EMPLOYMENT TRIBUNALS

Claimant: **Ms S Darcy**
Respondents: **(1) Ms K Katona**
(2) Home Office

PRELIMINARY HEARING

Heard at: **London Central** **On: 24 August 2020**
Before: **Employment Judge Elliott (by video)**

Appearances
For the claimant: **In person**
For the respondents: **Mr B Gray, counsel**

JUDGMENT ON PRELIMINARY HEARING

The unfair dismissal claim is out of time and the tribunal has no jurisdiction to hear it.

REASONS

The issue for this hearing

(1) This case was originally due to have a full merits hearing commencing today Monday 24 August 2020. On 15 April 2020 a telephone preliminary hearing took place before me and I converted day 1 of the full merits to this open preliminary hearing to deal with the following issue:

(2) Time limits: to consider whether the claims are within time, bearing in mind the statutory time limits in section 111 of Employment Rights Act 1996 and section 123 of the Equality Act and Regulation 7 of the Employment Tribunal (Extension of Jurisdiction) Order 1994.

(3) The claimant told the tribunal at this hearing that she no longer pursued a breach of contract claim in relation to not receiving her pay when she joined. There was no separate breach of contract claim. The breach relied upon related only to the

constructive unfair dismissal claim. The breach of contract claim will therefore be dismissed upon withdrawal.

(4) On 18 June 2020 a letter was sent to the parties stating that this preliminary would only deal with time limits under section 111 Employment Rights Act 1996 and under the Extension of Jurisdiction Order 1994. The parties were informed that the tribunal would not consider time limits on the reasonable adjustments claim as this would be a matter for the full merits hearing once all the evidence has been heard. What was in issue for this hearing was the time limit under the ERA 1996.

This remote hearing

(5) The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.

(6) In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

(7) The participants were told that is was an offence to record the proceedings.

(8) Evidence was heard from the claimant on the time point.

(9) During the hearing of the time limitation point, the parties were able to hear what the tribunal heard. After the decision on the time point had been given and as we moved on to case management the claimant had sound difficulties. This was just before lunch so we adjourned for a lunch break which allowed the claimant to log off and back on. The sound quality was better to being with but became more difficult for the claimant. So as to ensure that the parties remained on an equal footing we postponed any further case management to an in person hearing on Friday 11 September 2020 at 10am for 3 hours.

(10) The decision on the time point was given orally on 24 August 2020. The claimant requested written reasons.

Documents

(11) The respondent expected the tribunal to have four sets of documents for this hearing, a hearing bundle of 280 pages, a Skeleton Argument, a List of Issues and a case management agenda. The List of Issues was only sent on the morning of the hearing at 08:38 hours and was not received until during the hearing itself. The other documents were received by the claimant on Friday 21 August at midday with the bundle and at 16:52 hours she had the skeleton argument. This was late in the day particularly for a litigant in person.

(12) The claimant said that she was able to deal with the matter today so the hearing went ahead.

Findings of fact on the time point

(13) The claimant's employment terminated on 27 July 2018 as a result of a resignation sent on 29 June 2018. It was agreed that the effective date of termination was 27 July 2018. The primary time limit expired on 26 October 2018. The claimant is 13.5 months out of time.

(14) On 10 July 2018 the claimant submitted a grievance. She received the outcome on 19 July 2019.

(15) The claimant started Early Conciliation on 7 October 2019 and this completed on 20 November 2019. She presented her ET1 on 9 December 2019.

(16) The claimant's evidence was set out in a letter to the tribunal dated 30 January 2020. The parties agreed that this could be treated as her witness statement on the time point. The claimant said:

"The reason why I did not approach the Tribunal and could not submit a claim earlier than 7 October 2019 was because I was pursuing an internal grievance process with the Respondent which only concluded on the 19 July 2019.

The last act of discrimination and treatment by the Respondent continued through to 19 July 2019 which was a continuation of the treatment and the process that finally culminated in an outcome and decision of the internal grievance process. I could not consider the process closed until the decision was delivered to me on 19 July 2019. I was also advised that I must exhaust the internal grievance process before submitting a claim.

The Respondent carried out an internal investigation upon receiving my grievance on 10 July 2018 because I was forced to leave the Home Office with my last date of employment as 27 July 2018. The Respondent concluded the investigation on 19th July 2019 which was the last act and was partially upheld in my favour of my grievance. The Respondent had been unable to find an Investigating Manager until September 2018 despite having received my grievance on 10 July 2018. I was not interviewed for the investigation until the 9 October 2018. Myself and my Union (Guy Brewer from PCS) were advised we would expect a decision by December 2018. PCS followed this up and had no information or indication back from the Respondent. A summary report of my interview was only sent to me in February 2019 for validation and PCS followed up when we would expect an outcome to no avail.

