EMPLOYMENT TRIBUNALS

Claimant: **Mrs Gillian Jay**

Respondent: **Southend Borough Council**

Heard at: **East London Hearing Centre**

On: **Monday 20 July 2020**

Before: **Employment Judge Tobin (sitting alone)**

Representation
Claimant: In person
Respondent: Mr M Roberts (counsel)

JUDGMENT having been sent to the parties on 22 July 2020 and reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013.

REASONS

The claim

1 The claimant issued proceedings on 18 February 2020. Her Claim Form said that she was employed by the respondent for almost 5 years as an ICT Officer. Early conciliation was commenced with ACAS on 11 February 2020 and an ACAS Early Conciliation Certificate was issued on 18 February 2020. The claimant contended that she was constructively unfairly dismissed, pursuant to section 95(1)(c) Employment Rights Act 1996 ("ERA).

2 The claimant set out a chronology with her Claim Form and referred to a number of appendices. The claimant was frustrated with a number of issues at work and between March to July 2019 she decided that the only solution to improve her mental health and physical well-being would be to leave employment with the respondent. The chronology indicated that the claimant had conversations with the respondent between 26 to 29 July 2019 following her resignation and confirms that the claimant's last day of service was 18 September 2019. The claimant accepts that she should have raised a constructive dismissal case by this time, but she was not mentally strong enough to do this and that she did not want to jeopardise any future chance of employment with the respondent. The claimant's chronology then addressed her "Reasons for Out of Time submission". The claimant complained that the respondent did not respond to the issues that she had raised to advise her that she had 3 months [to issue her claim] so she was unaware that this would be a problem. The claimant said that she was angry and upset after many years of exemplary service and for the sake of mental health and well-being she needed time to

heal and focus on her new role and her health before pursuing her case. The claimant said that she accepted that ignorance of the law was no defence, but she was unaware of the time limitation in respect of bringing the claim until she researched the process in more detail. The claimant said that her email to the respondent of 7 November 2019 was ignored as this was within the 3-month time limit so effectively, the respondent took advantage of her lack of knowledge of the Employment Tribunal time limits. The claimant contended that the respondent ignored her complaints and forced her to leave as they knew her team would be made redundant during a restructuring and by not addressing the claimant's complaints the respondent forced her hand to leave, thus saving the local authority an additional redundancy or early retirement payout.

3 The Response was received by the Employment Tribunal on 15 May 2020. In their Grounds of Resistance, the respondent contended that the Tribunal did not have jurisdiction to hear this claim because it was time-barred. The respondent denied that it breached the employment contract of employment, or if there was any such breach of contract, it was not sufficiently serious so as to constitute a repudiation breach of contract which would give rise to a claim of constructive dismissal. The respondent contended the claimant resigned on 18 June 2019 and confirmed that her last day of employment with the respondent was 18 August 2019.

4 The parties confirmed that they had received a notice of hearing for this Preliminary Hearing (Open) and that the hearing would give consideration to the time limit or jurisdictional point. The respondents had prepared a hearing bundle of 51 pages. The claimant had provided various correspondence to the Tribunal, which included a number of appendices. I read through these documents before I commenced the hearing.

The law

5 The time limits for an unfair dismissal claim is set out in s111 ERA. The complaint must normally be presented to the Employment Tribunal within 3 months starting with the *effective date of termination* ("EDT"), or within such further period as the Tribunal considers reasonable were it was not reasonably practical for the complaint to be presented within 3 months. The EDT for this purpose is as defined in s97 ERA. For constructive dismissals (which includes resignation on notice), the EDT will be the date that the employee's employment came to an end and not the date that the employee accepted (or relied upon) the alleged repudiatory breach of contract (which in this case was 2 months earlier).

6 The 3-month time-limit starts with (i.e. includes) the EDT (see *Trow v Ind Coope (West Midlands) Limited [1967] 2QB 899* and *Hammond v Hague Castle & Co Ltd [1973] ICR 148*) so effectively this means 3 months less a day (see *Pacitti Jones v O'Brien [2005] IRLR 889 (Court of Session)*).

7 The time limit for presenting a complaint of unfair dismissal shall be regarded as strict. The Employment Tribunal's discretionary power to extend time limit is subject to a two-part test:

1. the Tribunal must be satisfied that it was not *reasonably practical* for the claim to be presented in time. If so, then

2. the Tribunal must be satisfied that the claim was presented within such

further period as the Tribunal considers reasonable.

8 Reasonably practical does not mean reasonably or physically possible, but rather something like "reasonably feasible": see *Palmer v Southend on Sea BC [1984] ICR 372 CA*. The determination of what is reasonably practical is a question of fact for the Tribunal (see *Miller v Community Links Trust Limited UKEAT/0486/07*. The burden of proof is on the claimant.

