



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103793/2018 Held in Glasgow on 4 December 2018

5

Employment Judge Shona MacLean

10 Ms T Smith

Claimant
In Person

15 Select Service Partner UK Limited

Respondent
Represented by:
Mr Gibson
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Tribunal does not have jurisdiction under Section 48 of the Employment Rights Act 1996 to hear the complaint that the claimant was subject to a detriment in contravention of Section
25 47 of the Employment Rights Act 1996.

REASONS

Background

1. On 1 April 2018 the claimant sent a claim form to the Tribunal. It referred to
30 an early conciliation certificate number R110223/18/15 which stated that the date of receipt by Acas of the EC notification was 25 January 2018 and that the EC certificate was issued by Acas on 11 March 2018.
2. None of the boxes at section 8.1 of the claim form was ticked. At section 8.2
35 of the claim form the claimant stated that she informed the respondent of

E.T. Z4 (WR)

breaches in health and safety and food hygiene. After raising a grievance on 14 July 2017 and continuing to complain to management and supervisors about the breaches she was told in October 2017 that the grievance was missing; someone had removed it from the safe. The claimant said that as a result of making her complaints she was labelled a trouble maker; her shifts were messed about she was being blamed for incidents happening. She had requested meetings with operations managers, but they were unactioned and she felt that she had no option but to resign. At section 9 of the claim form the claimant sought compensation and a recommendation. She stated at section 10 of the claim form that she was making a protected disclosure un the Employment Rights Act 1996 (the ERA) and ticked that she wanted the claim form to be copied to a relevant regulator. At section 15 of the claim form that the claimant said that she kept a diary for a month listing food hygiene breaches and had photographs on her telephone showing food hygiene and health and safety issues.

3. In the response the respondent raised a preliminary issue that the claim form lacked detail and could not be responded to in any meaningful way.
- 20 4. A preliminary hearing case management took place on 7 June 2018 following which orders were issued to the claimant to which she responded. The respondent provided additional information to the response. The respondent stated that all the detriments complained of by the claimant were submitted outside the three-month lime limit and the Tribunal has no jurisdiction to hear them. Also, the disclosures relied upon do not qualify for protection and that the claims must fall for that reason too.
- 25 5. A preliminary hearing case management took place on 1 October 2018. The Employment Judges' Note of the Preliminary Hearing records that the claimant lacks sufficient continuous service to claim "ordinary" unfair dismissal and there was no claim for unfair dismissal of any type in the claim form. The Note continues:
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“The past preliminary hearing for case management clarified that the claimant intended to claim that she was subjected to various detriments as a result of having made a protected disclosure.

5 There is no reference in that order to a claim for automatically unfair (constructive dismissal under section 103A of the Employment Rights Act 1996 and the case has proceed on the basis that it is limited to detriment claims under section 47B of the Act only. This is consistent with the failure to tick the box for unfair dismissal on the ET1.”

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6. The case was listed for a preliminary hearing to deal with the jurisdictional time points set out in the amended response; the issue whether the disclosures relied upon by the claimant qualify for protection and any necessary case management in light of the conclusions on the first two issues.

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7. The claimant appeared in person. Mr Gibson represented the respondent. the parties prepared a joint set of productions to which I was referred. The claimant gave oral evidence. I made the following findings.

20 **Findings in Fact**

8. The respondent employed the claimant from 4 July 2016 as a Team Member for the respondent’s “James Martin Kitchen” unit at Glasgow Airport. The claimant resigned from her employment with effect from 12 November 2017.

25 9. Around March 2017 the claimant says that she started making verbal complaints to the respondent’s management about breaches of food hygiene and food safety in the kitchen.

30 10. On 14 July 2017 the claimant sent a written grievance complaining about verbal abuse from a colleague and health and safety and food hygiene concerns. The claimant knew that the grievance was placed in the safe.

11. In September 2018 the claimant understood that she was going to be removed from night shift. The claimant sought advice from Acas.
12. The claimant made a statutory flexible working request on 17 September 2018. A meeting was scheduled for 6 October 2017 to discuss this. It was rescheduled at the claimant's request.
13. On 10 October 2018 the respondent received two infringement notices and a fine from their client. The claimant was suspended on full pay to allow the respondent to investigate the claimant's conduct.
14. The claimant contacted the Acas helpline for guidance. She was advised to obtain advice from the Citizens Advice Bureau. The claimant was unable to get an appointment; she worked nightshift.
15. An investigation hearing took place on 17 October 2017 during which the claimant referred to her outstanding grievance. The claimant was advised that the written grievance was missing from the safe.
16. The respondent's HR advisory team contacted the claimant. She was advised to send the grievance to them. If the claimant was dissatisfied with way in which it was handled locally the claimant could raise this as a further grievance point.
17. The claimant sent a typewritten letter dated 25 October 2017 to Mr Millar resigning from her position with effect from 12 November 2017. The letter stated, "I have now taken legal advice and I will discuss the reasons for my resignation with Alistair Caldwell and advise him what my next steps will be regarding this."
18. The claimant also sent Mr Miller a handwritten letter of resignation dated 25 October 2017 referring to a termination date of 4 November 2017. It referred to the reasons for resignation as "primarily because my formal written grievance submitted on 14 July 2017 was never dealt with; making my position in CPU not only difficult but I was made to feel very uncomfortable;

