EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123784/2018

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Held in Glasgow on 8 May 2019

Employment Judge: Robert Gall

10 **Mrs J Donker** — **Claimant**
Represented by:
Mr P Hannah -
Solicitor

15 **First Bus (No 1) Limited** — **Respondent**
Represented by:
Ms E McIlroy -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(1) Claim number 2202608/18, having been presented to the Employment Tribunal at London Central, and having been accepted by that Employment Tribunal, thereafter being transferred to the Employment Tribunal at Glasgow
25 is to proceed, after consideration in terms of Rule 26 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013.

(2) A Case Management Preliminary Hearing is set down to take place by way of telephone conference call on Monday, 10 June 2019 at 9.30am. This is to take place in case 4123784/18, being the case number allocated to the claim
30 brought by the claimant in Glasgow (4110587/18) and that presented in London (2202608/18)

REASONS

1. This case has a slightly unusual background. There are 2 claims currently before the Glasgow Employment Tribunal. They involve the same parties and same facts.

2. The claimant presented a claim by completing a claim form online. This claim was presented in time having regard to the act of discrimination said to have occurred.

3. The claimant lived and worked in Glasgow. Her employers were the current respondents. She described them in the claim form however as "First bus". She detailed their address as being in Glasgow. At part 2.4 of the claim form the claimant stated a postcode for her work location. She gave that postcode as "SW5 9QT".

4. As a result of providing that postcode, which was incorrect, the claim form was directed to the Employment Tribunal at London Central. It was received there on 28 April 2018. This claim is referred to as the "London claim". By letter of 21 June from the Employment Tribunal at London Central, the claimant was asked to confirm the full address where she worked. She does not appear to have replied.

5. For reasons which are not entirely clear, nothing further happened on the file until 19 October 2018. On that date four things happened. Firstly, a strike out warning was issued to the claimant in respect of the claim of unfair dismissal which she appeared to be bringing. This was on the basis that she did not have qualifying service to bring such a claim. Secondly, the claim was served upon the respondents. Thirdly, it was confirmed to the respondents that the claim had been accepted and that a response was required to claims made other than that of unfair dismissal. Finally, both parties were informed that it appeared to the Tribunal that the place of work of the claimant was in fact in Glasgow, notwithstanding the postcode supplied by the claimant for her place of work. Parties were asked whether they agreed to transfer of the claim to Scotland in those circumstances.

6. The claimant confirmed that in her view the case should be transferred to Glasgow. She also confirmed that she understood her claim of unfair dismissal was struck out with her claim of race discrimination remaining.

7. The respondents instructed their current solicitors. The solicitors sought clarification of the position, particularly given that a claim had been commenced in Glasgow. The Glasgow claim was allocated case number 4110587/18. It was presented on 26 June 2018. It is referred to as the "Glasgow claim". It narrated the same basis of claim as had the London claim.

8. Form ET3 was submitted by the respondents in the London claim on 16 November 2018. That response was accepted by the London Employment Tribunal, that being confirmed by letter of 3 December 2018. In that ET3, the respondents took the point that the Employment Tribunal at London Central did not have jurisdiction to deal with the claim as the respondents had no base in England and the claimant did not work for them in England.

9. No Rule 26 initial consideration was undertaken in the London claim. By letter of 5 December 2018 it was confirmed to parties that the Regional Employment Tribunal Judge had instructed that the case be transferred to the Employment Tribunal at its office in Glasgow. That duly occurred.

10. There is provision under the Rules, Rule 99, for transfer of "proceedings" between the Employment Tribunal in England and Wales and the Employment Tribunal in Scotland.

11. The Glasgow claim and the London claim were dealt with by the Glasgow Employment Tribunal under a further case reference number, 412 3784/18.

12. The Glasgow claim had been presented at a time such that there was an issue over whether it had or had not been presented in time under the Rules. The Preliminary Hearing ("PH") set down for 8 May was to determine the question of timebar.

