EMPLOYMENT TRIBUNALS

SITTING AT: **SOUTHAMPTON**

BEFORE: **EMPLOYMENT JUDGE EMERTON (sitting alone)**

BETWEEN: **Miss T M Jones**

Claimant

AND

Sunnycroft Residential Care Home Ltd

Respondent

ON: **6 August 2020**

APPEARANCES:

For the Claimant: In person
For the Respondent: Mr C Ludlow (Counsel)

JUDGMENT having been sent to the parties on 12 August 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Summary of the case

1. This was a preliminary hearing to determine whether the tribunal had the jurisdiction to hear the claimant's single claim of automatically unfair (constructive) dismissal for making a protected disclosure.

2. For the claim to have been potentially in time, the claimant needed to have commenced ACAS early conciliation on or before 14 September 2018. She did not commence early conciliation until 10 October 2018. After the ACAS early conciliation certificate was issued, the claimant then waited for another three weeks before presenting her claim.

3. The tribunal heard evidence which made it clear that the claimant had been seeking advice from the Citizen's Advice Bureau and from ACAS from an

early stage, and that there was nothing preventing her from presenting her claim within time, had she wished to do so. It ruled that it was reasonably practicable to have presented the claim within time, and in consequence the tribunal had no jurisdiction. The claimant appeared to believe that this was a matter of judicial discretion, and that it would be fairer if she was allowed to present the merits of her constructive dismissal case. The judge, however, explained fully the statutory test, and made it clear that if it was reasonably practicable to have presented the claim within time, but it was not presented within the specified time limit, the tribunal would have no jurisdiction to hear the claim.

Background to the preliminary hearing

4. The claimant resigned with an effective date of termination of 15 June 2018. ACAS early conciliation commenced 10 October 2018 and the certificate was issued on 8 November 2018.

5. On 30 November 2018 the claimant presented a claim form bringing one claim, namely of automatically unfair constructive dismissal under Sections 95(1)(c) and 103A of the Employment Rights Act 1996.

6. The full history of the case need not be set out, whilst noting that it took some time for this preliminary issue to be resolved. The arrangements for dealing with Covid-19 somewhat delayed matters, albeit they also gave the claimant additional time to prepare for hearing.

7. At the request of the respondent, a preliminary hearing in person was listed to determine a preliminary issue as to time jurisdiction, following an application for strike out. This was listed for 30 March 2020, shortly after the start of Covid-19 lockdown. It was, in the event, later converted into a telephone preliminary hearing for case management, heard by Employment Judge Dawson. Judge Dawson made arrangements for the case to be re-listed. He clarified the issues, and confirmed that there would be a preliminary hearing in person to determine whether the claim was brought in time, and if it was not, whether it was reasonably practicable to bring the claim within time. He gave directions as to the preparation of documents for the preliminary hearing and for the claimant to prepare a witness statement.

The Preliminary Hearing of 6 August 2020

8. The in-person hearing went ahead in Southampton Employment Tribunal, person, before Employment Judge Emerton on Thursday 6 August 2020.

9. The parties were represented as above. The respondent presented a small bundle (which was in fact the same bundle as had been prepared prior to the first preliminary hearing). The claimant relied on her email of 19 April 2020 as constituting her witness statement, dealing with the late presentation of the claim. Mr Ludlow, for the respondent, also presented a skeleton argument with attached case law.

10. The Tribunal confirmed the issues in the case, namely by reference (explained in straightforward language) to the test at Section 111 of the Employment Rights Act 1996, and confirmed with the parties that there was

no dispute that the effective date of termination was 15 June 2018, that ACAS early conciliation had commenced on 10 October 2018 and a certificate was issued on 8 November 2018, and that the claim of unfair dismissal was presented on 30 November 2018. The Judge explained to the parties how the hearing would be managed, and confirmed that he had already read the statement, the skeleton argument and the key documents in the bundle.

11. The tribunal heard oral evidence from the claimant, who adopted her witness statement and was cross-examined at some length, and also answered some additional questions from the Judge, designed to ensure that she had squarely put before the tribunal all the relevant facts within her knowledge, which might assist her case.

12. The tribunal heard short closing submissions from Mr Ludlow, who relied on his written skeleton argument, and then very brief submissions from the claimant. At all stages, the Judge sought to put the claimant at ease, and allowed her to take as long as she wanted to, in answering questions and setting out her oral submissions.

