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EMPLOYMENT TRIBUNALS

Claimant: Miss M Seale

Respondent: Axis Europe Limited

RECORD OF A PRELIMINARY HEARING

Heard at: East London Hearing Centre **On:** 27 August 2019

Before: Regional Employment Judge Taylor

Appearances

For the claimant: In person

For the respondent: Mr Rajiv Butt, Counsel

JUDGMENT FOLLOWING A PRELIMINARY HEARING

The judgment of the tribunal is that:

1. The claimant's claim for unfair dismissal was presented outside the primary time limit contained in section 111 (2) of the Employment Rights Act 1996, as amended by the early conciliation provisions; it was reasonably practicable for the claim to be presented within the primary time limit. Accordingly, the Tribunal does not have jurisdiction to consider this claim and therefore the claim is dismissed.
2. The claimant's claim for unlawful deduction of wages was presented outside the primary time limit contained in section 23 (4) of the Employment Rights Act 1996, as amended by the early conciliation provisions; it was reasonably practicable for the claim to be presented within the primary time limit. Accordingly, the Tribunal does not have jurisdiction to consider this claim and therefore the claim is dismissed.

3. The claimant's claims of disability discrimination have been presented outside the primary time limit contained in section 123 of the Equality Act 2010 having considered the circumstances it is not just and equitable to extend time for bringing the complaint of disability discrimination. Accordingly, the tribunal does not have jurisdiction to consider these claims and the claims are dismissed.

REASONS

1. The claimant was employed by the fourth respondent, a maintenance company based in London, most recently as Head of Community Investment, from 20 November 2006 until dismissal with effect on 26 November 2018. By a claim form presented on 26 April 2019, following a period of early conciliation from 24 February 2019 to 24 March 2019, the claimant brought complaints of unfair dismissal, unlawful deduction from wages and disability discrimination. The claim is essentially about the claimant's dismissal for gross misconduct after the respondent concluded she had treated other employees in a disrespectful manner, in breach of the company's values.

2. The claimant's effective date of termination was 26 November 2018 and the three-month primary limitation period would have expired on 25 February 2019 but for the early conciliation rules. The claimant contacted ACAS the day before the primary to limitation period expired, on 24 February 2019 and the early conciliation certificate was issued on 24 March 2019. Time for presenting a claim was extended by one month from the date the early conciliation certificate was issued, being 24 April 2019 (under section 207B(4) Employment Rights Act 1996). The claimant presented her claim form on 26 April 2019, two days outside of the time limitation period. It was not disputed that the claim was presented outside of the applicable time limit. The respondent applied for all of the claims to be struck out because they were presented out of time and this preliminary hearing was held to determine whether a tribunal has jurisdiction to consider the claims.

The applicable law

Discrimination claims

3. Section 123 of the **Equality Act 2010 (EA 2010)** provides:

'Proceedings on a complaint within section 120 may not be brought after the end of –

- (a) The period of three months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.'

Section 123 (3) EA 2010 provides that:

'Conduct extending over a period is to be treated as done at the end of the period.'

4. The principles to be applied by the tribunal when considering whether it is just and equitable to extend time are as follows:

4.1 The employment tribunal must take into account all relevant factors. The discretion is broad and tribunals are to have regard to section 33 Limitation Act 1980 in exercising their discretion (see *British Coal Corporation V Keeble* [1997] IRLR 336. The types of factors that can be taken into consideration are:

- (a) the length of and reasons for the delay;
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the parties sued had cooperated with any request for information
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
- (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

5. There is no presumption that the employment tribunal should extend time (**Robertson v Bexley Community Care Centre** [2003] IRLR 434). Unless the claimant can convince the tribunal that it is just and equitable to extend time an extension will not be granted. It is for the claimant to show why the primary time limit was not met and, if applicable, why after the expiry of the time limit the claim was not brought sooner than it was.

Unfair dismissal claim

6. Section 111 (2) of the **Employment Rights Act 1996** provides:

‘... An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as a 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.

