



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102468/2018

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Held in Glasgow on 18 March 2019

Employment Judge: Ms Amanda Jones (sitting alone)

10 **Mrs P Walker**

Claimant

Represented by:

**Mr R Miller -
Consultant**

15 **Barchester Healthcare**

Respondent

Represented by:

**Ms R Mohammed -
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal has no jurisdiction to consider the application and the claim is dismissed.

REASONS

Introduction

25 1. A claim was presented by the claimant on 8 February 2018 alleging unfair dismissal
for making a protected disclosure. The claimant had been dismissed without
notice on 9 March 2017. In the originating application, the claimant also
claimed that she had been dismissed in breach of contract and that she had
not been paid all sums due to her. These latter claims were subsequently
30 withdrawn.

2. A hearing was arranged to determine whether the Tribunal had jurisdiction to
consider the claimant's claim of unfair dismissal.

3. The Tribunal was required to consider whether it had jurisdiction to consider the claim of unfair dismissal.

Issued to be determined

4. The claimant sought to argue that the test which should be applied to the question of jurisdiction was whether it was just and equitable in terms of section 123 Equality Act 2010 to extend the period in which the proceedings could be brought.
5. The respondent argued that the applicable test was that set out in section 111 (2)(b) of the Employment Rights Act 2006, albeit no specific reference to that provision was made.
6. The parties agreed that the claim was eight months out of time. Therefore, the Tribunal was required to consider which test was applicable to the circumstances of the claimant's case and whether the Tribunal was satisfied that the evidence before it satisfied the applicable test.

Findings in Fact

7. Having heard evidence from the claimant and considered the documents before it, the Tribunal made the following finds in fact:
8. The claimant worked as a General Manager at a care home operated by the respondent in Fife for almost seven months.
9. The claimant asked for a meeting with her line manager to discuss the issues she had with a member of staff of the respondent.
10. At that meeting, which took place on 9 March 2017 the claimant was dismissed. The dismissal came as a shock to the claimant. The dismissal and the reasons for it were set out in writing to the claimant. The claimant was advised that she was being dismissed because of the view that she was 'not leading effectively and morale within the home suffered as a result'. She was paid 3 months' in lieu of notice. She consulted her professional association, the Royal College of Nursing.

11. The claimant was advised that as she had less than 2 years' service, she could not take any legal action in relation to the dismissal. She was advised that she could raise a grievance, but that it would be unlikely to yield any result. The claimant was advised of a 3 month time limit but not in any specific
5 context.
12. The claimant took no further action at this time and sought to obtain alternative employment.
13. The claimant was then advised by her former employer by letter dated 8 June 2017 that a referral had been made to the Nursing and Midwifery Council 10 ('NMC') in relation to her dismissal. The claimant was shocked by this turn of events and again sought advice from her professional association who provided her with legal support.
14. The NMC advised the claimant by letter dated 28 November 2017, that there was no case to answer in relation to the referral which had been made and 15 that no further action would be taken.
15. The claimant took no further action at this time.
16. The claimant could not obtain another managerial position and continued to work as a bank nurse, a state of affairs which continues to the present.
17. The claimant then sent an email to the respondent's CEO at the beginning of
20 2018. The claimant did not get a response to this email.
18. Sometime in January 2018, the claimant decided to take legal advice. Her husband had had previous dealings with Mr Miller of Hilltop Solutions and the claimant decided to contact him.
19. Following a telephone conversation with Mr Miller, the claimant had a meeting
25 with him in the second or third week of January 2018 although she could not remember the exact date.

20. Mr Miller emailed the claimant on 3 February asking her to pay a retainer and indicated that he would 'have the ET1 drawn up and get it off on Monday morning so we can get the ball rolling asap.'

21. A claim was then lodged on 8 February 2018.

Observations on the evidence

22. The Tribunal only heard evidence from the claimant. The claimant was credible and reliable in her evidence. Her evidence however differed
5 substantially from the narrative in her claim form. There was no suggestion for instance that she had been advised by the RCN that the time limit had not expired as she was continuing to take action in relation to her former employment.

23. Instead it was clear that the claimant was aware that her claim was out of
10 time, when it was lodged, but she felt that she wanted to take some action, having had no response to her email to the respondent.