13. Mr Ludlow's skeleton argument had contained a lot of material and case law "just in case," but the essence of it may be summarised below, albeit this is intended to be an overview of the salient points rather than a comprehensive summary of all the arguments and law referred to.

14. The arguments referred back to the original strike-out application [*albeit the Judge pointed out that this was not strictly a strike out application, but a preliminary issue relating to jurisdiction*]. It summarised the background to presenting the claim, highlighting the fact that the claimant had referred to taking advice from ACAS and the Citizen's Advice Bureau (CAB), and then set out the statutory test and referred to case law as to its meaning including as to effective date of termination (albeit this turned out not to be an issue), ignorance of rights, advice from the CAB. The key argument was perhaps that the claimant was clearly being advised by both ACAS and CAB in the immediate aftermath of her resignation, and it could not seriously be contended that it was reasonable for her to be ignorant of her rights or the application of time limits for bringing her claim. It was reasonably practicable to have presented the case in time and the Tribunal consequently had no jurisdiction.

15. In his oral submissions of around ten minutes, Mr Ludlow relied on his written submissions and referred to the evidence which had been heard, and the contemporaneous exchanges of emails set out in the bundle. He submitted that the evidence certainly did not amount to the claimant having established that it was not reasonably practicable to have presented her case earlier, and that she had clearly taken advice from ACAS and CAB from an early stage about not only notice pay, but about whistleblowing and about an unfair dismissal claim. She had conceded that she is not suggesting that she was given the wrong advice, but rather accepting that she may not have retained all the advice she was given. The burden of proof was on the claimant and she had failed to discharge that burden. As set out at paragraph 30 of his skeleton argument, the case of *ASDA Stores Ltd v Kauser EAT 0165/07* pointed out that "*the relevant test is not simply a matter of looking at what was possible but to ask whether on the facts on the case as found it was*

reasonable to expect that which was possible to have been done". He also referred to the case of *Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53.* If the Tribunal considered that the claimant was ignorant of her rights, the Tribunal must ask further questions "what were her opportunities for finding that that she had rights? Did she take action? Why not, if not? Was she misled or deceived?". As well as other case law, he referred to the case of *Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488:* wWood J stated that "*when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right*". In essence, the respondent's case was that it *was* reasonably practicable, and therefore the Tribunal had no jurisdiction.

16. In very brief submissions in response, the claimant confirmed that she was not suggesting that ACAS or the CAB gave her the wrong information but she herself had had no legal training and had never been in this position before. She also did not understand why there had been an application to strike out her claim, if her claims had been unfounded. The tribunal noted that the claimant's witness statement had also referred to "waiting for weeks for a lack of response". She had also referred in the statement to it being a "stressful period", albeit without further explanation, and that she had not retained information or been able to "make sense of any employment laws or procedures I was being advised on". There was no suggestion of any medical condition.

17. After deliberation, the judge gave judgment, with oral reasons. He explained that he would sign a judgment that day, which would be sent to the parties shortly. Neither party requested written reasons at the hearing. The judge explained that the parties would have 14 days from when the judgment was sent to the parries to request written reasons. He also pointed out that provision of reasons was an administrative burden on already hard-pressed staff and the judiciary, and that as the reasons would be published on-line in a publicly-accessible document, the parties might wish to consider very carefully before requesting written reasons.

18. In fact, the claimant requested written reasons by email on 6 August 2020, before she had received a copy of the signed judgment.

19. The claimant sent a second email to the tribunal on 11 August 2020, asserting that the judge had suggested that she changed the reason for bringing a claim to the tribunal, and that he had allowed the respondent's barrister to question her further on this. This comment was not understood by the tribunal, but it did not appear to be an application for reconsideration. The judge had sought to ensure that the oral evidence, cross-examination and closing submissions dealt with the possibility that it might not have been reasonably practicable to bring the claim in time, and therefore covered whether the claim was brought within such further time as was reasonable. If that is what the claimant was referring to, it was wholly uncontroversial, and enabled the claimant to give her explanation during the evidence on a matter which she had not addressed. This merely reflected what had been discussed, at the start of the hearing, as to the issues which fell to be determined by the tribunal.