7. The claimant must show that it was not reasonably practicable to present the claim in time in doing so they must show precisely why they did not present the claim in time. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

8. In determining the question of whether it was reasonably practicable the tribunal must have regard to the facts of the case, including whether the claimant had just cause or excuse for not presenting the complaint within the prescribed time. Ignorance of the time limit is not just cause or excuse (**Deadman V British Building and Engineering Appliances Ltd** [1974] ICR 53.) In **Palmer and Saunders v Southend-on-Sea Borough Council** [1984] ICR 372 CA, guidance was given that the tribunal should consider the question of was it reasonably feasible to present the complaint to the employment tribunal within the relevant time.

9. Similar time limitation provisions apply to the claim for unauthorised deduction of wages. (See 23 of the Employment Rights Act 1996)

The facts

10. Although orders and directions had been made for a final hearing, no orders were made for the preliminary hearing requiring the claimant to prepare a witness statement. The claimant had prepared a bundle of documents for the tribunal and was called to give her evidence orally. The respondent prepared a skeleton argument which the claimant was given time to read before the preliminary hearing began. Having heard the claimant's evidence and having considered the documents put before it, the Tribunal found the following facts.

11. The claimant was employed by the respondent, latterly, as Head of Community Investment.

12. An investigation meeting was held on 13 November 2019, after which the claimant was invited to a disciplinary hearing to answer disciplinary charges concerning her alleged conduct towards a colleague and a manager.

13. From the outset the claimant considered the bringing of disciplinary charges to be completely unfair. After the investigation meeting, the claimant was informed that a disciplinary hearing would be held on 22 November 2019.

14. On or about 19 November 2018, the claimant and respondent began to negotiate terms of her leaving the respondent company, potentially avoiding the disciplinary hearing. Terms were not agreed and the disciplinary hearing proceeded as scheduled.

15. Shortly before the disciplinary hearing, on 20 November 2019, the claimant contacted a firm of solicitors and sought legal advice from them about the potential settlement agreement and about the imminent disciplinary hearing. Among other things, the claimant's solicitors advised the claimant that she could make a claim to the employment tribunal if she was dismissed following the disciplinary hearing.

16. The claimant gave evidence that the solicitor did not discuss time limits with her, possibly because the focus of their discussion was the potential agreement to leave the company on agreed terms. With the claimant anticipating a possible settlement and with the strict time limits regime in the employment tribunal, is likely that time limits were discussed at that meeting. Nevertheless, it is not necessary for the Tribunal to find whether the claimant was informed by her solicitor of the primary time for presenting a claim, it is sufficient to conclude that at such a meeting, being two

days before a disciplinary hearing that could have ended in dismissal, the claimant and her solicitor had the opportunity to discuss time limits for making claims to the employment tribunal.

17. The disciplinary hearing was duly held on 22 November 2018.

18. While waiting to be informed of the outcome of the hearing the claimant who has an insurance policy that provides cover for legal expenses, contacted the insurance company on 24 November 2018 asking them to inform her whether an prospective employment tribunal claim would be covered by her policy.

19. By a letter dated 26 November 2018, the claimant was dismissed for gross misconduct. The claimant's dismissal was with immediate effect, and the effective date of termination was the 26 November 2018.

20. The claimant appealed the decision to dismiss her on 30 November 2019. The appeal hearing was held on 17 December 2018. Her appeal failed and the appeal decision was communicated to her in a letter dated 19 December 2018.

21. The claimant gave evidence that there was a lengthy delay in the insurance company notifying her that a claim to the employment tribunal would not be covered by her policy. It was not until 24 February 2019 that the claimant was informed that the insurance company would not cover her legal expenses for an employment tribunal claim. Until then, the claimant had expected to received a positive reply and that any application made to the employment tribunal would have been prepared, by a lawyer on her behalf.

22. Having rejected her application for assistance, the insurance company also informed the claimant not to delay presenting a claim to the employment tribunal. The claimant took heed but did not know how to bring a claim to the employment tribunal. The claimant then spoke to someone she knew who worked in a citizens' advice bureau this person helped her to find out that she first needed to apply for an early conciliation certificate. The claimant contacted Acas herself on 24 February 2019 to begin the early conciliation procedure.

23. In an email from an Acas officer dated 24 March 2019, enclosing the early conciliation certificate the claimant was informed that:

'... Acas cannot advise you about when the tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time.'

