**RM**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss S Combie**

**Respondent:** **Elevate East London**

**Heard at:** **East London Hearing Centre**

**On:** **Monday 2 March 2020**

**Before:** **Employment Judge Burgher**

**Representation**

Claimant: In person

Respondent: Ms M Shetty (solicitor)

# JUDGMENT

**The judgment of the Tribunal is that:-**

**The Claimant presented her complaint outside the required time limits. Therefore the Tribunal does not have jurisdiction to consider the Claimant's complaints which are dismissed.**

# REASONS

1 The matter was listed before me as a Preliminary Hearing to consider whether the Claimant's claim for unfair dismissal could proceed.

2 The Claimant was employed as a Customer Service Advisor by the Respondent between 7 August 2017 and 12 February 2018. This was less than two years continuous employment and it was alleged that she had insufficient qualifying period of employment to bring an unfair dismissal complaint.

3 The Claimant clarified that she was bringing a claim for automatic unfair dismissal contrary to section 100(1)(c) of ERA, dismissal by reason of health and safety complaint. In summary, the Claimant claims that she suffered an accident at work on

23 November 2017, she then raised health and safety concerns about this which, she alleges, resulted in her dismissal on 12 February 2018.

4 Under section 108(2)(c) ERA two years qualifying period of employment is not required to advance a claim for automatic unfair dismissal pursuant to section 100 ERA.

5 The Tribunal can therefore consider the Claimant's unfair dismissal pursuant to section 100 ERA claim if it has been presented in time.

6 The Claimant also brings claims of disability discrimination and sex discrimination arising from her treatment during employment with the Respondent and her termination on 12 February 2018.

7 The Respondent denies the Claimant's claims and asserts that the Claimant was dismissed due to unsatisfactory completion of her probation period.

8 I considered whether the Claimant's unfair dismissal claim was presented within the requisite time limit provided by section 111 Employment Rights Act (ERA) and whether her sex and disability discrimination complaints were presented within the time limit provided by section 123 of the Equality Act 2010 (EqA).

9 Section 111 ERA states:

> ***Complaints to employment tribunal.***
>
> *(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*
>
> *(2) Subject to the following provisions of this section, 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 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.*

9.1 Section 123 Equality Act 2010:

> *Time limits*
>
> *(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 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.*
> *(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*

*(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section—*

*(a)conduct extending over a period is to be treated as done at the end of the period;*

*(b)failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

**Evidence**

10 I heard evidence from the Claimant. Ms Natasha Hill, Human Resources Business Partner gave evidence for the Respondent. I was also referred to relevant pages in a miscellaneous documents bundle provided by the Claimant and documents in a 432 page bundle provided by the Respondent.

**Facts**

11 The Claimant commenced employment with the Respondent on 7 August 2017. On 23 November 2017 the Claimant had accident at work. She was dismissed on 12 February 2018.

12 The Claimant appealed against her dismissal on 16 February 2018 and attended an appeal meeting on 14 March 2019. The Claimant did not get the appeal outcome which was sent by the Respondent on 30 March 2018. However, by the end of April 2018 the Claimant was informed by her experienced union representative, Ms Tracy Ridley that her appeal had been unsuccessful and she would not be reinstated.

13 The Claimant had access to Thompsons solicitors who were managing her personal injury claim following her accident at work. The Claimant contacted ACAS on two or three occasions. She did not bring any claim to the Tribunal immediately and she stated that she was advised by ACAS in February/March 2018 that she had to exhaust the internal appeal process before she could bring a claim. The Claimant maintained before me that she believed that she had three months to bring her complaint from the written appeal outcome decision. Her belief was badly mistaken.

14 The Claimant stated that she was in a very dark place suffering from anxiety following the termination of employment and that she suffered mobility problems and problems with her laptop computer.

15 Whilst there was no medical documentation provided to support the Claimant's evidence of ill health I accept her evidence in this regard. The Claimant also stated that she was advised by Ms Ridley on 20 September 2018 that she had a strong claim for unfair dismissal.

16 The Claimant was able to work elsewhere for up to 6 months but stated she became anxious nearing probation reviews and left her alternative employment.

17 The Claimant was able to reinstitute her enquiries regarding appeal with the Respondent in November 2018 as she still had not received written notification confirming the appeal outcome by this stage. She stated that she lived in hope although it is difficult to understand why she believed any written outcome would be different to what Ms Ridley told her was the outcome previously.

18 The Claimant finally received a copy of the outcome letter on 1 May 2019. This was dated 30 March 2018. The Claimant had 5 working days' notice to appeal it. The Claimant opted to pursue a further appeal. A further meeting was held on 7 June 2019 and the Claimant was notified of the outcome of this on 24 July 2019. She then contacted ACAS on 30 July 2019, received an EC certification and submitted her Employment Tribunal claim on the same day. This was over 14 months after her dismissal.

