EMPLOYMENT TRIBUNALS

Claimant: Ms Caoilfhionn Warne

Respondent: Rochdale Borough Council

Heard at: Liverpool **On:** 18 August 2020

Before: Employment Judge Shotter (sitting alone)

Representatives
For the claimant: In person – by written submissions
For the respondent: Ms Quigley, counsel – by written submissions

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claim contains a complaint of breach of contract. An Employment Tribunal shall not consider the complaint as was it was not presented before the end of the period of 3 months beginning with the effective date of termination giving rise to the claim. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months, and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint of breach of contract, which is dismissed.

REASONS

Introduction

(1) This is a preliminary hearing following a case management hearing held on the 24 June 2020 when various orders leading to today's hearing were agreed between the parties which have been complied with by the respondent only. The claimant has not provided any written arguments as to why her claims should not be struck out today, and she has not made contact with the Tribunal since the 24 June 2020 hearing. The Tribunal has tried to contact the claimant today with no success.

(2) The claimant understood that today's preliminary hearing will take place by written submissions to deal with the issues of jurisdiction and the respondent's application for a strike out/deposit order in respect of the claimant's claim. The parties agreed it will be an in chambers hearing following exchange of written submissions in accordance with the case management orders agreed and the parties would not be attending in person.

(3) As recorded in the Record of Preliminary Hearing sent to the parties on 24 June 2020, the claimant was invited to inform the Tribunal in writing no later than 8 July 2020, providing full details, if what is set out in the Case Management Summary was inaccurate and/or incomplete in any important way, and she has not commented. The Tribunal concludes that the clarification received from the claimant about her case was correctly recorded. This is relevant to today's application as follows.

Time for presentation of the ET1

3.1 By a claim form received on the 21 January 2020 following Early ACAS conciliation on the same date, the claimant claims breach of contract arising out of the offer and withdrawal of an offer of employment.

3.2 In a letter dated 31 March 2020 the claimant seeks a remedy in the following terms; the Tribunal to "make" the respondent's employees "across the board" undertake training in interviews and job offers, review their complaints process and effective communication.

3.3 The claimant remained employed with her original employer, and claims damages of a token one-month salary with her current employer to "symbolise the potential loss incurred" had the claimant handed in her notice, which she did not. The Tribunal who discussed remedy with the claimant, took the view that the damages claim was likely to be found misconceived and if her breach of contract claim was successful the damages could only cover contractual losses flowing from the breach, and there appeared to be none. It was suggested the claimant took the opportunity to seek legal advice before the next preliminary hearing.

3.4 It is agreed between the parties that the job offer related to the post of music tutor provided by "Rochdale Music service" run by the respondent, a service it offered to schools and pupils of various ages. In order to take up the position a Criminal Background ("DBS") clearance was required. The claimant was provided with a DBS application form, and following an interview an offer was made to her on 29 August 2019 which was accepted by the claimant. Liz Jacobs wrote "We would like to offer you the percussion tutor post subject to all checks being successfully completed." It is undisputed that as the claimant was working with children, and the offer was conditional on her obtaining DBS clearance. In short, the claimant could not work unless DBS clearance was obtained and the contract was due to commence at the start of the school term.

3.5 Ms Quiggley in written submissions referred to a number of communications including emails. It is notable that the claimant confirmed on the 29 August 2019 in

an email sent to the respondent; "I would assume that my start date would need to follow the receipt of the DBS clearance." The claimant was employed elsewhere.

3.6 By 2 September 2019 the DBS check had not come through and the claimant had not handed in her notice. She was unable to be in post at the start of September and the offer was withdrawn on 4 September 2019. The 4th of September withdrawal letter stated; "we are withdrawing our offer to you as unfortunately you will not be in post in time to meet the service needs."

3.7 In email sent by the claimant to Liz Jacobs of the respondent at 2.53.42 on the 4 September 2019 she wrote; "Further to my previous response, please see conversation wherein you made the offer of the position, subject to checks. The gov.UK website states that the offer can only be withdrawn if those checks are not completed. It also recommends that employees do not hand in their notices until the checks are satisfactory. I am disappointed that you feel it is suitable to withdraw an offer based on my timescale for handing in my notice. Should you wish to withdraw this offer I may have to seek legal redress for a breach of contract."

3.8 The claimant did not hand in her notice and remained employed with her original employer.

3.9 The offer was made on the 29 August 2019 and withdrawn on 5 September 2019 when DBS clearance had not come through. For the purposes of the primary statutory limitation period the 4 September 2019 is the relevant act from which time runs.

3.10 At the preliminary hearing the claimant indicated that a "few weeks" after the offer was withdrawn she spoke to her current employers HR department to "see if I could start looking into it" i.e. the withdrawal of the offer. She then explored this with the respondent, who took its time to get back to her. During this period the claimant continued to work for her current employer and took no steps to issue proceedings. She is aware that her claim was submitted late on the 21 January 2020, the date when ACAS early conciliation took place. The primary limitation expired on the 4 December 2019, and the claim was lodged almost 7-weeks late.

The Law

(4) The contractual jurisdiction of employment tribunals is governed by S.3 ETA, together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 ('the Order'). Article 7 of the Order provides that an *employee's* contractual claim must be made:

• within the period of three months beginning with the effective date of termination of the contract giving rise to the claim — Article 7(a)

• where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated — Article 7(b), or

• where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the applicable time limit, within such further period as the tribunal considers reasonable — Article 7(c).

