EMPLOYMENT TRIBUNALS

Claimant: **Ms J Winschief**

Respondent: **SRS Realisations 2017 Ltd (in administration)**

Heard at: **Exeter** **On: 25 January 2019**

Before: Employment Judge Maxwell

Representation
Claimant: in person
Respondent: no appearance

JUDGMENT

1. There is no jurisdiction to determine the claimant's claim of unfair dismissal and this is dismissed.

2. The claimant's unlawful deductions claim is not well-founded and is dismissed.

3. The claimant's age discrimination claim is well-founded and succeeds, she is entitled to compensation:

    3.1. loss of earnings £4,662;

    3.2. injury to feelings £7,500;

    3.3. interest £967.20;

    3.4. total £13,129.20.

REASONS

Claims

4. By a claim form presented on 5 July 2018, the claimant brought claims of:

    4.1. unfair dismissal;

    4.2. age discrimination;

    4.3. unlawful deductions.

5. The claimant seeks to recover loss of earnings for the period to 19 April 2018.

6. The respondent presented its response on 27 July 2018, denying the claims and asserting they were out of time.

7. Administrators were appointed on 17 August 2018, and by an email of 1 October 2018 consented to the claim proceeding.

Evidence

8. I heard oral evidence from the claimant and saw various documents, including:

    8.1. notes of interview for alternative position which included references to lack of knowledge / experience / understanding and “answers not good enough”;

    8.2. the claimant’s grievance / appeal against dismissal letter;

    8.3. redundancy appeal outcome letter attaching minutes, which include “the reason why you didn’t get the two jobs is your cultural fit it was nothing to do with your age…”;

    8.4. an email from Helen Smith of 5 December 2018, in which the author described being an HR administrator and refered to a meeting with “Angus Thomas” in June 2017 when he “said to me that he wanted Jackie out of the business and to start disciplinary proceedings […] He then estimated how long the process would take, a notice period and when we could get a replacement in.”

Facts

9. The claimant was employed between 18 November 2014 and 9 January 2018 as Production and Shipping Administrator. At the time of her dismissal, she was 60 years of age.

10. The claimant was paid £1,750 per month gross, which resulted in net take-home pay of £1,443.

11. On 14 June 2017, the claimant's manager, Angus Thompson, called her to a meeting. He said he had received complaints about her attitude and work ethic, he struggled to see how she would fit in with the new "younger team" he was making and didn't think she would be a "good fit". Mr Thompson offered her a sum of money and said she had a week to go through matters. He proposed that she should agree to leave the company rather than going through a disciplinary process. In the course of this short meeting, Mr Thompson did not identify any specific performance or conduct issues.

12. The claimant contested Mr Thompson's approach. She made enquiries of the HR department (Lisa and Helen) and was told that no complaint about either her performance or behaviour had been made, she should get a solicitor and fight it. Helen Smith told the claimant that Mr Thompson had previously said that he wanted to get her (the claimant) out.

13. A solicitor wrote on the claimant's behalf. No disciplinary proceedings were commenced.

14. On 12 December 2017, the claimant and other members of staff were called into the respondent's board room and told their roles were being made redundant.

15. The claimant was told that her role was redundant because it was being split into two new positions, Stock Controller and Assistant Buyer. The claimant believed she could have undertaken either role with a small amount of training and applied for both. Notwithstanding that her CV disclosed previous experience of Stock Replenishment and Assistant Buyer roles with other companies, she was unsuccessful and the reason given for rejecting her applications included a lack of experience.

16. The claimant received a letter dated 13 December 2017, stating her employment would terminate on 9 January 2018.

17. During the period between being told she would be dismissed for redundancy and her effective date of termination, the claimant was instructed to train other employees to carry out her duties.

Law

Time

18. For an unfair dismissal claim, the onus is upon a claimant to prove that is was not "reasonably practicable" for a claim to have presented within the specified time period. This represents a high hurdle to a late claim; see **Saunders v Southend on Sea Borough Council [1984] IRLR 119 CA**, May LJ giving the judgement of the Court said:

> **22. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However we think that one can say that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view too favourable to the employee. On the other hand 'reasonably practicable' means more than merely what is reasonably capable physically of being done – different, for instance, from its construction in the context of the legislation relating to factories: compare Marshal v Gotham (1954) AC 360. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word 'practicable' as the equivalent of 'feasible' as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic – 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' – is the best approach to the correct application of the relevant subsection.**

19. A claimant will not establish that it was not reasonably practicable to bring a claim before an Employment Tribunal simply by relying upon ignorance of the right to bring such a claim, or the time in which that might be done, rather the reasonableness of such ignorance will need to be established. In **Walls Meat Company Limited v Khan [1978] IRLR 499 CA**, Lord Denning MR said:

> **15. I would venture to take the simple test given by the majority in Dedman's [1973] IRLR 379 case. It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights — or ignorance of the time limit — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. […]**

