she had got the certificate from ACAS and therefore submitted an incomplete number. However, that would mean she submitted it before the 12 January and that the Leicester Office did not deal with her claim for over a month, of course that is possible but as the claimant cannot remember when she submitted the paperwork it is equally possible that she simply submitted the incorrect details on the form. However she does say in her letter of 31st May (see below) that she submitted it

within a month of receiving the ACAS certificate. Therefore I find that on the balance of probabilities she submitted her original claim before the 12th February

15. Accordingly, she had to re-submit the form which she did on 9 March, she said that she sought further advice from the CAB at this stage, again she could not remember when, she said that the lady she spoke to who could translate into Polish was only available on Fridays and was only available if an appointment was mad. However she could not remember which of the three Fridays within the period from when she received the letter from Leicester and when she resubmitted her claim (say 17th February to 9th March), she saw the Polish advisor.

16. The claimant gave some confusing evidence about the three-week gap, she eventually referred to the matter referred to above about the CAB advisor not being available very often but she had previously said she had been to see a Solicitor or spoken to a solicitor on the phone but later withdrew that and said that she had spoken to them on the telephone but that was at a point later on when the matter was listed for a Case Management Hearing.

17. The respondent submitted in their ET3 in response to the claimant's valid claim that the claimant was out of time and that she had never been dismissed.

18. On the 2nd May the claimant was asked for details of her discrimination and what appeared to be 'whistleblowing' claims. She replied on 9th May stating that she had been dismissed on 11th October and that her manager had at a meeting on 13th October told her she was dismissed again and that she had a recording of that meeting. She included some brief details of her sexual and racial harassment claim. In respect of unfair dismissal, she stated she was dismissed directly on 11 October and her discrimination claim was that Andrew created a hostile, degrading, humiliating and offensive environment at work using the words "fuck off", "close your mouth", "you piss me off", "fuck off you are a stupid Polish woman, you do not English stupid women". His repeated abusive behaviour caused her illness related to stress at work.

19. The Case Management Discussion then took place on 17 May where the claimant raised the fact that she wanted to include a holiday and notice pay claim and she was required to provide details of these. However when she did write in on 31st May all she did say was that she wished to amend to include unlawful deductions – notice pay and unpaid holiday.

20. She did say in this letter that "she would like to consider the claim is issued to a Tribunal within the time limit because I posted the claim to an Employment Tribunal within less than one month after receiving the certificate for ACAS however the claim has been returned to me on 15 February as I did some mistake on it. Please see the attachment it happened only because I could not afford professional legal help" and she enclosed the letter of 15 February. Accordingly I find that the claimant has simply entered the ACAS wrong number by accident into the claim form.

21. In relation to amendments the claimant had not ticked the box on the claim form relating to unlawful deductions or notice pay.

The Law

22. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective as follows

> "the overriding objective of these rules is to enable the Employment Tribunal to deal with cases fairly and justly, dealing with a case fairly and justly includes so far as practicable: -
>
> (a) Ensuring the parties are on an equal footing;
>
> (b) Dealing with cases in ways which are proportionate to their complexity and the importance of the issues;
>
> (c) Avoiding unnecessary formality as seeking flexibility in the proceedings;
>
> (d) Avoiding delay as far as is compatible with a proper consideration of the issues and saving expense;

Amendment

23. Guidance as to whether or not to allow an application to amend is given in the case of **Selkent Bus Company -v- Moore 1996 EAT**, the overarching principle was stated by Mummery J to be "whenever the discretion to grant an amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. "

24. Mummery J went on to set out a non-exhaustive list of factors relevant to the exercise of discretion.

A. The nature of the amendment;

B. The applicability of time limits;

C. The timing and manner of the application.

25. It was stressed however that the paramount consideration remains that of comparative disadvantage, the Tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it. In respect of the nature of the amendment it was said in Selkent "applications to amend are many different kinds ranging on the one hand from the correction of clerical and typing errors to addition of factual details to existing claims and the additional substitution of other labels for facts already pleaded to on the other hand the make of an entirely new factual allegation which change the basis of the existing claim. The Tribunal has to decide whether the amendments sought is one of the minor matters or is a substantial alteration pleading a new course of action. Where an amendment merely involves relabelling facts that were fully set out in the claim form the amendment will in most circumstances be very readily permitted TGWU -v- Safeway

Stores Limited EAT 2007. If, on the other hand, it introduces a whole new claim it is important to consider time limits as part of the overall balancing exercise.