24. The claimant knew there was a deadline for making a claim to the employment tribunal but was not clear when the deadline was, yet she did not take any steps to find out the time limit for presenting a claim in her case. The claimant had the opportunity to do this but simply did not. The claimant gave three explanations for her inaction in this regard throughout this period. The first was that she had expected to receive support from the insurance company. The second was that she expected that the respondent would respond positively to the ongoing efforts to settle the case. This was challenged by the respondent who stated that no communication took place between the parties between 24 March and 26 April. The claimant disagreed that settlement discussions were not taking place during

that time, but accepted that nothing had been done or said by the respondent which would give her any reason not to present a claim. The final reason the claimant gave was that she had an ongoing disability. The claimant claimed that she had chronic fatigue during this time which had affected her ability to make a claim. (Whether the claimant has a disability is challenged by the respondent.) The claimant did not provide any medical evidence to the tribunal in support of her claim to be disabled, or in support of her contention that her ability to make a timely claim to the employment tribunal was impeded by her disability or in what way.

25. On 24 April 2019 the claimant contacted the ACAS officer by email to make enquiries about whether the respondent had been in contact. In a reply sent on the same day (with the time of the email recorded as 10.50am) the Acas officer writes this:

‘... You have the certificate and your potential limitation date is here so I would suggest you go ahead and make an application the tribunal if that is what you wish to do otherwise you run the risk of being out of time.’

26. The claimant did not take any action in response to this warning. The claimant gave evidence that she had a routine medical appointment, an MRI scan, on 25 April 2019. The claimant decided to submit her claim the day after the medical appointment. Notwithstanding having been given clear time limit information from the ACAS officer on 24 April 2019.

27. The submitted her claim form to the Employment Tribunal on 26 April 2019, by which time it was presented two days outside of the applicable time limit.

The submissions

28. The respondent submitted that the claimant relied on three reasons for late submission of her claim: disability, ongoing settlement agreement, and insurance.

29. Although the claimant had a doctor’s appointment on 25 April 2019 it was not relevant to her decision of when to present a claim. In cross-examination the claimant had given evidence that she had not undertaken any research between 24 March 2019 to 24 April 2019. The Acas officer had clearly informed the claimant on 24 March 2019 that it was important for her to research the applicable time limits. A diligent claimant would have done that in response. Disability can be a relevant factor but the tribunal needs to look at the entire period during which the claimant could have presented her claim. The claimant could have submitted a claim in time. She sought advice only after the claim to the insurance company had been rejected. There was a dispute between the parties as to whether there were any ongoing discussions after the Acas certificate was issued on 24 March 2019. The claimant says that she was waiting for the outcome of settlement discussions between 24 March 2019 to 24 April 2019. The respondent was not aware that the claimant was going to take that as a point, but the respondent submits that there were no settlement discussions between 24 March 2019 and 24 April 2019. In any event, only in exceptional circumstances would the progress of settlement discussions provide a reason for finding that it was not reasonably practicable for the claimant to present her complaint in time. It was reasonably practicable for the claimant to present a claim in time and the unfair dismissal claim and wages claim should be dismissed.

30. Relying on the same matters in respect of whether it is just and equitable to extend time for the claimant to bring a complaint of disability discrimination, there is no presumption that an employment tribunal should extend time. Any extension of time is the exception rather than the rule. The claimant had taken legal advice, she knew about her rights, she did not investigate the time limit and when she was told on 24 April to present a claim she did not. It would not be just and equitable to extend time in this case and the claim of disability discrimination should be dismissed.

31. The claimant submitted that she had a disability and her ability to function had been impaired. She did as much as she could to progress and present her claim. She was surprised to hear that the respondent were now saying that they had not been conducting negotiations through Acas during the period of early conciliation. The respondent had commented that she had not produced a witness statement for the preliminary hearing, although she had not done this she had done as much preparation she thought necessary and had complied with all the tribunal's orders to date. She had waited for the insurance company to inform her whether she had cover and she had made as much progress with the case as she could.

The Tribunal's conclusions

32. The tribunal asked itself whether it was not reasonably practicable for the claimant to present her claim of unfair dismissal and unauthorised deduction of wages in time. The tribunal considered whether it was feasible for the claimant to present her employment tribunal claim with the relevant period. In doing so the tribunal considered whether the claimant had just cause or excuse for not presenting her complaint within time.