20. Awaiting the outcome of an internal appeal against dismissal will not, generally, justify a finding that it was not reasonably practicable to present a claim within the time limit; see **Saunders**:

> **31. However in Bodha v Hants Area Health Authority (1982) ICR 200 another division of the Appeal Tribunal presided over by Browne-Wilkinson, J (as he was then) disagreed in these terms:**
>
> > **'Despite the reference to there having been consultation with other members of this Appeal Tribunal, the fact that both the argument and the judgment were concluded on the same date shows that such consultation was obviously not very widespread. For the reasons we have given, we do not think we should follow that dictum having had the matter fully argued before us. There may be cases where the special facts (additional to the bare fact that there is an internal**

> **appeal pending) may persuade an Industrial Tribunal, as a question of fact, that it was not reasonably practicable to complain to the Industrial Tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the industrial tribunal.'**
>
> **32. In the light of the passages from earlier judgments of this court which we have quoted in this judgment, we respectfully prefer the views on the effect of a pending internal appeal on the question whether it has been reasonably practicable to present a complaint within the time limit expressed by the Employment Appeal Tribunal in Bodha's case to those expressed in the Crown Agents' [1978] IRLR 542 decision.**

21. For a discrimination claim, an Employment Tribunal considering whether it is "just and equitable" to extend time has a broad discretion and, pursuant to the decision in **British Coal Corporation v Keeble [1997] IRLR 336 EAT**, the factors relevant to its exercise may include those under section 33 of the **Limitation Act 1980**, in particular:

    21.1. the length of and reasons for the delay;

    21.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

    21.3. the extent to which the party sued had cooperated with any requests for information;

    21.4. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.

22. The balance of prejudice between the parties will always be an important factor.

23. There is, however, no presumption that time will be extended; see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 343 CA**, per Auld LJ:

> **25. It is also 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 failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. […]**

24. Most recently, the Court of Appeal considered the exercise of this discretion in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, per Leggatt LJ:

> **18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the**

> **Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. […]**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).**

25. Whilst awaiting the outcome of an appeal, may be a relevant factor, it does not automatically give rise to an extension of time; see **Apelogun v Lambeth London Borough Council []2002] ICR 713 CA** per Gibson LG

> **16 […] I regard the decision in Robinson's case as being plainly correct. If one considers what was said in Aniagwu's case it may be that the headnote to the Industrial Relations Law Reports is not quite accurate in appearing to suggest that it was laying down some general principle to be followed in all cases by tribunals, as the tribunal with which we are concerned appears to have thought. Instead, as it seems to me, what was said in Aniagwu's case was intended to be limited to the particular circumstances of that case, and on those facts the appeal tribunal was expressing the opinion that every employment tribunal, unless there was some particular feature about the case or some particular prejudice which the employers could show, would take the view that to await the outcome of the grievance procedure was an appropriate course to take. To the extent that Aniagwu's case goes any further than that and lays down some general principle that one should always await the outcome of internal grievance procedures before embarking on litigation, in my judgment Aniagwu's case was plainly wrong. It has long been known to those practising in this field that the pursuit of domestic grievance or appeal procedures will normally not constitute a sufficient ground for delaying the presentation of an appeal. The very fact that there have been suggestions made by eminent judges in 1973 and in 1982 that the statutory provisions should be amended demonstrates that, without such amendment, time would ordinarily run whether or not the internal procedure was being followed. For my part, therefore, I can see no error whatever in what Lindsay J said in the present case in relation to this matter, that is to say that the fact, if it be so, that the applicant had deferred commencing proceedings in the tribunal while awaiting the outcome of domestic proceedings is only one factor to be taken into account. It is clear from the tribunal's decision that the tribunal was applying what it thought was a general approach laid down in Aniagwu's case, and that was erroneous. I see no real prospect of success on this first ground of appeal.**

<u>Unfair Dismissal</u>

26. Pursuant to section 98(1)(a) of ERA, it is for the respondent to show a potentially fair reason for dismissal within section 98(1)(b).

27. If the reason for dismissal falls within section 98(1)(b), neither party has the burden of proving fairness or unfairness within section 98(4) of ERA, which provides:

In any case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

28. As to redundancy, ERA section 139 provides:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to...

(b) the fact that the requirements of that business--

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

29. The leading authority on the definition of redundancy is **Murray v Foyle Meats [1999] IRLR 562 HL**. Lord Irvine said of section 139:

"My Lords, the language of para. (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter."

30. As to a fair redundancy selection process, guidance was provided by the EAT in **Williams v Compair Maxam [1982] IRLR 83**, Browne-Wilkinson J presiding set-out principals of good practice:

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union

> **the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**
>
> **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
>
> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**
>
> **5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."**

31. The band of reasonable responses test applies to the respondent's decision in identifying the pool from which the redundant employee will be selected, which is to say that a dismissal would only be unfair for this reason if the pool was such that no reasonable employer would have chosen it; see **Capita Hartshead v Byard [2012] ICR 1256 EAT**.

