



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111291/2019

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Held in Glasgow on 30 January 2020

Employment Judge: S Cowen

10 **Ms M Sih**

**Claimant
Represented by:
Mr Smith -
Solicitor**

15 **J&A Mitchell & Company Limited**

**Respondent
Represented by:
Mr Stafford -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant's claim is time barred and is dismissed.

REASONS

Background

1. The parties appeared before the Tribunal on a preliminary issue of timebar.
- 25 The Respondent asserts that the Claimant's case of unfair dismissal has been brought outwith the 3-month time limit and that, as it was reasonably practicable for the Claimant to have brought the claim within the time limit, no discretion to extend time should be applied.

The Hearing

- 30 2. The Claimant gave oral evidence and was cross examined. An agreed bundle of productions was referred to throughout. The Respondent submitted written submissions and both parties gave oral submissions accompanied by a number of case authorities.

The Facts

3. The Claimant was employed by the Respondent from 1 August 1991 as a personal assistant. She was dismissed on 30 April 2019 for reasons which the Respondent says are misconduct. The Respondent is a distillery business based in Campbeltown, Argyll.
- 5 4. On 24 April 2019 the Claimant was asked to attend a meeting in Mr Clapperton's office. There were three people in the room. The Claimant was accused of writing anonymous malicious letters about Mr Clapperton and sending these to the company, two customers, a shareholder and others. She denied any involvement. The Claimant was shown a copy of one letter and an envelope. She was told that there were a number of letters and envelopes which were being sent away for fingerprint analysis. The Claimant was told at the meeting that she would be subject to both criminal and civil proceedings. She felt frightened by these comments.
- 10 5. She was handed a letter which stated that she had to prove by 4pm that day, that she was not the author of the letters. She was provided with a copy of an investigation report written that day by Mr Watson, which indicated that forensic analysis had already taken place and concluded that the Claimant was the author. The Claimant was unable to take any steps to disprove her guilt.
- 15 6. At 4pm the same day she was issued with another letter. This letter indicated that the Claimant was suspended and required to attend a disciplinary hearing on 26 April for an allegation of gross misconduct.
- 20 7. The Claimant attended the disciplinary hearing and denied that she was the author of the letters. She was dismissed from her position. This was confirmed in a letter dated 30 April 2019.
- 25 8. The Claimant took legal advice on or before 5 May 2019, as this was the date that Mr Smith of Beltrami and Co first wrote to the Respondent. He requested copies of the offending letters from the Respondent. It took until the end of May for the Respondent to provide the Claimant with redacted copies of the relevant letters and until 9 July for other documents to be produced. The Claimant decided to wait until she had been given the outcome of her appeal
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before she submitted her ET1. She was guided by her solicitor's advice on this point.

9. The Claimant was aware "from the very beginning" that she had a claim because she believed that she had not done what she was accused of.
- 5 10. The Claimant's solicitor indicated on 17 July 2019 that they had instigated 'pre-claim conciliation' via ACAS to "protect our client's position in relation to Employment Tribunal timescales" The ACAS certificate ran from 12 July to 12 August 2019.
- 10 11. The Respondent asked on 18 July 2019 for the Claimant's detailed grounds of appeal. Further correspondence led to an appeal which was heard on 24 September 2019.
12. The decision of the appeal was made on 8 October 2019 refusing the Claimant's appeal. The Claimant issued her ET1 on 27 September 2019.

The Law

- 15 13. S.111(2)(a) Employment Rights Act 1996 sets out that:

"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 -

- 20 (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".*
- 25 14. The burden of proof is on the Claimant to persuade the Tribunal that it was not reasonably practicable for her to have issued her claim within time.

15. The provisions of s.207B ERA set out the extension of time to be applied where the Claimant has complied with the requirements of the ACAS early conciliation process.
- 5 16. The question of whether it was reasonably practicable is one of fact which the Tribunal will decide taking into account the case authorities including *Dedman v British Building and Engineering Appliances* [1973] IRLR 379 and in particular whether the skilled adviser took all the steps they could reasonably have taken to see that the application was presented in time.
- 10 17. The Tribunal was also referred to *Northampton County Council v Entwhistle* [2010] IRLR 740 which highlighted that the solicitor is to be judged by what they should reasonably have advised in the circumstances.
18. If the Tribunal conclude that it was not reasonably practicable to have issued in time, they should continue to consider the period which is considered to be reasonable thereafter, taking into account the circumstances of the delay.

15 **Decision**

19. The Tribunal consider that the effective date of termination of the Claimant was 30 April 2019. The date by which the Tribunal claim should have been issued (but for the ACAS procedure) would be 29 July 2019. However, the ACAS procedure was started on 12 July 2019, within the initial three month
20 time limit. The clock therefore stopped on 13 July and the EC certificate was provided on 12 August.
20. The ACAS process took 30 days and in accordance with s.207B(3) this is added to the original time limit (to extend to 28 August).
21. In accordance with s.207B(4) the time limit would have expired during the
25 ACAS conciliation period and hence an extension to the time limit of one month after the end of the EC certificate is made. This takes the limit to 12 September 2019.
22. The Claimant issued the claim on 27 September 2019 and is therefore out of time.

23. The Tribunal then considered the oral evidence of the Claimant and the documentary evidence of the correspondence between the Claimant's solicitor and the Respondent after the Claimant's dismissal.
24. The Tribunal accepts that the Claimant was aware on or around 5 May 2019 that she had a potential claim for unfair dismissal and that there was a time limit for issuing such a claim at the Tribunal.
25. The Tribunal also finds that the Claimant's solicitor was a legal adviser and made reference to the process for early conciliation in a letter dated 17 July 2019. It is the conclusion of the Tribunal that the Claimant's solicitor was therefore aware of the procedure for issuing a claim and was appropriately placed to be able to advise his client.
26. The Tribunal accepts the Claimant's evidence that she followed the advice of her solicitor in not issuing her claim earlier.
27. In accordance with the authorities, reliance on the advice of a legal adviser is not a reason why it is not reasonably practicable to issue the claim.
28. The Tribunal therefore finds the claim to be out of time and declines jurisdiction to hear the claim.

Employment Judge: S Cowen
Date of Judgement: 29 May 2020

Entered in Register,
Copied to Parties: 02 June 2020