EMPLOYMENT TRIBUNALS

Claimant: Mrs R Hodgson

Respondent: BAE Systems Marine Limited

HELD AT: Manchester **ON:** 4 December 2018

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr C Brass, Partner
Respondent: Ms A Smith, Counsel

JUDGMENT ON PRELIMINARY HEARING

Employment Tribunals Rules of Procedure 2013
Rule 53(1)(a)

The judgment of the Tribunal is that the claimant's claim was presented out of time, it was not reasonably practicable to present it within the original time limit but the claimant failed to present it within a reasonable time thereafter. Accordingly the Tribunal does not have jurisdiction to consider the claimant's claim and it is dismissed.

REASONS

1. The claimant submitted a claim form on 18 June 2018 claiming unfair dismissal relating to a dismissal on 13 February 2014. In her claim form the claimant said she was 'unfairly dismissed from her employment with the defendant given that her dismissal for serious misconduct relates to 65 hours of time that could not reconcile with their clock in system on the main building.'

2. The claimant stated she was visiting the location as part of her job, however no clock in system of any kind was found to operate there as part of the investigation. After appealing on the grounds that the penalty was too severe and the decision remaining the claimant asked the question as to if she could work in the business again. It was confirmed that she could and was the reason she chose not to take the defendant to an Employment Tribunal at the time.

3. Given that the claim was potentially filed four years after the effective date of termination the matter was listed for a Preliminary Hearing to decide whether it was indeed out of time and if so, whether time should be extended.

Time Limits

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

> 111. 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:
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> (a) Before the end of the period of three months beginning with the effective date of termination or
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> (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.

5. 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.

6. 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
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> (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.
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> 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.
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> 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.

7. 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.

8. The tribunal should also consider the factors set out in British Coal Corporation v Keeble(1997) EAT which include whether any action of the respondent has caused the delay, whether the witnesses and documentation will be available, the prejudice to the parties and whether a fair trial is still possible.

Submissions

9. The claimant submitted that she had failed to bring a claim earlier because she had relied on the fact that the respondents had advised her she would be able to get a job with them again in the future and in those circumstances, she was content not to pursue any claim, she now feels she was misled after discovering in 2016 when she was offered a job but then it was withdrawn by an agency where the job was with the respondent that in fact she would not be able to obtain work with them.

10. The respondents submitted that they denied any such undertaking was made and that having heard the claimant's evidence it was not clear who made any comment in any event and if any comment was made, when it was made, there was no explanation for the vast gaps in time between events which should have alerted the claimant even on her own case to the possibility of bringing a claim but she still did not bring a claim. Further, a fair trial was not possible as so much time had now passed the claimant could not remember events, it was even less likely that the respondents would be able to, a number of witnesses no longer work for the respondent and although this was not an insurmountable obstacle it made it much more difficult for the respondents to defend the claim, this was a case there would be genuine prejudice to the respondent.

Issues

11. Was the claimant's claim presented out of time?

12. If so, was it not reasonably practicable to present it in time?

13. If it was not reasonably practicable to present it within time did the claimant present it within a reasonable time thereafter.

Witnesses

14. The claimant gave evidence. There were documents brought by the claimant which were added to during the hearing.

Tribunal's Findings of Fact

15. At her dismissal or appeal the claimant stated initially that she had been told that there would be no problem with her working with the respondents in the future after her dismissal and the failure of her appeal and therefore she did not bring the Tribunal claim, even though at the time she felt that her dismissal was unfair. The claimant was dismissed on 13th February 2014.

16. She subsequently went to work at Sellafield. Being an engineer and living in Barrow realistically the respondent and Sellafield are the only employers where the claimant can exercise her professional skills within a reasonable travelling distance. The claimant stated she did not like the travelling to Sellafield and felt it contributed to her marriage breakdown but she completed her contract there following which she applied for a job in 2016 with the respondent through JAM recruitment, a subcontractor rather than an agency. However when she did apply for a job with them through a subcontractor she was initially offered the job in June and then turned down which started her to doubt the initial promise.

17. The claimant had applied for a job which she knew was with the respondents via a recruitment agency called JAM. She had been offered the job following an interview where members of BAE staff were present and where she had fully explained the circumstances of her previously leaving BAE. She believed there would not be a difficulty in addition because the job was not with the same team she had worked for before. The agency offered her the job subject to a medical and security clearance, she passed the medical but then there was a delay finding out the outcome of the security. She would later report that she saw her old manager Mr Burns at the medical and that he glared at her but they did not speak.