Direct Discrimination

32. Section 13(1) of the **Equality Act 2010** ("EqA") provides:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

33. I must consider whether:

33.1. the claimant received less favourable treatment;

33.2. if so, whether that was because of a protected characteristic.

34. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply Section 23(1) of the **Equality Act 2010**, which provides:

> **(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.**

35. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless by of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

36. As to whether any less favourable treatment was because of the claimant's protected characteristic:

    36.1. direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

    36.2. if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;

    36.3. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case is may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.

37. The definition in EqA section 13 makes no reference to the protected characteristic of any particular person, and discrimination may occur when A is discriminated against because of a protected characteristic that that A does not possess; this is sometimes known as 'discrimination by association'.

38. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**

39. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or R; see **Laing v Manchester City Council [2006] IRLR 748 EAT**.

40. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

41. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1,**

> **pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent!s motivation and what is in issue is its correct characterisation in law […]**

Conclusion

Time

42. Given dismissal on 9 January 2018, absent ACAS EC the claimant had until 8 April 2018 to present a claim within the 3-month period. The claimant commenced ACAS EC on 25 June 2018 and the certificate was issued on 28 June 2018. Because the primary limitation period had already expired, ACAS EC did not extend time. Accordingly, the claim form presented on 5 July 2018 was nearly 3 months late.

43. The claimant says her claim was late because she was trying to resolve this dispute by way of the respondent's internal procedures, including an appeal against dismissal and grievance which were not finally determined until 19 April 2018. This comes nowhere near discharging the burden of showing that it was not reasonably practicable to have presented her claim within time. Accordingly, the Tribunal has no jurisdiction to determine her unfair dismissal claim and this is dismissed.

44. I am however satisfied that it is just and equitable to extend time for the claimant's age discrimination claim, for the followings reasons:

    44.1. even if not especially compelling, the claimant has at least provided a full and honest explanation for the delay;

    44.2. the respondent has advanced no prejudice that would be suffered in the event of time being extended;

    44.3. a period of less than 3 months delay is unlikely to have caused any difficulty with witnesses recollecting the events in question;

    44.4. given the claimant's appeal against dismissal and / or grievance, the respondent had at least two opportunities to consider and document the reasons for and circumstances surrounding her dismissal;

    44.5. the respondent has elected not to actively participate in these proceedings;

    44.6. the claimant would be severely prejudiced if her claim is not allowed, as she has no other extant claim;

    44.7. the balance of prejudice firmly favours extending time.

Reason for Dismissal

45. I find that Mr Thompson wished to dismiss the claimant, in part at least, because he wanted a younger team and thought she was too old. I am persuaded of this by the following matters:

    45.1. Mr Thompson was concerned the claimant would not "fit" the "younger" team he was building;

    45.2. Mr Thompson attempted to secure the claimant's dismissal by underhand means, in particular a spurious threat of disciplinary proceedings;

    45.3. whilst it is possible for a redundancy situation to occur where the duties of a particular employee are split between two new roles, the claimant's lack of success in applying for either coupled with her being required to train-up her replacements, all points toward this being something other than an entirely genuine redundancy exercise;

    45.4. a more plausible explanation for the sequence of events is that the "redundancy" was window dressing for a dismissal decided upon for other reasons, including her age.

Direct Discrimination

46. Dismissal was plainly less favourable treatment within EqA section 13. I have made a finding that the decision to dismiss was, at least in part, because of the claimant's age. It follows that in being dismissed, the claimant suffered less favourable treatment because of her age.

Unlawful Deductions

47. The claimant does not allege that she received less than was properly payable during her employment, her complaint is that she lost wages when her employment terminated. This does not fall within ERA section 13.

Remedy

48. The claimant seeks loss of earnings for the period 10 January to 19 April 2018, a period of 14 weeks. Her net monthly pay was £1,443, which equates to (x 12 / 52) £333 per week. The claimant was reasonably seeking to mitigate her losses during this period by attempting to recover her employment with the respondent. She is entitled compensation of £4,662 (12 x £333).

49. The clamant is also entitled to compensation for injury to feeling. She very much enjoyed her job with the respondent and was insulted and upset to have it taken from her without good reason and because of her age. She fought vigorously to recover her job through the respondent's internal processes and became tearful at this hearing when attempting to explain how dismissal had made her feel.

50. Taking into account the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following D**e Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, I am satisfied this is a case in the lower band, towards the upper end, and I award £7,500.

51. Interest is due:

    51.1. On loss of earnings:

        51.1.1. mid-point is 28 February 2018;

        51.1.2. 28 February 2018 to 25 January 2019 is 332 days (90.96% of a year);

        51.1.3. £4,662 x 0.08 x 0.9096 = £339.24;

    51.2. on injury to feeling award:

        51.2.1. from 9 January 2018 to 25 January 2019 is 382 days (104.66% of a year);

        51.2.2. £7,500 x .008 x 1.0466 = £627.96;

    51.3. total interest £967.20

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Employment Judge Maxwell

Date: 25 January 2019