20. The judgment was sent to the parties on 12 August 2020.

The issues

21. The relevant statutory test for jurisdiction is set out at section 111 of the Employment Rights Act 1996. The relevant part reads as follows:

> (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—
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> .
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
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> (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.

22. In practice, this means that the tribunal must approach the decision as follows:

    a. Was the claim made to the tribunal within three months (plus early conciliation extension) of the effective date of termination? [*It is not in dispute that the claim was out of time*];

    b. If not, was it reasonably practicable for the claim to be made to the tribunal within the time limit? (*The burden of proof is upon the claimant to show that it is not reasonably practicable*); and

    c. If it was not reasonably practicable for the claim to be made to the tribunal within the time limit, was it made within a reasonable period?

The Evidence

23. This is a case which largely turns on its facts. Although Mr Ludlow helpfully made submissions as to law, as it turns out, most of the facts relevant to this preliminary issue are not in dispute: the only matters where there might be a different perspective between the parties are the inferences to be drawn from those facts, or the conclusions which should reached.

24. It is not in dispute that the effective date of termination was 15 June 2018 and it is not in dispute that the ACAS early conciliation commenced on 10 October 2018 a certificate was issued on 8 November 2018 before the claimant presented her claim for unfair dismissal 30 November 2018.

25. The tribunal had no reason to doubt the claimant's credibility, and very fairly, she did not seek to suggest that she had been misinformed or misled as to her rights by the CAB or ACAS, but conceded that she had probably not retained in her mind all the information or advice they had given her.

However, given her access to advice, it is plain that she was in a position to query and clarify any matters about which she was uncertain.

26. The tribunal has made its findings of fact upon a balance of probabilities.

27. The key events leading up to the presentation of the claim on 30 November 2019 are as follows.

28. In early June 2018, the claimant raised concerns with her employer and with the Care Quality Commission, as a result of which she regarded herself as a whistle-blower. She then resigned on the afternoon of Wednesday 13 June 2018.

29. The resignation was originally with notice, but after an exchange of emails it was agreed that employment would terminate early. As it turned out, this worked out well for the claimant and she was fortunately able to start work as a care assistant elsewhere, very shortly after employment ended.

30. It is not in dispute that the last day of employment, and hence the effective date of termination, was Friday 15 June 2018.

31. The Tribunal notes that there were various email exchanges between the parties. On Monday 18 June the claimant explained in an email to her former employers that she would be contacting ACAS. It is clear from her oral evidence that shortly after that, she did so.

32. There is no need to go through all the exchanges of emails. The key point is that these largely related to the claimant's entitlement to paid notice, and to payment of sums representing pay in lieu of notice. The claimant was mistaken as to her entitlement, and in any event had started work elsewhere immediately, during what would originally have been her notice period.

33. In any event, very shortly after Monday 18 June, the claimant took advice from ACAS, and a little after that took advice from the CAB. She returned for further advice later on. The claimant confirmed to the Tribunal that when she was taking advice, both from ACAS and from the CAB, she told them as to her situation. She took advice not only on the question of financial entitlement in respect of notice pay, but also in respect of whistleblowing, and also in respect of a potential claim for unfair dismissal. What the claimant concentrated on, however, in her exchanges of emails with the respondent, was to seek to clarify various points specifically on the question of whether she should or should not be paid a sum representing notice pay. As indicated above, although notice pay was her main concern, she confirmed that she had been taking advice much more broadly from ACAS and the CAB.

34. The tribunal would observe that the exchanges about notice pay entitlement had no impact on the substance of the constructive dismissal claim which the claimant subsequently brought. At the point of resigning the claimant was aware of all the evidence which she would subsequently seek to rely upon. The arguments about notice pay were something of a distraction, and did not relate to the basis of her unfair dismissal claim.

35. Email exchanges continued. On 19 June the claimant confirmed that she had already previously contacted the CAB for legal advice, and she further clarified that, to say she had to make an appointment and she would be in touch again after meeting the CAB. The claimant confirmed that in her oral evidence. This was also reflected in an email dated 27 June, which made it clear that, by then, she had had a meeting with the CAB and had been given advice. She referred to the fact that she had been advised to email a letter of complaint.