Relevant law

24. Part X of the Employment Rights Act addresses the right to claim unfair dismissal.

15 25. Section 111 Employment Rights Act provides that a complaint may be presented to the Employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.

26. Section 111 (2) states that 'Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section 20 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

25 complaint to be presented before the end of that period of three months.

27. There is an exception to this requirement where it is alleged that the dismissal is as a result of section 104F of the Employment Rights Act, which relates to blacklists.
28. There is no exception in relation to section 103A which relates to protected disclosures. The Tribunal was therefore satisfied that the test to be adopted was whether it had been reasonably practicable for the claimant to have submitted the complaint within the three months of the date of her dismissal and if had not been, had the claim been submitted in a further period which the Tribunal considered reasonable.

10 **Submissions**

29. The parties made brief submissions. The respondent's representative referred the Tribunal to the case of *Royal Bank of Scotland v Bevan EAT440/07/LA* as authority for the proposition that any extension of the time limit should be short.

15 **Discussion and Decision**

30. The Tribunal was satisfied that the test to be considered was whether or not it was reasonably practicable to bring a claim within three months.
31. The Tribunal concluded that it was reasonably practicable to have brought a claim in time. The only reason advanced in evidence by the claimant for not lodging a claim at the time was that she was not aware that a claim in relation to an unfair dismissal for having made a protected disclosure would not have required her to have two years' service. She had at the time been taking the advice of her professional association, the RCN. The first point at which it was suggested that her dismissal could have been because she made a protected disclosure, appears to have been after she sought the advice of Mr Miller in January 2018.

32. The claimant had been taking advice in relation to her position from a solicitor instructed by the RCN during the period under which she was investigated. That investigation concluded in November 2017. That letter makes reference to the fact that the issues giving rise to the reference 'did not come to light until after Mrs Walker's dismissal for separate, unrelated matters.'

33. The claimant only sought further advice in January 2018 after she did not receive a response to an email to the respondent's CEO.

5 34. The Tribunal is satisfied that in these circumstances it was reasonably practicable for the claimant to have raised a claim within three months of her dismissal. While the Tribunal accepts that the claimant was not aware that there were circumstances in which a claim of unfair dismissal could be brought even if an employee did not have 2 years' qualifying service, the 10 Tribunal was of the view that ignorance of this fact alone was not sufficient. This is particularly the case when she was being professionally advised at the time of her dismissal.

35. Further, she had the benefit of legal representation during the period of the investigation into the referral made by the respondent. There was no evidence 15 heard by the Tribunal that the claimant had specifically advised that she believed she had been dismissed for making a protected disclosure. Indeed, her evidence before the Tribunal appeared to be that she believed she had been dismissed because she did not have 2 years' service and the Chef with whom she had an issue had longer service. Indeed, the email sent to the 20 respondent in January 2018 states "I was dismissed purely because I had less than 2 years' service and could not contest."

36. In any event, the Tribunal is of the view that the delay in continuing to wait to lodge a claim until some eight months after dismissal was not reasonable. While there may have been fault on the part of the RCN in not exploring further 25 with the claimant potential claims which did not require two years' service, and the Tribunal puts it no higher than that, the claimant was being provided with professional legal advice through a solicitor in relation to the circumstances of her referral to the NMC. It is not clear why she did not take advice on any employment remedy open to her at that point and waited further months 30 before seeking advice.

37. In addition, having sought advice and apparently having been advised that she may in fact have an alternative claim, it would appear that a claim was not lodged on behalf of the claimant for a further two weeks. While the claimant's representative indicated to the Tribunal (in his submissions) that he worked alone and therefore took longer than he might otherwise have done to progress the claim, this is a further delay which is not reasonable in the circumstances.

38. In all of these circumstances, the Tribunal concludes that it was reasonably practicable for a claim to be lodged in time, that in any event the delay in eventually lodging a claim was not reasonable and therefore the Tribunal does not have jurisdiction to consider the claim and it falls to be dismissed.

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Employment Judge

Amanda Jones

Date of Judgment

27 March 2019

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**Entered in register
copied to parties**

02 April 2019 and