

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102791/2019 Preliminary Hearing at Edinburgh on 30 May 2019

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Employment Judge: M A Macleod

10	Charlene MacDonald	<u>Claimant</u> Represented by Mr T Graham Lay Representative
15	Sky Subscribers Services Limited	<u>Respondent</u> Represented by Mr M Leon Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim fails for want of jurisdiction, in that the claimant lacks the necessary two years' qualifying service upon which to base a claim of unfair dismissal; and therefore the claim is
25 dismissed.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 5 March 2019, in which she complained that the respondent had unfairly dismissed her.
2. The respondent submitted an ET3 in which they resisted the claimant's claim and argued that the Tribunal lacked jurisdiction to hear the case as it was presented out of time, and also because the claimant lacked the minimum necessary qualifying service to found a claim of unfair dismissal.
3. A Preliminary Hearing was fixed to take place on 30 May 2019 in order to determine this preliminary issue. The claimant attended and was

represented by Mr Graham, her partner and a lay representative with trade union experience. The respondent was represented by Mr Leon, solicitor.

4. The claimant gave evidence on her own behalf, and both parties presented documents upon which reliance was placed.
5. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

6. The claimant, whose date of birth is 24 May 1984, commenced employment with the respondent on 16 February 2018. Her employment came to an end with effect from 9 September 2018, when she tendered her resignation.
7. The claimant's evidence was that she decided to resign her employment with the respondent when she felt that she could no longer accept the bullying behaviour of management, and their lack of respect to her. The Tribunal makes no findings in fact about this matter, on the basis that this was a preliminary hearing only designed to determine the preliminary issues before it, and not to consider the details of the merits of the case.
8. The claimant submitted an internal grievance in which she complained about her treatment to the respondent, on 7 August 2018. A grievance investigation meeting was held with the claimant by telephone on 19 September 2018, following her resignation. Her grievance was partly upheld, though the claimant remained dissatisfied, and submitted an appeal against the grievance decision. An appeal meeting was held with her on 30 January 2019.
9. The claimant produced copies of emails exchanged with Laura Anderson, the manager who handled her grievance. Discussions continued following the submission of her grievance and following the investigation meeting. On 4 October 2018, Ms Anderson wrote to the claimant (C4) to advise that as at that date she had interviewed a number of the staff mentioned in the grievance, but still had others to speak to. She said the others were to be interviewed over the next 2.5 weeks. She confirmed that the investigation

would “not be a quick one”, and that the claimant was noted to be out of the country at the end of October.

10. Ms Anderson emailed the claimant on 2 November to advise that she had completed the interviews and was now putting her findings together, and would keep the claimant advised (C5). Following a further update, Ms Anderson wrote again to say, on 23 November, that further information had come to light which may have a bearing on the complaint, and that she was committed to conducting a full investigation.

11. The final grievance outcome was provided to the claimant by email on 4 January 2019 (C15).

12. After receiving the grievance decision, the claimant contacted ACAS. She had written to the respondent on 23 December 2018 to say (R36) “*I am ready to press my claim through ACAS to a full tribunal as I feel we are no nearer to a conclusion.*”

15. On 7 January 2019, the claimant commenced the ACAS Early Conciliation process (R23), and the Early Conciliation Certificate was issued at the conclusion of the Early Conciliation process on 7 February 2019.

14. The claimant believed that she had been informed by the respondent that she could not raise Employment Tribunal proceedings before she had completed the grievance process. She knew from the point when she resigned about her right to submit a claim to an Employment Tribunal. She did look up her rights online, but she said that she did not know about the time limits involved. She did not seek advice, for example, from the local Citizens’ Advice Bureau.

20. At that time the claimant was under investigation for cancer, and regularly had to attend her GP as well as hospital for consultations. She said she had 3 or 4 visits to hospital but was also very anxious about the possibility of requiring surgery which could be major. As she put it, when it was suggested to her that she should have been exploring her rights before the Tribunal, she had “other pressing matters on my mind”.

16. The claimant presented her claim to the Employment Tribunal on 5 March 2019. She understood that from the date of 7 February 2019, being the date of issue of the Early Conciliation Certificate, she had an additional 4 or 5 weeks within which to submit her claim. She relied upon Mr Graham, who has some trade union experience, to handle the contact with ACAS during early conciliation.

17. The claimant said before this Tribunal that had she received the grievance outcome when she expected to receive it, in early November, she would have gone to ACAS immediately in order to commence the process of 10 raising her claim before the Tribunal.

Submissions

18. Mr Graham made a short oral submission. He described the case as “somewhat of a David v Goliath” situation. He said that the timelines were driven by the respondent. He said that he and the claimant did not know about the time bar until January when they contacted ACAS. They had had 15 several conversations with ACAS to find out what the process was, but nothing was said about timescales.