9 The remedy of unfair dismissal is considered to be sufficiently well known that ignorance of the remedy will not normally be accepted as an excuse (see *Read in Partnership Ltd v Fraine UKAEAT/0520/10*, *John Lewis Partnership v Charmaine UKEAT/0079/11* and *Walls Meat Co Ltd v Khan [1979] ICR 52*.

The law applied to the claimant's case

10 In her Claim Form, the claimant contended that her employment ended on 18 August 2019. I read through the claimant's resignation letter of 18 June 2019, which was contained within the hearing bundle. This referred to the claimant's 2-month notice period and stated that she would like her last day of service to be 18 August 2019. I note the claimant commenced another job the following day. I also note that the claimant's resignation letter did not refer to a constructive dismissal or any repudiation of her contract of employment. That said, I accept that the claimant obtained another job and resigned her employment because she was dissatisfied or discontent with her working conditions or working arrangements.

11 As the claimant's EDT was 18 August 2019, she needed to commence proceedings by 17 November 2019 if her claim was to be in time. The ACAS early conciliation rules (made pursuant to s18A Employment Tribunals Act 1996) may extend time limits by up to 1 month (or exceptionally 1 month plus 2 weeks) but for the early conciliation rules to apply ACAS must have been contacted within the statutory time limit. Consequently, the claimant does not get the benefit of any time extension for early conciliation. The Claim Form was received by the Employment Tribunal on 18 February 2020, so consequently this claim is over 3 months out of time.

12 In evidence the claimant said that she was getting her life back on track and that she was learning the new job which precluded her from issuing proceedings. She said her new job was stressful, although when asked, she said that she had not taken time off sick from her new employment. Although sickness absence is not necessarily an indicator of stress, it is a good indicator of a claimant's incapacity through an illness that might genuinely preclude someone from issuing proceedings. The claimant resigned 2-months before her employment with the respondent came to an end. She worked throughout this period. She then commenced another job promptly. The claimant did not produce any medical report nor GP letter or GP notes to confirm that she was affected by a stress-related or depressive illness that may have rendered her unable to issue proceedings. The claimant did not seek medical assistance throughout this period. The claimant did not move to another address or out of the jurisdiction, nor did she present any evidence that suggested her new hours of work were so long that this might make it difficult to issue proceedings.

13 The claimant's email of 7 November 2019 merely sought information in respect of a temporary job with the respondent and was nothing to do with a complaint of

constructive unfair dismissal. Whilst I appreciate the claimant may now feel aggrieved that the respondent did not tell her that she needed to make a claim against the council within 3 months this is not a valid criticism against her former employer. Indeed, it is an extraordinary expectation to think that there could somehow be an onus on a potential respondent to advise a claimant in respect of her statutory time limits to pursue a case against it.

14 The lack of knowledge in respect of time limits is not a valid explanation for non-compliance in all but the most unusual circumstances. The case law refers to vulnerable employees, which the claimant is not. However, the claimant said in evidence that she became aware of her right to bring Employment Tribunal proceedings between 7 November 2019 and 12 December 2019. If we take the earlier period, then the claimant had 10 days to issue her claim within the statutory time limit or to apply for an early conciliation certificate extension which would give her significantly more time. The claimant said that she became aware of her time limits shortly after she learned that the respondent had made several her erstwhile colleagues redundant and that they had received significant and enhanced payments. The claimant said that she felt it only fair that she should have the benefit of an enhanced payment because of the problems she had encountered prior to her resignation. Mr Roberts said that this was the real reason for the claimant issued proceedings as it reflected the claimant's desire to secure a payoff for which she was not entitled to at the time she resigned. Irrespective of whether or not this was the real reason that the claimant issued proceedings, the claimant did not proceed to issue proceedings within a reasonable period of time after the expiry of the statutory time limit. She delayed further for a period of between over 9½ weeks to over 14½ weeks from when she said that she knew of the relevant time limit requirement. So once the claimant realised that she needed to issue Tribunal proceedings promptly, she inexplicably delayed further.

15 Applying the statutory test, I am satisfied that it was reasonably practical for the claimant to issue proceedings within the 3-month time limit prescribed by s111 ERA. So, the claimant fails at the first limb of the legal test set out above. Even if I was persuaded on the balance of probabilities (which I am not), that it was not reasonably practical for the claimant to issue proceedings within the statutory time limit, then the claimant delayed for a substantial further period, which was not reasonable in the circumstances. Accordingly, the claimant fails the second limb of the legal test also.

16 In summary, I consider that it was reasonably practical for the claimant to issue her constructive unfair dismissal complaint within the appropriate statutory time limit. I am not going to exercise my discretion to allow this claim to proceed further. Consequently, I strike this claim out pursuant to s111 ERA.

Employment Judge Tobin
Date: 12 August 2020