26. In respect of time limits Mummery J observed that of a new complaint or cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so, whether the time limits should be extended under the applicable statutory provisions. It is not an absolute bar however that a claim is out of time. The Tribunal has to consider whether the claim would have been out of time even if included in the original claim form. In terms of comparative hardship, the claimant suffers no disadvantage by the refusal of the amendments as the newly introduced claim would inevitably fail on the time limit grounds.

27. In respect of the timing and manner of the application the guidance in Selkent was "an application should not be refused solely because there has been a delay in making it there are no time limits laid down in the regulations for the making of amendments, the amendments may be made at any time – before, at, even after the hearing of the case, a delay in making the application is, however, discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made – for example the discovery of new facts or new information appearing from documents disclosed on discovery.

28. Part of the Selkent balancing exercise may involve examining the pros amendment claim on its merits, the weaker the allegations the less disadvantage there will be to the claiming in refusing to allow the claimant to introduce it. However, it has to be a clear-cut case.

Striking out – no reasonable prospects of success law

29. Under Rule 37 Employment Tribunals(Constitution and Rules of Procedure) 2013 ("the Tribunal Rules") the Tribunal has the power to strike out proceedings as follows.

(i) At any stage of the proceedings, either on its own initiative or on the application of a party a Tribunal may strike out all or part of the claim or response on any of the following grounds: -

(a) That it is scandalous or vexatious or has no reasonable prospects of success;

(b) That the claim in which the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious.

(c) For non-compliance with any of these rules or with an order of the Tribunal.

(d) That it has not been actively pursued.

(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response or the part to be struck out.

Deposit orders

Under Rule 39 of the Tribunal Rules allows a tribunal to make a deposit order of upto £1000 where a claim or claims have " little reasonable prospect of success". Where such an order is made a claimant is at a higher risk of having costs awarded against them if the lose at the substantive hearing for broadly the same reason or reasons as the deposit order was based on.

Time Limits

30. The limitation period applicable to complaints of unfair dismissal are set out in Section 111 of the Employment Rights Act which provides that: -

> 112. 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 that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

The basic approach is two staged – to decide if it was reasonably practicable to put the claim in in time,and if it was not to decide whether it was the put in within a reasonable time after the primary time limit. This typically involves consideration of what action a claimant took after legitimately becoming aware that the claim needed to be submitted,or as here resubmitted.

31. This is extended to facilitate ACAS conciliation by section 207B of the Employment Rights Act 1996which provides that: -

> 2. In this section (a) day A is the day on which the complainant or applicant concerned complies with the requirement in sub section 1 of Section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings). In relation to the matter in respect of which the proceedings are and
>
> (b) Day B the day on which the complainant or applicant concerned receives or if earlier is treating as receiving (by virtue of the Regulations made under sub-section 11 of that Section) the certificate issued under sub-section 4 of that section.
>
> 3. In working out when a time limit set by relevant provision expires the period beginning with the day after day A and ending with day B is not to be counted.

4. If a time limit set by relevant provisions would (if not extended by this sub section) expire during the period beginning with Day A and ending one month after Day B the time limit expires instead at the end of that period.

5. Where an Employment Tribunal has the power under this act to extend the time limit set by a relevant provision the power is exercisable in relation to the time limit as extended by this section.

32. The issue of whether those provisions in three and four were alternatives or sequential was considered in the case of Luton Borough Council -v- Haq EAT 2018. It was decided in that case that the sections were sequential and were not mutually exclusive.

33. In relation to the claimant's discrimination claim the primary time limits are the same, three months less one day but the grounds on which time can be extended is not reasonably practicable but on the basis of just and equitable. Section 123(1) Equality Act 2010.

34. In **Robertson-v- Bexley Community Centre trading as Leisurelink 2013 Court of Appeal** the Court of Appeal stated that when Employment Tribunals consider exercising the just and equitable discretion "there is no presumption that they should do so unless they can justify failure to exercise the discretion, quite the reverse the Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule".