36. The claimant did not refer to the other advice which she was given, and indeed did not recall the precise advice she had received. The Tribunal considers, however, that as the claimant had been discussing whistleblowing and unfair dismissal with CAB and ACAS, it is near inevitable (and certainly more likely than not), that the CAB and ACAS would have discussed with her the process for Employment Tribunal claims. This would have included the fact that there were time limits. The tribunal considers that the claimant would either have been given precise advice on this, or at the very least could easily have sought such advice, had she wished for more information.

37. In response to the claimant's emails a reply was drafted by the respondent, and apparently sent. But the claimant did not receive it. Effectively, the reply sought to close down the correspondence.

38. The Tribunal would also make the observation that the issue of complaints-handling would have been reflected in any advice given, considering that the claimant had been advised to set out her concerns in writing as to notice pay entitlement. The claimant was no longer an employee and therefore any contractual or non-contractual complaints procedure would hardly be likely to apply to her, and the ACAS Code of Practice as to complaints relates to employees.

39. In any event, if the claimant wanted to hear what the respondent had to say, she had not received a reply. Rather than progress her claim, however, she emailed the respondent again on 29 August 2018, still well within time for commencing ACAS early conciliation. She explained that she had been advised by ACAS to requesting that outstanding notice pay was paid to her, giving a deadline of 12 September.

40. The Tribunal notes that (1) this email was as a result of recent further advice from ACAS, and indeed (2) the deadline of 12 September would still give the claimant a further two days after the response (or failure to respond) to consider commencing ACAS early conciliation, in order to bring an entitled claim for unfair dismissal.

41. The claimant did not commence ACAS early conciliation at that point, despite having been in touch with ACAS and taking their advice.

42. 12 September came and went, with no further response from the respondent. 14 September was the last date for commencing early conciliation, so as to be able to present an in-time claim. 14 September also came and went.

43. The claimant waited for a further month. She did not explain why. She eventually commenced early conciliation on 10 October. After early

conciliation was completed on 8 November, the claimant waited some three further weeks before presenting her claim on 30 November 2018. She does not explain why she chose to delay.

Conclusions

44. The issues are set out above. As explained, this was a preliminary hearing to determine a point of time jurisdiction, at the request of the respondent, by reference to Section 111 of the Employment Rights Act 1996.

45. The claimant brought a single claim of automatically unfair constructive dismissal relying on Sections 95(1)(c) and 103A of the Employment Rights Act 1996. In essence the claim is about alleged whistle-blowing, namely automatically unfair dismissal for making a protected disclosure.

46. This is also a case where the claimant took advice on a number of occasions, right from the start, from ACAS and from the CAB. She made it clear throughout that she was not seeking to suggest that she had been given incorrect advice by ACAS or by the CAB, but rather that she had a lot on her mind, found the process stressful and accepts that that she may not have retained in her mind all the information and advice which she had sought and obtained from ACAS and the CAB. As for stressfulness, it is clear that there is no suggestion of any medical condition, and no suggestion that the claimant needed medical treatment.

47. As explained above, the statutory provisions allow for three months to bring a claim (or strictly speaking, three months less a day), from the effective date of termination but extended by ACAS early conciliation, if that conciliations commences within the three-month period.

48. In this case, of course, it is not in dispute that the three months from the effective date of termination, the last day for commencing early conciliation would be 14 September 2018. In fact, the claimant waited some four weeks before going back to ACAS to commence early conciliation. And there was a further delay of three weeks or so before presenting the claim.

49. The tribunal notes that the claim which was presented was solely for automatically unfair constructive dismissal, not for the matters which had been exercising the claimant's mind in her earlier email exchanges with the respondent. It is a relatively straightforward and succinct claim, that fairly sets out the claimant's concern in writing. It refers to her whistleblowing, it sets out the circumstances of her deciding that she had no choice but to resign. The claimant does not suggest that there was a need to take detailed legal advice, or conduct legal research, before she felt able to be in a position to set out the facts she relied upon.