13. At the PH, the first point which arose and upon which I asked for comments from the claimant and respondents was that of the status of the London claim.

14. The respondents maintained that the claim ought not to have been accepted in London. They had taken the point as to jurisdiction in submitting form ET3. There was no basis on which the London Tribunal had jurisdiction. When the file was transferred to Glasgow therefore, the issue of jurisdiction remained to be determined. Form ET3 also included a request for the decision to accept the claim form to be reconsidered. Initial consideration in terms of Rule 26 still required to be undertaken. As and when that occurred, the claim should be dismissed as there was no jurisdiction to consider the claim.

15. The claimant submitted that the London claim had been accepted in London and with the case having been transferred to Glasgow, the question for the Employment Tribunal in terms of Rule 26 was whether it currently had jurisdiction i.e. whether the Glasgow Employment Tribunal had jurisdiction. It clearly did, the claimant said. The London claim was now therefore able to proceed before the Glasgow Employment Tribunal. Mr Hannah accepted that if the issue of jurisdiction was being determined in London, the claimant could not argue that the claim could proceed before the London Central Employment Tribunal. That however was not the situation which pertained.

16. It seemed to me that I had enough information to undertake the initial consideration in terms of Rule 26. I therefore took that step.

17. I was satisfied that the London claim had indeed been accepted in the Employment Tribunal at London Central. It might be argued that it ought not to have been. The postcode however supplied by the claimant for a place of work was a London postcode. It is unclear how that came to be the case.

18. In my view what I had before me at initial consideration stage was not simply a file passed from London to Glasgow, but rather transferred proceedings. The terms of Rule 99 talk about "proceedings" being transferred. That to me involves the case being transferred. In my view I was therefore considering whether the Glasgow Employment Tribunal had jurisdiction to hear the case transferred to it. I concluded that it did. I therefore confirmed to parties, having considered the claim in terms of Rule 26, that the London claim could proceed before the Glasgow Employment Tribunal.

19. It was not possible, in my view, for me to examine whether or not the Employment Tribunal at London Central ought to have accepted the claim. The request made for reconsideration of the decision to accept the claim, that being contained within form ET3 presented to London Central Employment Tribunal, had not been something upon which the London Central Employment Tribunal had commented or acted. I appreciated that a point as to jurisdiction can be taken in response to a the claim or by the Tribunal itself. I concluded however that where the proceedings had been transferred to the Glasgow Employment Tribunal, the question of jurisdiction would be tested on the basis of whether the Glasgow Employment Tribunal had jurisdiction rather than whether, at time of presentation of the claim, London Central Employment Tribunal had jurisdiction.

20. I confirmed to Mr Hannah and Ms McIlroy that having undertaken initial consideration in terms of Rule 26, I had concluded that that the claim was to proceed. Ms McIlroy was unhappy with this decision. There was exploration with parties as to whether there was a basis on which the decision in terms of Rule 26, could be challenged by an aggrieved party. Rules 27 and 28 detail that possibility, however only in circumstances where a claimant wishes to challenge a decision that the claim is to be dismissed, or where a respondent wishes to challenge a decision that a response is to be dismissed. Ms McIlroy was unable at that stage to point me to a basis on which a respondent, aggrieved by a decision under Rule 26 that the claim was to proceed, could challenge that decision. The principle would also apply in the opposite set of circumstances. There does not seem to be a provision under which a claimant, aggrieved by decision that a response was not dismissed, can then challenge that decision.

21. I recognise that Ms McIlroy might, upon reflection, come to the view that there is a basis for her to challenge my decision under Rule 26 that the claim is not dismissed due to there being no jurisdiction. At present however the decision is that the claim will proceed.