5 the fact that I was verbally abused by another member of staff on a least two separate occasions and still company policy was not followed.” The letter concluded “I will also be seeking legal advice regarding my accident in JMK on 24 May 2017 with a view to [pursuing] a claim for personal injury compensation”.

19. The claimant also sent a letter dated 25 October 2017 to Mr Caldwell. In that letter the claimant referred to taking legal advice about constructive dismissal and a personal injury claim.

10 20. The respondent’s HR advisory team wrote to the claimant asking if she wished to reconsider her resignation. The claimant was also asked if she wished to continue with her grievance. If the claimant did not get in touch it was assumed that the claimant did not wish to reconsider her resignation and
15 it would take effect from 12 November 2017.

21. The claimant confirmed that she was did not wish to reconsider her resignation.

20 22. The claimant found new employment from 6 November 2017.

23. The claimant continued to email the respondent’s HR advisory team about her final salary payment. In an email sent on 11 December 2017 the claimant regarding a recorded delivery letter sent by the claimant to Mr Caldwell the
25 claimant stated, “I have already started talks with a view to bringing a case against SSP Glasgow airport for the termination of my employment there, this will be something else that I will add to this.”

24. The claimant sought advice from the Acas helpline in December 2017. The
30 claimant knew that she had insufficient qualifying service to bring a claim of unfair dismissal.

25. On 17 January 2018 the claimant presented a claim form to the Tribunal. The
35 claimant was advised by letter dated 24 January 2018 that the claim form could not be accepted as the claimant had indicated that she was exempt

from early conciliation but none of the exemptions applied. The claim form was returned.

5 26. The claimant contacted Acas on 25 January 2018. The EC certificate was issued by Acas on 11 March 2018. The claimant presented the claim form on 1 April 2018.

10 27. I considered that the claimant's evidence was equivocal. For example, she said that she wrote the resignation letters on 25 October and did not know when they were delivered to the respondent by her son. She then stated that they were delivered on 1 November. The claimant could not recall when she spoke to Acas but then said that it was before Christmas. She could not recall when she was told about time limits but then said Acas told her about time limits after her claim form was rejected by the Tribunal. The claimant said that
15 she was unaware of the need for early conciliation until her claim form was rejected yet she had spoken to Acas on at least two occasions in late 2017 and had access to the internet and submitted the claim form online. The claimant also specifically responded to the question on the claim form about the need for an EC certificate and said that the claim was exempt. The
20 claimant also said that there was no reason for the delay in presenting the claim form after she received the EC certificate but then referred to her health and having to travel to Aberdeen to deal with her parents.

25 28. From the tone and content of the claimant's correspondence with the respondent during her employment the claimant knew her rights and could refer to relevant statutory authorities to support her position. I felt that the claimant's evidence about her understanding of what was required of her when presenting a complaint to a Tribunal was unconvincing especially when she had spoken to Acas in December 2017.

The Law

29. Section 48(1A) of the Employment Rights Act 1996 (the ERA) states that an employee may present a complaint to an employment tribunal that she has been subject to a detriment in contravention of section 47B.
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30. Section 48(3) of the ERA provides that an employment tribunal shall not consider a complaint unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or where that act or failure is part of a series of similar acts or failures the last of them, or (b) within such 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.
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31. Section 207B(3) of the ERA provides that when working out when the time limit set by a 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 a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires after that period.
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Submissions

The Respondent

32. I was referred to the claimant's additional information in response to the order. Taking the claimant's case at its highest (for the purpose of this preliminary hearing) the last possible detriment was 24 October 2017. The claimant's resignation was not an act by the respondent or a deliberate failure on its part.
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33. Applying section 203(3) and *Luton Borough Council v Haque* [2018] ICR 1388 the limitation period ordinarily expires on 23 January 2018. The time limit had already expired before the claimant started early conciliation. Accordingly, there is no extension of the time limit under the early conciliation rules.
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34. It was reasonably practicable for the claimant to have submitted the claim form in time; she did so on 17 January 2018, but it was rejected.