50. In considering the statutory test, it is self-evidence that the claim is significantly out of time.

51. The tribunal considered all the evidence which had been presented, and its findings of fact, in light of the statutory test and the case law (correctly referred to by Mr Ludlow). Following Lady Smith's guidance in *ASDA Stores*, on the facts of this case, it was not only possible for the claimant to have presented

the claim much earlier (and indeed, to have progressed very shortly after resignation, having sought and obtained advice), but it was also reasonable to expect her to have done so. It was certainly reasonably feasible to do so (*Palmer v Southend-on-Sea Borough Council [1984] ICR 372).* The claimant plainly knew of her right to complain of unfair dismissal, and was under an obligation to find out information as to how to enforce her rights; indeed, she evidently did so, and could have clarified any other points with ACAS or CAB which were unclear to her, but failed to do what she should have done to progress matters (see *Trevelyan's v Norton*, per Wood J).

52. This is a case where the tribunal has plainly found that the claim was out of time. It would stress that, unlike discrimination claims, this is not a matter of the tribunal taking a broader view as to what is in the interest of justice. The initial issue is for the tribunal to decide, as a question of fact, whether the claimant has discharged the burden of showing that it was not reasonably practicable to have brought the claim in time.

53. In essence, the claimant's case is primarily that she found the whole process overwhelming, stressful and confusing. Whilst she does not dispute that she would have been given the correct advice by ACAS and the CAB, she did not retain in her mind the advice on all the matters they discussed.

54. The tribunal has considered that it is clear that the advice must have touched upon, at least in general terms, the process for bringing a claim in the Tribunal and the fact of time limits. Plainly, the circumstances of taking advice were to do with the dispute about any notice pay owing, but also concerned with the claimant being a whistle-blower, and in relation to her resigning her employment and potentially bringing a claim for constructive dismissal.

55. The tribunal considers that the position, very shortly after resigning, must have been that the claimant was aware, and had access to further advice, as to the mechanism for bringing a claim and in general term as to time limits. Whilst accepting that the claimant may have forgotten the advice she received, and not have asked further supplementary questions, this does not mean that she was not easily able to ascertain her rights.

56. This is not a case where it is suggested that the respondent misled the claimant as to her rights, or represented that she should delay brining any sort of legal challenge as to constructive dismissal until financial issues were resolved. Indeed, even if the claimant did not receive the respondent's letter confirming that it had set out its position and would not re-consider, the reality is that the respondent was clear throughout that it had paid the claimant her entitlement and would pay no further sums to her.

57. Even if the claimant (mistakenly) had believed that the respondent was prepared to change its position and to further investigate the issue of the sums due at termination, this is wholly irrelevant to the question of whether she had an arguable case for automatically unfair dismissal.

58. The tribunal considers there is no logical basis for not progressing a claim for unfair dismissal, on the basis of the possibility of getting a little more notice pay, when the respondent had made it clear that the claimant had (from their perspective) been paid her entitlement. In any event, the deadline for

payment suggested by the claimant in consultation with ACAS, still allowed sufficient time for the claim to be brought in time. The claimant failed to do so.

59. Despite the issues being clarified at the start of the hearing, and dealt with clearly by Mr Ludlow in his closing submissions, the claimant has given no adequate explanation for the delay other than generalised comments such as finding it stressful. The tribunal considers that none of the arguments come close to establishing that it was not reasonably practicable.

60. The tribunal concludes that this is a case where the claimant's own evidence falls some considerable way below what would be required for her to be able to establish it was not reasonably practicable to bring a claim within time. The tribunal finds, on a balance of probabilities, that it was indeed reasonably practicable to bring the claim within time, by commencing early conciliation on or before 14 September 2018 (and then bringing the claim within the specified period after the early conciliation certificate was issued).

61. The tribunal would also observe the following: Even if it had not come to the above conclusion, it would have come to the conclusion that the claim was not presented within a reasonable time after 14 September. It was unreasonable to wait for almost another month before commencing ACAS early conciliation. It was unreasonable, in a case where the claim was already well out of time, for the claimant to delay for a further three weeks or so after early conciliation, before eventually presenting her unfair dismissal claim.

62. Having found that the claim was out of time but that it was reasonably practicable to have presented the claim within time, the tribunal has no jurisdiction to hear the case. There is no discretion. It is irrelevant as to whether the claim of constructive unfair dismissal may have merit. The tribunal is prevented from hearing the claim, and it must be dismissed for want of jurisdiction.

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Employment Judge Emerton

Date 17 August 2020

Reasons sent to parties 21 August 2020

FOR THE TRIBUNAL OFFICE