18. On 29 July 2016 the claimant was told that the job offer was withdrawn due to her failing security clearance. She advised JM that she had got a higher security clearance in her last job at Sellafield than was required to work for the respondent but JM were unable to establish why she had failed it hence her discussion with Stuart Hudson
19.

20. Regarding the jobs point the claimant elaborated on this in some particulars of claim that she served in August this year where she said at paragraph 27that it was confirmed by Mr Bosanko at both the initial hearing and the appeal hearing that the claimant would be able to apply for positions with the defendant in future (i.e. she was not barred from working with them).

21. Further, in oral evidence the claimant said a number of different things.

(i) That she had been told she should wait for a year before applying for a job;

(ii) That she had been told that if she brought a claim she would be jeopardising her chances of getting a job with the respondent.

The claimant could not tell us towards the end of her evidence who had made not only these statements which elaborated on her original points but also who had made the original statements. In the particulars of claim as can be seen she said it was Mr Bosanko but she agreed Mr Bosanko was not at the appeal and towards the end of her evidence said she really could not remember who it was although earlier she thought it was Stuart Hudson.

22. The claimant had a text message exchange with Mr Hudson (who had worked in HR at the time) when she was concerned her security clearance was being held up in July 2016 where he said that the previous dismissal would not have affected her clearance and there was nothing to stop her from applying to BAE directly, never mind through an agency she had done. She told him on 29 July that she had been told her clearance wouldn't go through and he replied "it won't be your clearance that has been turned down as that is done independently from BAE so they have no influence you have had clearance up here it sounds as though the HR Manager himself/herself intervening person which is strange, I agree it is unfair as well you're not working for BAE directly so either its odd, somebody is telling porkies by the sound of it. I would contact the union and ask them to investigate it, I'm sure they will have issues with it as well."

23. The claimant also had attached to her particulars of claim/witness statement an email to the agency dealing with the job where she stated that when she had gone for a medical she had seen her old manager Mr Burn and although he had not said anything he had glared at her and she believed he had reported back that she was being approved for a job and either he or someone connected with him had ensured she did not get the job.

24. In addition, she did contact the union officer (Mr David Thompson) who dealt with her appeal and in an email to her he said "Hi Rebecca not sure if I can help you in this matter all I can do is remind the company that during your appeal (as I recalled) that you would be able to reapply for jobs in BAE in the future. The HR person who dealt with it is on holiday at the moment, I will speak to her on her return next week, don't think I will be able to find out why you have failed security vetting though leave it with me" and although the claimant sought to have further contact with Mr Thompson he never responded any further to her enquiries.

25. I find that the claimant's evidence was unsatisfactory as she elaborated and embroidered on what she had originally put in her claim form.

26. However I do find given the supporting documents (although those witnesses were not called) that the claimant was told at the hearing that she could apply for jobs in the future however I do not accept that anybody from the company told the claimant to wait for a year or not to take a Tribunal case because it would jeopardise her chances of getting another job with the respondent. In the circumstances given that this information came forward in a piece meal fashion given that it was not corroborated and given the poor quality of the claimant's recollection I do not accept that anybody told her at the company those two matters.

27. The claimant knew however by the end of July that she was not going to be given this job and she made no further effort to find out why, she could have written

to the company at this stage, she could have pressed the recruitment agency, she could have taken legal advice, she did none of these things. In fact, the claimant did nothing until a friend mentioned to her a "Subject Access Request" possibility under Section 7 of the Data Protection Act, therefore on 17 September 2017 over fifteen months since the offer had been decisively withdrawn the claimant made a "Subject Access Request" to the respondent, the respondent did not reply within the 40 days as required and a follow up letter was sent on 5 December.

28. The claimant accepted that by January 2018 she had been provided with all the relevant documentation that the respondent held on her. This included an email from a Paula Todd, Senior Security Advisor for the respondent stating that "Rebecca Hodgson's application must now be declined, can you please ensure all areas are updated accordingly to reflect this should we receive any further applications". This was sent on 29 July 2016. Once the claimant received this in January 2018 she knew categorically that no further applications from her would be considered.

29. The claimant then did not explain why she did nothing then, except that some time in February she wrote to Clare Martin In House Counsel for the respondent and there was a reply on February 16th to her letter dated 9 February which I did not have, acknowledging receipt of her letter. The claimant wrote back with more detail on 20 February and again on 2 March when there was no response. Ms Martin did reply on 2 March, the claimant replied again on the same day and Ms Martin's last response was March 15 however the claimant advised in submissions that there was a further response on 23 March which we did not have the benefit of accordingly she put her claim in within three months of that last response.