19 The Claimant evidently had a number of internal meetings and was trying to resolve the matter internally. These proved unsuccessful and she stated that the Respondent was at fault in delaying in sending her the written appeal outcome.

20 The Respondent stated that the dismissal officer Ms Julie Hayward, the appeal officer, Eshe Dow and Tahar, the relevant HR Officer were no longer employed by the Respondent. They had left the employment some time before the Claimant presented her complaints to the Tribunal and it was submitted that the Respondent would be severely prejudiced by having to consider such late claims.

## Law and Conclusions

*Time limit*

21 The Claimant ought to have contacted ACAS by 11 May 2018 in order to benefit from any ACAS extension to the ordinary time limit.

22 The Claimant contacted ACAS on 30 July 2019, well outside the three month period provided by the relevant provisions. She presented her complaint to the Tribunal on the same date. Her complaints were therefore presented out of time.

## Discretion

23 I therefore have to consider the relevant provisions relating to the discretion to extend the time limits for the different claims.

*Reasonably practicable*

24 In relation to section 111 ERA, the issue is whether it was reasonably practicable to have presented the claim in time.

25 I considered the guidance in the case of Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, CA per May LJ at paragraph 35 in respect of the test of reasonable practicability. This is also construed as assessing what is reasonably feasible or what is reasonably capable of being done. I am aware that there are numerous factors that a Tribunal can properly consider when determining whether it is reasonably feasible.

26 When considering whether it is reasonably feasible to have been done, modern methods of obtaining information and communication mean ignorance of the law is no excuse. The ignorance itself has to be reasonable. The Claimant did not make sufficient enquiries about what her options were to bring the Employment Tribunal claim to pursue her entitlements. This was not reasonable. Specifically, awaiting the written notification of the appeal when Ms Ridley had told her at the end of April 2018 that her appeal was refused was not reasonable. Deciding to continue matters internally in November 2018 instead of pursuing a Tribunal complaint (which would in any event have been out of time by then) was not reasonable.

27 I therefore conclude that the Claimant could have presented her complaint within a three month period. The fact that she sought to resolve matters internally, for such a long period, was her choice but that does lead me to conclude that it was not reasonably practicable for her to present a claim within time.

28 Therefore, the Tribunal does not have jurisdiction to consider the Claimant's unfair dismissal claim which is dismissed.

*Just and Equitable*

29 In respect of the Claimant's sex and disability discrimination claims, I had regard to the summary of the law regarding time limits and extension of time at paragraphs 30-41 provided by Jackson LJ in the case of Aziz v FDA which sets out a helpful summary. I also considered the guidance of Robertson v Bexley Community Centre (t/a Leisure Link) that the extension of time is the exception rather than the rule.

30 I also considered the balance of prejudice between the parties when considering whether it is just and equitable to extend time and the factors in the case of British Coal Corp v Keeble where Mrs Justice Smith held:

> "*The EAT also advised that the Industrial Tribunal should adopt as a check list the factors mentioned in Section 33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to (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 party sued had co-operated with any requests 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 plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action. The decision of the EAT was not appealed; nor has it been suggested to us that the guidance given in respect of the consideration of the factors mentioned in Section 33 was erroneous.*"

31 When considering the facts and the legal guidance

31.1 There was a very long delay in presenting the complaint to the Tribunal. The Claimant's ignorance of the procedure was not reasonable/ Whilst her intervening ill health was relevant, she was able to pursue matters internally and I do not conclude that her ill health prevented her from bringing a Tribunal claim.

31.2 The cogency of evidence is likely to be adversely affected. Three key witnesses for the Respondent no longer work for them, this is a significant factor prejudicing the Respondent.

31.3 The Respondent communicated with the Claimant's union representative in April 2018 regarding the outcome of her initial appeal. The Respondent was at fault in failing to provide another copy of the written outcome until 1 May 2019 despite this being requested. However, given the time that was passing the Claimant was not sensible in seeking to wait for the receipt of the written outcome of the appeal from the Respondent before commencing a claim.

31.4 The Claimant knew the basis of her complaint from 12 February 2018 and obviously did not act promptly.

31.5 The Claimant had access to professional advice, through her trade union representative and Thompson's solicitors, but did not make reasonable enquiries of them about when to bring a claim.

32 I conclude that the balance of prejudice in this matter favours the Respondent in refusing to exercise my discretion to extend time. I considered that if my discretion to extend time is not exercised the Claimant will not be able to pursue her unlawful discrimination complaints and it is public policy for such complaints to be heard having regard to the interests of justice. However, the cogency of evidence with three key witnesses no longer being employed by the Respondent is a significant factor when combined with the delay, for such a long period against exercising my discretion. Further, the Claimant did have access to legal advice which either was not fully understood or properly interpreted by her.

33 Therefore, I do not consider that it is just and equitable to extend time. The Claimant claims sex discrimination and disability discrimination are therefore dismissed

**Employment Judge Burgher**
**Date: 9 March 2020**