33. The claimant explained that she initially delayed presenting a claim because she had waited to find out whether she could rely on her insurance policy. When the support from the insurance company was not forthcoming, the insurance company informed the claimant that she needed to get on with pursuing her claim. This prompted the claimant to apply for and obtain an early conciliation certificate. This demonstrated to the Tribunal that the claimant with the deadline upon her could act quickly in response to relevant information.

34. The claimant was aware of her right to bring a claim to the employment tribunal not least because she sought legal advice before disciplinary hearing. The claimant was also aware that there were strict time limits. The claimant's evidence was that she was confused about the precise day was accepted. Nevertheless she had taken legal advice from a solicitor and had contacted the citizens advice bureau and the Tribunal was satisfied that the claimant could reasonably have been expected to ask the citizens advice bureau about the time limits or find out by other means. The claimant did not explain why she took no steps to find out about this even in response to the clear notice by Acas that it was her responsibility to find out.

35. The Tribunal has had regard to the claimant's contention that she has a disability which prevented her from presenting her claim on time. The Tribunal did not have any medical evidence before it to support the claimant's contention that she has a disability of 'chronic fatigue' or that it if he had affected her ability to present a claim on time. The tribunal did not accept that the claimant's evidence that late presentation of her claim was caused or contributed to by her ill-health disability.

36. The Tribunal was also had regard to the fact that the claimant knew with certainty was the very last day for presenting a timely claim, having been informed of this by Acas.

37. Having considered all of the evidence, the Tribunal was satisfied that it was both physically possible and feasible for the claimant to present her claims of unfair dismissal and unlawful deduction of wages on time.

38. Therefore the Tribunal find that the claimant's claim for unfair dismissal was presented outside the primary time limit contained in section 111 (2) of the Employment Rights Act 1996, as amended by the early conciliation provisions; it was reasonably practicable for the claim to be presented within the primary time limit. Accordingly, the Tribunal does not have jurisdiction to consider this claim and therefore the claim is dismissed.

39. The claimant's claim for unlawful deduction of wages was presented outside the primary time limit contained in section 23 (4) of the Employment Rights Act 1996, as amended by the early conciliation provisions; it was reasonably practicable for the claim to be presented within the primary time limit. Accordingly, the Tribunal does not have jurisdiction to consider this claim and therefore the claim is dismissed.

40. When considering whether it is just and equitable to grant an extension of time to present a complaint of disability discrimination the Tribunal has a wider discretion than the 'reasonably practicable' test. Nevertheless, time limits are to be exercised strictly in employment cases and there is no presumption that a tribunal should exercise its discretion to extend time on the just and equitable ground unless it can justify failure to exercise the discretion. The onus is on the claimant to convince the tribunal that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule (See *Robertson v Bexley*).

41. The Tribunal considered why the time limit had not been complied with, having regard to checklist of factors in section 33 of the Limitation Act 1980. Although the delay was short, the claimant did not satisfy the Tribunal that there was any reason at all for her not presenting her claim in time. By the time the expiry date was upon her she had taken advice or received information from a variety of advisers, a solicitor, an insurance company, the citizens advice bureau, and also Acas. The claimant was not ignorant of the need to present a claim. Taken together, the information the claimant had received was that there were strict time limits and that she must get on with bringing her Tribunal claim, if that was what she wanted to do. The claimant did not act promptly in response to this information and advice, even choosing not to present a claim when she was informed on the very last day she could have made a timely application to the employment tribunal. The claimant claimed that her health was a reason why she had not presented her claim in time. The claimant was vague and did not give any evidence about this. No medical evidence was produced that might support this. Having regard to all of the circumstances, the Tribunal was satisfied that there were insufficient grounds on which to exercise its discretion to extend time to consider the claim of disability discrimination.

42. The Tribunal finds the claimant's claims of disability discrimination have been presented outside the primary time limit contained in section 123 of the Equality Act

2010; it is not just and equitable to extend time for bringing the complaint of disability discrimination. Accordingly, the tribunal does not have jurisdiction to consider these claims and the claims are dismissed.

43. It follows that, the hearing fixed for 7 - 10 and 14 July 2020 has been cancelled.

Regional Employment Judge Taylor

27 August 2019