30. The claimant also said she had spoken to ACAS before contacting Clare Martin as she had been told about the three month time limit by ACAS which she then referred to in her correspondence with Ms Martin.

31. The claimant contacted ACAS on 18 June 2016, her certificate was discharged the same day and proceedings issued the same day.

Conclusions

32. I have accepted that the claimant was told she would be able to apply for jobs with the respondent in the future. That was possibly a genuine thought of the person undertaking the appeal. I do not hear from him so I do not know that, but giving the respondents the benefit of the doubt it would be unlikely such a thing would be said with the intention of misleading the claimant by saying she could apply where there would be no intention to offer her a job.

33. The claimant did not apply for a job with the respondent because she obtained a job at Sellafield, she did not give evidence regarding this job but she accepts she that she did not apply for a job with the respondent until the Sellafield job was coming to an end. Accordingly, a choice was made there, she did not say there were no jobs with the respondent in that period. Accordingly, it was in 2016 when she applied for the job with the respondent by JAM recruitment, she would be employed by JAM recruitment but she did meet people from the respondent at the interview and told them about being dismissed.

34. Her job offer from JAM recruitment was subject to a satisfactory medical and security clearance, she obtained the medical and she was told she had failed the security clearance, for what reason we do not know but it is clear from the later letter that she was not going to be able to apply for a job with the respondent in the future. Nevertheless, going back to the position at the end of July 2016 although the claimant did not have the benefit of the email from Paula Todd by 29th July she knew she was not getting that job and at its lowest the reason was not connected with her competence or health. She had been advised around the same time by Mr Hudson (who at this stage no longer worked for the respondent) it was likely that somebody from HR was interfering as it seemed not feasible that the reason was security clearance.

35. Accordingly it is a mystery why the claimant did not take proceedings at this point in time as all the information she needed was there, she knew she had been turned down for a job, she had been told it was for failing security clearance, she had advice from someone who had worked in HR for the respondent that this was unlikely. The fact that she got better evidence later on does not change the position.

36. So while I accept that it was not reasonably practicable to issue proceedings whilst she thought there was a potential for work with the respondent, once this was clear on 29 July she needed to act within a reasonable further period and she failed to do so. Therefore, I would find that the claimant was out of time on the second limb that she did not bring proceedings within a reasonable time of the 29 July 2016.

37. If I am wrong on that I have examined the later period, the later period begins when the claimant makes a Subject Access Request and receives the Paula Todd letter, she receives that in January but again, does not take proceedings, she engages in correspondence with the respondent's lawyer, from 9 February to 23 March, in full knowledge of the three-month time limit.

38. Accordingly, if I was wrong in saying that she should have acted before the Subject Access Request she had all the information by January 2018 and she still failed to act. I find that if it was not reasonably practicable to bring a claim before she had the SAR information, once she had it by January it was then reasonably practicable and she failed to bring a claim within a reasonable period thereafter, there was no pressing need to enter into correspondence with the respondent's lawyer. Indeed, the claimant advised she had spoken to ACAS before she corresponded with Ms Martin and ACAS had advised her of the time limit.

39. Even then if it was not reasonably practicable to bring a claim before 23 March the claimant waited nearly three months after that. She did not say in terms she believed time did not run from then and pointed to no advice which said this and therefore the best that can be said is that for her own reasons she thought the time limit applied from that point clearly it does not and she had been advise by ACAS of the three months. Indeed in her ET1 she refers to the job application point as she realised she had to explain why she had not brought a claim within time.

40. I also accept the respondent's submission that a fair trial is no longer possible, whilst there are some notes of the meetings a complete record is not available and a number of personnel employed have left. The fact that the claimant

herself cannot remember some details which very important to her suggests that the respondent's witnesses will have extreme difficulty remembering what happened four years ago and so the respondent will not be able to properly defend the claim.

41. Accordingly, I find that the claimant's claim is out of time, that it was not reasonably practicable to put the claim in time until 29 July 2015 but that once it was reasonably practicable to put the claim in the claimant delayed for unreasonable amount of time before presenting her claim, consequently, the Tribunal does not have jurisdiction to hear it and it is dismissed.

Employment Judge Feeney

Date: 5th December 2018

ORDER SENT TO THE PARTIES ON

12th December 2018

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.