22. I should clarify that the only basis on which Ms McIlroy said that consideration under Rule 26 should lead to the claim being dismissed was that of there

being no jurisdiction. That was predicated on the position that there was no jurisdiction on the part of London Central Employment Tribunal to accept the claim when the claim was presented there. In other words, putting it slightly differently, Ms McIlroy submitted that the ability to challenge jurisdiction at 5 time of presentation of the claim remained, notwithstanding the transfer of proceedings to the Glasgow Employment Tribunal. The fact that the Glasgow Employment Tribunal had jurisdiction and now had the transferred proceedings before it did not matter, she said, as those proceedings ought not to have been accepted by the London Central Employment Tribunal. As 10 stated however, I did not accept that argument.

23. Ms McIlroy had referred in correspondence prior to the tribunal to the case of *McFadyen and others v PB Recovery Ltd and others* 2009 WL 257 8837. That case confirmed that a claim submitted to the English Employment Tribunal did not mean that the claim had been presented in time when in fact it ought 15 to have been presented to the Scottish Employment Tribunal. In my view, the the circumstances of this case are different to that of *McFadyen*. In *McFadyen,* the claim submitted to the English Employment Tribunal was rejected. Ironically, it appears it ought to have been accepted. It was, nevertheless, rejected. A claim was then submitted to the Scottish 20 Employment Tribunal. That however was late. It was held not to be possible to argue successfully that the claimant been presented in time by "pointing to" the claim presented to the English Employment Tribunal. The distinction between *McFadyen* and this case is that in *McFadyen* there was no "live claim" transferred to the Scottish Employment Tribunal. The claim in 25 *McFadyen*, when presented to the English Employment Tribunal was rejected. In this case, however, the claim presented to London Central Employment Tribunal was accepted. Those proceedings were then transferred to Glasgow.

24. For those reasons therefore, my view is that the London claim, having been 30 transferred to Glasgow, can now proceed. It is common ground that it was presented in time. The issue of timebar is therefore no longer live. The hearing falls to be fixed.

25. In order to make the relevant arrangements for the hearing, a case management PH was set down to be conducted by way of telephone conference call at 9:30 AM on Monday, 10 June 2019. The Clerk to the Tribunals is requested to send to parties the relevant hearing notice with appropriate dial in details. The agenda for this case management PH will be to make arrangements for the hearing. That will involve fixing the dates and length of hearing, together with clarification of the issues and also practical arrangements being confirmed such as in relation to preparation of the bundle. In order to assist with clarification of the position of both parties, the Clerk to the Tribunals is requested to issue agendas to the parties for completion. It is recognised that agendas were completed at an earlier point in this case. It may therefore be that either party simply wish to refer back to those earlier agendas. Equally some matters may have moved on such that completion of the fresh agendas is appropriately undertaken.

26. Other matters were discussed at this PH. Mr Hannah confirmed that the claimant no longer sought to amend the claim. Ms McIlroy looked to explore the issue of the comparator detailed by Mr Hannah for the claimant. It seemed to me that whether a comparator named was appropriately regarded as a comparator was a matter better determined at the hearing than at this PH. The question of whether the currently proposed comparator is properly so regarded as therefore left until the hearing.

27. I also raised with Mr Hannah for consideration by him the question of remedy. It seemed to me that as this was a claim under the Equality Act 2010 where it is said that dismissal of the claimant was an act of direct discrimination, the remedy of reinstatement was not one open to the Tribunal to grant. The claimant does not have qualifying service to bring a “standard” claim of unfair dismissal. The claim is not therefore brought under the Employment Rights Act 1996. I do not see any ability on the part of the Employment Tribunal to award reinstatement where the claim is made under the Equality Act 2010. Mr Hannah confirmed that he would consider this point and confirm the position for the claimant as to whether she sought reinstatement and if so on what basis within 21 days of this PH.

28. Having explored these matters and made the determination set out above, this PH closed.

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Employment Judge: Robert Gall
Date of Judgment: 08 May 2019
Entered in register: 16 May 2019
and copied to parties

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