Conclusion – applying the law to the facts

(5) Having listened to what the claimant had to say at the preliminary hearing (as recorded), I took the preliminary view that it was likely the Tribunal did not have the jurisdiction to consider the claimant's claim of breach of contract due to the strict time limits set out by statute and the fact that there was no suggestion from the claimant, who was working throughout the relevant period, that it was not reasonably practicable for her have taken part in ACAS early conciliation and lodged the proceedings within the time limits.

(6) Since the preliminary hearing I now have had the benefit of Ms Quigley's written submissions and copies of case law provided, duly highlighted, to make it easier for the claimant to read and understand as discussed at the preliminary hearing.

(7) The cause of action for the alleged breach of contract arose on the 4th of September 2019, and it is provided in Article 7 that an employment tribunal][1] shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
(ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).
(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

(8) The Claimant was required to commence Early Conciliation before the 4th of December 2019, and did not commence Early Conciliation until the 21st of January 2020 when she issued her claim on the same day. The claimant was fully aware that she had issued proceedings late, and she was equally aware by the questions asked of her at the preliminary hearing that she must prove (the burden is on the claimant) that it was not "reasonably practicable" to bring the claim within the primary time period.

(9) Ms Quigley referred me to *Palmer and Saunders ([1984] ICR 372 at 384, 385*, May LJ held that:

"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than

merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360, HL*. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [*Singh v Post Office [1973] ICR 437, NIRC*] and to ask colloquially and untrammelled by too much legal logic— "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection." In the case of Ms Warne, the Tribunal took the view it was reasonably feasible for her to have taken part in Early ACAS Conciliation within the primary 3-month period; she had spoken with her employers HR department a "couple of weeks" after the offer was withdrawn and immediately the offer was withdrawn referred to breach of contract proceedings.

(10) The Tribunal was also referred to *Wall's Meat Co Ltd v Khan [1979] ICR 52, CA*, Lord Denning held the relevant enquiry to be as follows:

"It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences'.

Further, Brandon LJ held that:

"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made […] '.'

(11) With reference to Ms Warne, there was no suggestion (a) she was ignorant of her legal rights, quite the reverse, given her threat to take action for breach of contract made in the 4 September 2019 email referred to above. Ms Quigley submitted the claimant continued to work from September onwards in her pre-existing role; she was not unfit to work at any point and there was no medical reason why she was unable to present her claim in time. The fact the claimant attempted to communicate with the Respondent and exhaust an internal process to work out reason why the offer was withdrawn does not assist her. The Tribunal was referred to the judgment of Browne-Wilkinson J in Palmer

referred to above, that the mere fact of a pending appeal is an insufficient basis to merit an extension of time:

"There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not reasonably practicable to complain to the … tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the … tribunal'.'

(12) The Tribunal agreed with Ms Quigley that there was no impediment to the Claimant submitting the claim in time nor any apparently good reason to justify the length of the delay. The fact the Claimant elected to communicate with the respondent and seek a resolution, having consulted with her employer's HR department, does not render it "not reasonably practicable" to submit the claim in time.

(13) In conclusion, the claimant's claim contains a complaint of beach of contract. An Employment Tribunal shall not consider the complaint as was it was not presented before the end of the period of 3 months beginning with the effective date of termination giving rise to the claim. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months, and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint of breach of contract, which is dismissed.

Strike Out/Deposit

(14) In the alternative, if the Tribunal is wrong on the time limit issue, it would have struck the claim out under Rule 37 of the Tribunal Rules 2013 which provides;

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(15) Ms Quigley referred the Tribunal to the judgment of Maurice Kay LJ in Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 CA:

"29. … It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

(16) Ms Quigley also referred the Tribunal to the guidance as to the application of rule 37 was further provided by the EAT in Balls v Downham Market High School & College [2011] IRLR 217 (para 6):

"6. Where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success … the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. Is it, in short, a high test. There must be no reasonable prospects." (Original emphasis).

(17) Whilst it is acknowledged that the circumstances in which it would be justifiable to strike out claims may be rare, nonetheless Underhill LJ held that Tribunals should not be deterred from doing so, even where a dispute of fact is involved, 'if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context;' Ahir v British Airways plc [2017] EWCA Civ 1392, at para 16).

(18) The Tribunal concluded on the agreed facts set out above, and taking into account the legal guidance provided, exceptionally, the claim for breach of contract had no reasonable prospects of success from its inception and through to the preliminary hearing. The job offer was made subject to the claimant being DBS checked and by the beginning of the new term the claimant had not been DBS cleared, had not handed in her notice and was unable to start work. The claimant was fully aware of the position and that she had not complied with the conditions attached to the offer; it should therefore

have not come as a surprise to her that the offer was withdrawn at the start of term. Ms Quigley is correct that as a matter of law the respondent was lawfully permitted to withdraw the offer and was not in breach of contract. Such a position is unarguable and there is no scope whatsoever for a different conclusion to be reached.

(19) At the preliminary hearing the way in which the claimant put her damages was discussed and clarified with the claimant. The Tribunal agreed with Ms Quigley that on the face of it the Claimant has suffered no loss because of the breach, the remedies sought are misconceived and the Employment Tribunal has no jurisdiction to award the same.

(20) It is unfortunate the claimant had not sought legal advice as suggested by the Tribunal, and her claim proceeded beyond case management to this preliminary hearing without any input from her. Her claim has no reasonable prospect of success and had it been received by the Tribunal within the statutory time limits it would have been struck out under Rule 37.

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Employment Judge Shotter

DATE:18 August.2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

25 August 2020

FOR THE TRIBUNAL OFFICE