Case Number: 3200553/2019

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EMPLOYMENT TRIBUNALS

Claimant: **Miss D Akinfolarin**

Respondent: **Teenagers Support Services UK Limited**

Heard at: **East London Hearing Centre**
On: **25 July 2019**

Before: **Employment Judge O'Brien sitting alone**

Representation

Claimant: In person

Respondent: Ms Nevins, Solicitor

JUDGMENT having been sent to the parties on 17 August 2019 and reasons having been requested in accordance with Rule 62(2) of the Rules of Procedure 2013.

REASONS

1. On 10 March 2019, the claimant presented a complaint of constructive unfair dismissal and a claim for unpaid holiday pay. The respondent defended the claim on 24 April 2019. Whilst the respondent accepted that the holiday pay claim was presented in time, it argued that the constructive unfair dismissal complaint was out of time.

2. On 4 July 2019, an open preliminary hearing was listed to deal with the time issue.

Findings of Fact

3. The claimant worked for the respondent as HR Lead and Office Manager from 1 February 2016 to 3 December 2018.

4. The claimant accepts that she knows a little about employment law and bringing claims in the Employment Tribunal. In particular, she is aware of the time limits applicable in the Employment Tribunal.

10.2 Judgment - rule 61

5. There was a hostile takeover of the respondent in September 2018 following which a series of events occurred which eventually led to the claimant's resignation on 3 December 2018.

6. On 12 October 2018, the claimant contacted ACAS for advice. By then, a number of the events had occurred upon which the claimant eventually relied in her constructive unfair dismissal claim. In particular, the claimant had been informed that a grievance had been raised against her for her "intimidating behaviour". The claimant believes that this grievance was raised because she herself had raised a grievance on 25 September 2018.

7. The claimant claims that she contacted ACAS because she had not been paid as expected on 28 September 2018; however, according to her ET1, she was paid eventually on 2 October 2018. The coincidence of timing and the fact that claimant had already been paid by then leads me to conclude that the claimant contacted ACAS on 12 October 2018 at least in part because of the grievance, as well as the pay matters. The claimant was issued with an early conciliation certificate that same day.

8. The claimant resigned on 3 December 2018, by which time she been off work since 26 September 2018, and certified as unfit to work because of stress at work between 15 October and 1 December 2018.

9. The claimant corresponded with the respondent regarding a further failure to pay wages on 21 December 2018. She contacted ACAS again for early conciliation on 26 January 2019 and received a second early conciliation certificate on 11 February 2019.

10. The claimant submitted her ET1 claim form on 10 March 2019 believing it to be in time. She gave on that form the number of the first early conciliation certificate she received.

<u>The law</u>

11. Section 111 of the Employment Rights Act 1996 (ERA) provides that a complaint may be presented to an Employment Tribunal against an employer by a person that he was unfairly dismissed by the employer. Section 111 further provides that an Employment Tribunal shall not consider such a complaint unless presented to Tribunal before the end of the period of three months beginning with the date of the effective date of termination or within such further 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 within the ordinary time limit.

12. A complaint of unfair dismissal cannot in any event be presented to the Employment Tribunal unless the claimant has obtained an early conciliation certificate pursuant to s18A of the Employment Tribunals Act 1996 (ETA). However, s207B ERA provides for an extension of the applicable time limit whilst early conciliation is pursued. In general, provided that early conciliation is commenced within the ordinary time limit, that limit is extended by the time spent conciliating, or longer if necessary so that the claimant has at least month from obtaining his certificate to present his claim.

13. The question of the extension of time when more than one period of early conciliation has been undertaken was considered relatively recently in **Revenue and Customs Commissioners v Serra Garau [2017] ICR 111**. The relevant conclusions of Kerr J in the Employment Appeal Tribunal are to be found at paragraphs 18-26:

> 18. I come to my reasoning and conclusions. I am in no doubt whatever that the employer's submissions are to be preferred. Only one mandatory process is enacted by the statutory provisions. The effect of the provision is to prevent the bringing of a claim without first obtaining an early conciliation certificate. Once that has been done, the prohibition against bringing a claim enacted by section 18A(8) of the Employment Tribunals Act 1996 is lifted.
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> 19. The quid pro quo for the prohibition against issuing a claim until a certificate is obtained, is that the limitation regime is modified so that the certification process does not prejudice the claimant. That is how section 207B of the Employment Rights Act 1996 and its counterpart section 140B of the Equality Act 2010 operate.
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> 20. I agree with Mr Northall that the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted.
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> 21. It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4) . The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of Procedure scheduled to the 2014 Regulations.
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> 22. Section 207B then deals with the impact of the section 18A regime (and the 2014 Regulations) on unfair dismissal time limits. Section 140B of the Equality Act 2010 deals in the same way with discrimination claims, as is agreed. I can therefore confine myself to section 207B .
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> 23. That section modifies the limitation regime by defining "Day A" and "Day B" and discounting for limitation purposes periods falling between them, and giving the claimant a further month in which to claim after the end of Day B, where the primary period of limitation would expire during the period between one day after Day A and Day B. There is no provision requiring Day A or Day B to fall within a primary limitation period however; either or both may or may not do so.
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> 24. I am satisfied that the definition of "Day A" in section 207B(2)(a) refers to a mandatory notification under section 18A(1) . It does not refer to a purely voluntary

> second notification which is not a notification falling within section 18A(1) . Similarly, I am satisfied that the definition of "Day B" in section 207B(2)(b) of the Employment Rights Act 1996 refers to a mandatory certificate obtained under section 18A(4) of the Employment Tribunals Act 1996 . Section 207B(2)(b) says as much. It does not refer to a purely voluntary second certificate not falling within section 18A(4) .
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> 25. Therefore such a voluntary second certificate does not trigger the modified limitation regime in section 207B or its counterpart in section 140B of the Equality Act 2010. Such a second voluntary certificate is not required under the mandatory early conciliation provisions and does not generate the quid pro quo of a slightly relaxed limitation regime.
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> 26. That does not mean, of course, that continuing voluntary conciliation under the auspices of Acas is other than useful and to be encouraged. Voluntary conciliation through Acas has been available for decades, since long before the mandatory element was introduced in 2014. Such voluntary conciliation does not, of itself, modify time limits; though it may influence tribunals which have to decide whether to allow amendments, grant extensions of time, or make other case management decisions.

14. Kerr J cited with approval the judgment of the Employment Appeal Tribunal (chaired by Simler J, President) in **Compass Group and Morgan [2017] ICR 73** where she held that that it did not matter that the early conciliation certificate had preceded some of the events relied on in the case. The word "matter" in section 18A(1) ETA was very broad and could embrace a range of events, including events that had not yet happened when the early conciliation process was completed.

15. Morgan, who suffered from acute anxiety disorder, was instructed by her employer to work at a different place and in a less senior capacity. She presented a grievance and instructed a solicitor, who obtained an early conciliation certificate from ACAS in accordance with section 18A ETA. Two months after the issue of the certificate, she resigned from her employment and lodged a claim for, amongst other things, constructive unfair dismissal, alleging a breach of the implied term of mutual trust and confidence in that the employer failed to deal with her grievance fairly. The employer opposed the unfair dismissal claim on the ground that the claimant had not complied with the early conciliation procedure, as her resignation had occurred after the issue of the certificate. Simler J said at paragraphs 21 and 22:

> 21. Section 18A could have been enacted so as to require the matters complained of in subsequent proceedings to pre-date any relevant early conciliation certificate, but Parliament chose not to do so. Equally, Parliament could have provided for a time limit on the validity of an early conciliation certificate but did not do that either. Nor does the legislation provide that a certificate cannot pre-date causes of action complained about subsequently as, again, Parliament could have done. Indeed, there is nothing express in the legislation that provides any temporal or other limitation on the use of an early conciliation certificate in relation to relevant proceedings, causes of actions or claims. Rather, the legislation is, as we have said, deliberately defined by reference to a broader term than "cause of action" or "claim". We see nothing in the operation of the legislation that requires or entails a conclusion that the process and certificate only apply to events and allegations pre-dating the commencement of the process or the issue of the certificate or that requires any matter to be defined by reference only to the actual or alleged state of affairs or facts as at the date when early conciliation commenced or the certificate