35. In the **Chief Constable of Lincolnshire Police -v- Caston 2010 CA** this approach was also confirmed. Tribunals are also encouraged to have regard to the checklist in Section 33 of the Limitation Act 1980 as discussed in **British Coal Corporation -v- Keeble and Others 1997 EAT** which says the following matters should be taken into account - all the circumstances of the case and in particular the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any request for information, the promptness with which the complaint acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain advice once he or she knew of the possibility of taking action.

Conclusions

Unfair Dismissal Claim

36. The claimant was unable to explain why she had filled in the ACAS number incorrectly in her original claim form; considering the evidence I have found that she inserted the wrong number by accident. I accept that because the claimant has language difficulties and because the two different numbers can be confusing i.e. the original number given when registering with ACAS and the number given when the certificate is issued it was not reasonably practicable for the claimant to submit her claim in time.

37. The claimant then has to satisfy the second limb of the unfair dismissal time limit test, i.e. did she put her claim in within a reasonable time thereafter. The form was returned to the claimant by a letter of 15th February received probably by 17 – 19th

February, the claimant then did re-submit the claim on 9 March.

38. The claimant gave confusing evidence about the reason for the delay, the most cogent was that she was waiting for the Polish specific advisor to be available at her local Citizens Advice Bureau.

39. She is required to act promptly once her claim was returned to her and in fact there was at least a three week delay. If the claimant had brought evidence that she was in fact unable to see the Polish advisor until Friday 9th March I would have extended time however there was no corroborating evidence of this and the claimant could not give specific evidence about what happened. Accordingly I find that the claimant did not present her claim within a reasonable period after she became aware it had not been accepted.

No reasonable prospects of success with the dismissal claim and/or a deposit order.

40. The respondent relied on their contention there had been no dismissal. Apart from filing a claim ticking unfair dismissal the claimant's actions were inconsistent with there having been a dismissal, the only other information on the claim form expressly contradicted there having been a dismissal such as giving no date for leaving, confirming that she was still employed, ticking the still employed box. Further, her letter of 13th October was inconsistent with a dismissal as also was accepting SSP. However in the light of the claimant's recording and without oral evidence from Andrew and the claimant the point could not be specifically determined. Accordingly I do not strike it out but this is irrelevant as I have found the claim is out of time.

Race and Sexual Harassment – Out of Time Point

A. Time Limits

41. The test is whether it will be just and equitable to allow the claim to proceed. The facts are the same in that the unfair dismissal although it is inherently likely that the only discrimination occurred before the 11 October, the test on just and equitable is more generous than reasonably practicable test in unfair dismissal. The respondent has not argued that Andrew is unable to give evidence and whilst the claimant could not explain in detail the two to three week gap between receiving the letter from Leicester and submitting the claim as the respondents are in a position to defend this claim Andrew still being employed and bearing in mind the claimant's language difficulties, I find that it would be just and equitable to extend time to allow this claim to proceed.

B. No Reasonable Prospect of Success

42. The claimant has quoted comments by Andrew which are capable of comprising race and sexual harassment although the detail has yet to be pinned down. In respect of the claimant's claims they are unparticularised and further particulars are required however given that there has been sufficient quoted to establish the basics of a claim of sexual and racial harassment I do not either strike that claim out or make for a deposit order, if following the provision of particulars the claimant's claim is still unmeritorious in the respondent's view they can reapply for a strike out or deposit.

Amendment

43. The claimant has delayed until 17 May before raising an unlawful deductions and holiday pay claim and breach of contract for notice pay. She is extremely late and there is no particularly cogent reason given for this lateness. However, they are matters regarding which she is entitled to make a claim and given that she could pursue these claims in any event in the County Court it would be inconsistent with the overriding objective not to allow her to pursue these claims now whilst she has issued proceeding sin the Tribunal. Neither would it profit the respondent if the claimant did bring these claims in the County Court which she could do within a time limit of six years. I have also taken the claimant's language difficulties into account in making the decision to allow the claims regarding holiday pay and breach of contract.

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Employment Judge Feeney

Date: 16th November 2018

JUDGMENT SENT TO THE PARTIES ON
28 November 2018

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FOR THE TRIBUNAL OFFICE