5 35. The claimant received the early conciliation certificate on 11 March 2018 but did not present the claimant form until 1 April 2018. The rejected claim form had been returned to her. All that had to be added was the early conciliation certificate reference number.

10 36. The claim form was presented out of time. It was practicable for the claimant to have presented it on time. The Tribunal has no jurisdiction.

The Claimant

15 37. The claimant said that she was suspended from work from 10 October 2017 and did not return. She knew around 18 October 2017 that her grievance had gone missing from the safe. She knew that the respondent would not deal with her grievance. She wrote her letter of resignation on 25 October 2017. She spoke to Acas and was advised to contact the CAB. She was unable to get a suitable appointment.

20 38. Although the claimant contacted the Acas helpline her focus was on finding new work. She started her new job on 6 November 2017.

25 39. The claimant's son continued to work for the respondent. She spoke again to Acas a couple of days before Christmas. The claimant had access to the internet via her mobile telephone. This was how she presented her claim form on 17 January 2018.

40. The claimant was unaware of early conciliation until her claim form was rejected. She contacted Acas immediately.

30 41. The claimant said that she had health issues and other pressures. She had a family bereavement at the end of March 2018. She was involved in travelling to Aberdeen and dealing with her parents.

Deliberations

42. The claim has proceeded on the basis that it is limited to detriment claims under section 47B of the ERA. The additional information provided by the claimant refers to detriments which ended on 24 October 2017. Absent section 207B of the ERA the time limit would have expired on 23 January 2018. The ACAS early conciliation procedure did not commence until 25 January 2018. The claimant therefore does not benefit from an extension of time. The claim presented on 1 April 2018 is presented out of time.
43. I therefore considered whether it was not reasonably practicable for the claimant to have presented the claim on time. I noted that this is a question of fact and it was for the claimant to show precisely why it was she did not present the claim.
44. In coming to a decision, I asked if on the facts I have found it was reasonable to expect that which was possible to have been done.
45. The claimant did not suggest that she was unable to present her claim because she was unaware of her right to bring a claim. Indeed, she referred in her resignation to taking legal advice and before Christmas she spoke to Acas who suggested to the claimant that she obtain advice from CAB. The claimant said that she could not get an appointment because she worked nightshift. The claimant knew that she had insufficient qualifying service to bring a claim of unfair dismissal. On 17 January 2018, the claimant completed the claim form and presented it online. She answered the question relating to the EC certificate which once again suggest that she was put on enquiry.
46. I considered that the claimant knew her legal rights. I found it surprising that having spoken to Acas in December 2017 the claimant did not discuss early conciliation and time limits. In any event she had access to the internet and searching about presenting a claim to the employment tribunal would have put her on inquiry as to the need for an early conciliation certificate before

raising proceedings and the impact this may have on time limits for presenting claims.

5 47. I was not convinced by the fact that the claimant's son was an employee of the respondent and the claimant had been suspended on 10 October 2017 hampered her ability to make a claim. She had a diary and photographs and was able to present the claim of 17 January 2018 when her son was still employed by the respondent.

10 48. While the claimant was under stress and had personal matter to address this did not prevent her from presenting the claim on 17 January 2018.

15 49. I therefore concluded that that it was reasonably practicable for the claimant to have presented the claim on time. I therefore did not need to consider if it was presented within a further reasonable period. I did however note that no medical evidence was produced to suggest that she was incapacitated from presenting the claim form between 11 March 2018 and 1 April 2018. While I accepted that the claimant had a family at the end of March 2018 she had already completed a claim form on line that had been returned to her. All that she needed to add to that claim form was the EC certificate number.

20 50. I considered that the claim was presented out of time. It was reasonably practicable for the claim to be submitted on time. Accordingly, in terms of section 48 of the ERA an employment tribunal does not have jurisdiction to hear the complaints under section 47B of the ERA.

25 51. I was addressed by Mr Gibson about the second preliminary issue: the alleged disclosures on 11 April 2017; 24 May 2017; 18 September 2017 and 10 October 2017) he said were not protected disclosures.

30 52. The claimant said that the disclosure on 11 April 2017 provided information of breach of health and safety when preparing food. The claimant explained that the tabled had been prepared by the respondent's representative. I noted that in the handwritten additional information the event/correspondence on

24 May 2017; 18 September 2017 and 10 October 2017 were not indicated as being protected disclosures.

53. Having reached the conclusion that I did in relation to the Tribunal's
5 jurisdiction I did not go on to consider this preliminary issue.

Employment Judge: Shona MacLean
Date of Judgment: 11 December 2018
10 Copied to parties: 13 December 2018