19. Mr Graham pointed out that the claimant was off sick from work with stress when she resigned. She was told timescales by the respondent in relation 20 to the grievance which were not met. This was “infuriating”, that what happened on 23 November could not be alluded to. Had the outcome been delivered on 23 November, the claimant would have learned about the time bar and acted accordingly. While ignorance of the law is no excuse, he said they did not know that the CAB could offer assistance.

25 20. Mr Graham very candidly said that it was “100% our fault” that the claim was not presented in time, but had she been aware earlier, the claim would have been presented earlier.

21. He submitted that it would be just and equitable to allow the claim to proceed.

22. With regard to length of service, Mr Graham acknowledged that he was unsure how employment law works. He observed that any decent human being has the right to carry out their employment without fear. It should not matter whether an employee has been in a job for a week or longer, if someone makes that employee's life a misery, it should be just and equitable to allow a hearing to proceed so that the Tribunal can have access to the full information in the case.

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23. For the respondent, Mr Leon presented a short written submission, to which he spoke briefly.

10 24. He submitted that section 108(1) of the Employment Rights Act 1996 provides that employees require two years' qualifying service ending with the effective date of termination. The claimant did not have two years' qualifying service and therefore the claim should be dismissed.

15 25. With regard to time bar, Mr Leon referred to section 111 of the 1996 Act as authority for saying that the Tribunal shall not consider a claim of unfair dismissal unless the claim is presented within three months of the effective date of termination of employment, or such further period as the Tribunal considers to be reasonable where it is satisfied that it was not reasonably practicable for the claim to have been presented within the three month period.

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26. ACAS Early Conciliation can extend the period, in certain circumstances, set out in section 207B of the 1996 Act.

27. The claimant resigned on 9 September 2018. The original time limit for presenting the claim was therefore 8 December 2018, but it was not presented until 5 March 2018. She contacted ACAS to commence early conciliation 30 days after the time limit had expired, and therefore is not entitled to an extension of time.

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28. Mr Leon submitted that it was reasonably practicable for the claimant to have presented her claim within the three month time limit. The claimant submitted that her grievance procedure had an impact on her ability to raise

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a claim, but he argued that this was irrelevant to the question of reasonable practicability. She knew of the acts which she wanted to complain of prior to her resignation, and therefore it was reasonably practicable for her to present her claim in time. She wrote to the respondent on 23 December 5 and referred to contacting ACAS but did not do so for a further 15 days.

29. He argued that the claimant cannot argue that she did not, or could not be reasonably taken to, know about the time limits applicable to Employment Tribunal claims. She had access to the internet, and took no steps to seek advice from the CAB as to her rights.

10 30. Even if it were not reasonably practicable to present the claim within three months, the claimant, said Mr Leon, failed to present the claim within such further time as the Tribunal should consider to be reasonable in all the circumstances.

15 31. The interest of the employer must be taken into consideration when balancing up the different interests in this case, he submitted.

32. Accordingly, he argued that the claim should be dismissed on this ground.

Discussion and Decision

20 33. The first issue before this Tribunal is whether the claimant had two years' qualifying service upon which to base the only claim which she has presented to this Tribunal, that is, an unfair dismissal claim. Section 108(1) requires that the claimant demonstrate that she had two years' qualifying service before the effective date of termination of her employment.

25 34. In this case, the claimant's employment began on 16 February 2018, and came to an end on 9 September 2018. Her qualifying service amounted to just less than 7 months with the respondent.

35. Mr Graham submitted what may be said to be a heartfelt plea that the circumstances of this case are such that they deserve a hearing, and that it would be just and equitable for the Tribunal to allow the case to proceed in these circumstances.

36. The law, however, allows no discretion to Tribunals in these matters. If the claimant cannot demonstrate that she has two years' qualifying service, the Tribunal simply has no jurisdiction to hear her claim of unfair dismissal. There is no dispute that this case the claimant had less than 7 months' 5 qualifying service.

37. As a result, the Tribunal has no jurisdiction to hear this case on the basis that she has insufficient qualifying service upon which to found a claim for unfair dismissal.

38. While this may seem a harsh outcome to the claimant and her 10 representative, the reality is that the law does not permit her to make a claim of unfair dismissal without the minimum qualifying service.

39. It is therefore my judgment that the Tribunal has no jurisdiction to hear this claim, and that it must be dismissed.

40. It is unnecessary for me to consider whether or not the Tribunal might have 15 been prepared to exercise its discretion to allow her claim in late, because even if I were prepared to do so, the claim would still fall for want of satisfying section 108(1) of the Employment Rights Act 1996.

41. The claimant's claim must therefore fail for want of jurisdiction and is dismissed.

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Employment Judge: Murdo Macleod
Date of Judgment: 26 June 2019

Entered into the Register: 26 June 2019

And Copied to Parties