> is issued. We do not regard the fact that claimants might bring claims about which early conciliation has not been conducted as significant in circumstances where there is no obligation to undertake any early conciliation at all and certainly no obligation to undertake it in relation to any particular claim. The only obligation on the prospective claimant is to obtain formal recognition that Acas has been relevantly notified before any proceedings are instituted, and the fact that the prospective respondent has no right to engage in pre-claim conciliation at all and any contact with the prospective respondent is entirely conditional upon the claimant's consent is consistent with this view.
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> 22. The employers' shifting case, which now accepts that if a matter is in contemplation but has not occurred prior to the issue of the certificate it can be encompassed within the certificate provided it does not result in dismissal, has no underlying logic to it, in our judgment, and does not obviously emerge from the legislation itself. We do not consider that there is a difference in kind between a cause of action involving dismissal and other causes of action that do not result in dismissal and agree with Mr Moore that this is a red herring. In practice, it is easy to imagine a situation in which an individual contacts Acas complaining about a poor relationship that is deteriorating or developing in a particular and unacceptable way. The individual might have in his or her contemplation a belief that he is about to be dismissed, or that possibility might not yet have registered. Circumstances might exist where an individual's relationship with his or her employer is breaking down but has not reached the point at which he or she feels bound to resign. We cannot see why it makes all the difference in such a situation that the relationship has come to an end. In either case (whether a case involving continuing employment or one involving a resignation) the underlying deteriorating employment relationship based on bullying, discrimination, victimisation or whatever other cause can constitute matters between the parties whose names have been notified to Acas, and the fact of employment subsequently terminating is simply an additional factual matter that either is or is not related to those earlier matters.

16. In **Palmer and anor v Southend-on-Sea Borough Council [1984] ICR 372**, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser EAT 0165/07** explained it in the following words: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

17. It is for the claimant to persuade the tribunal to extend time.

Findings

18. The claimant's early conciliation on 12 October 2018 was sufficient to satisfy the mandatory requirements to bring her subsequent claim for constructive unfair dismissal. Indeed, I find it likely on balance that she had in mind when she contacted ACAS many of the matters which subsequently comprised her constructive unfair dismissal claim.

19. It follows that the second period of conciliation between 26 January and 11 February 2019 did not extend time further. Consequently, when the claimant submitted her claim on 10 March 2019, it was eight days out of time, the primary limitation period having expired on 2 March 2019.

20. It is necessary, therefore, to consider whether it was not reasonably practicable for the claimant to bring her claim within time and if not whether the claim was presented within a reasonable period of time thereafter.

21. I accept that the claimant genuinely believed that she had submitted her claim in time, because she benefitted from an extension of time whilst she obtained the second early conciliation certificate. However, she could and should have checked with ACAS whether that was actually going to be the case. I bear in mind in this regard the fact that the claimant fulfilled an HR role in the respondent and (as is apparent from her subsequent correspondence with the Tribunal) was aware of time limits. The claimant could and should have notified ACAS in January 2019 that she already got a certificate.

22. Had there been any evidence that she had done so, and that ACAS had given her misleading advice then I would have accepted that it had not been reasonably practicable for the claim to have been brought in time. However, there is none. The claimant's misunderstanding over time limits was not reasonable and did not, in my judgment, make it not reasonably practicable to submit her claim in time.

23. The claimant also claims that it was not reasonably practicable to bring her claim in time because she was suffering from panic attacks, anxiety and stress. She has provided evidence of a level of stress, perhaps unsurprisingly given the circumstances her termination of employment. However, the medical evidence falls far short of establishing that it was not reasonably practicable for the claimant to submit her claim earlier. On the contrary, the claimant was capable of engaging in correspondence regarding a failure by the respondent in December 2018 to pay what was due and was also capable of engaging in early conciliation with ACAS in January/February 2019. In those circumstances, she could equally have submitted a claim at some point in late December 2018, or in January or even February 2019. The fact that the claimant did not is a failure for which she must bear the consequences.

24. In short, I find that it was reasonably practicable for the claimant to submit her claim on or before 2 March 2019. In the circumstances, it is unnecessary to consider whether the 8-day delay was reasonable.

25. In all of the circumstances, including the fact that the claimant is representing herself, I find that the claimant has not persuaded me that she can benefit for an extension to the ordinarily applicable time limit. The complaint of constructive unfair dismissal has been brought out of time. The Tribunal does not have jurisdiction that complaint, which must therefore be dismissed.

26. The parties do, however, agree that the claimant's money claims have been brought in time and can proceed today.

Employment Judge O'Brien

Date 30 September 2019