When I did receive the decision, I was never provided with the full findings report or invited to discuss the grievance which was set out in the Respondent's letter (Krisztina Katona) to me dated 4th September 2018 when the investigation begun. I provided this letter of evidence to the Respondent's Representative to evidence that I had expected to also receive the full report of the findings when I received the outcome on 19 July 2019. I was still suffering from the detrimental effects of my employer's treatment towards me at this point when I received the outcome and decision. I had been long awaiting the outcome of my grievance before proceeding with the tribunal because I was advised that I must exhaust the internal investigation process. I complied with this timeline."

(17) The respondent did not challenge this evidence and did not wish to cross examine the claimant on this or any of the oral evidence she gave at this hearing.

(18) The claimant said she acted in good faith that the respondent would carry out an internal investigation and she considered that they were intentionally frustrating the process. She said as soon as she had the outcome she followed the process. She said when she did receive a decision she pursued the claim and she agrees

that it was out of time but she acted in good faith and followed due process. By way of example as early as 10 July 2018 there was an email exchange with HR and Head of Service saying "*this looks like constructive dismissal"* and the claimant only knew this through disclosure.

(19) I asked the claimant if she had union representation throughout. She said she had union representation from 11 May 2018 until the end of August 2019 after the outcome decision.

(20) I asked if she ever had a discussion with her union representative Mr Brewer as to what would happen if things did not go her way. She did have those discussions. I asked if he ever mentioned the time limit for tribunal proceedings and she said that he did on 9 October 2018 when they attended the claimant's investigatory interview. He told the claimant that for constructive dismissal there were time limits, of three months, but he said she had to exhaust the internal process first and that she also had the same advice from the Head Office of PCS as to exhausting the internal investigation.

(21) The claimant said that she called ACAS in July 2018 and she said she would have to show she had to follow the internal grievance process and was told "*otherwise what are you taking to the tribunal*". I asked if they told her about the time limit. She said they focused on the internal grievance.

The relevant law on the time point

(22) Section 111 of the Employment Rights Act 1996 states that:

(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—

(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.

(23) What is reasonably practicable is a question of fact and therefore a matter for the tribunal to decide. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. There is a duty upon her to show precisely why she did not present the complaint within time.

(24) The Court of Appeal in ***Palmer v Southend on Sea BC 1984 ICR 372*** the said that 'reasonably practicable' equates to 'reasonably feasible'.

(25) The ***Dedman*** principle is found in the case of ***Dedman v British Building and Engineering Appliances Ltd 1973 IRLR 379***. This is that if a person engages skilled advisers to act for them and they make a mistake as tot eh time limit, they are fixed with that. This was a case that involved solicitors so that if the claimant

has put the case in the hands of solicitors, he or she cannot plead ignorance of the time limit.

(26) Trade union representatives count as advisers for this purpose as held in ***Times Newspapers Ltd v O'Regan 1977 IRLR 101*** in which the EAT held that the union's advice was attributable to the claimant and she could not say that it was not reasonably practicable to present her claim within time.

(27) When deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge she should have had she acted reasonably in all the circumstances – ***Marks and Spencer plc v Williams-Ryan 2005 IRLR 562 Court of Appeal.***

Decision on the time point

(28) This claim for unfair dismissal is 13.5 months out of time. This is a very considerable period of time. It should have been presented by 26 October 2018 and was not presented until 9 December 2019. The claimant relies predominantly on the fact that she was advised by her union representative Mr Guy Brewer and also by someone at the Head Office of the PCS union, that she had to exhaust her internal grievance process before she could commence tribunal proceedings. Her evidence was and I find, that at an internal grievance investigation meeting on 9 October 2018, which was within the primary time limit, Mr Brewer told her about the three month time limit. I find that the claimant had knowledge of the time limit.

(29) I do not doubt that the claimant acted in good faith and did as she had been advised. She told the tribunal that she also had a conversation with ACAS in July 2018. They were not her official advisors. She said that the focus of that conversation was on the internal grievance. I agree with the respondent's submission, that any advice from ACAS was secondary to the advice that she was receiving from her union from May 2018 until August 2019.

(30) The law in this area is clear that the claimant is bound by the incorrect advice from her advisors.

(31) Although not in her witness evidence, being the letter of 30 January 2020, but in submissions, the claimant also mentioned her health difficulties. I also do not doubt that the claimant has been unwell but she did not rely on this is the reason why she did not present her claim within time. I also took account of the fact that she has been in work from July 2018 to date.

(32) I find that the reason the claimant did not present her claim within time was due to erroneous advice from her union and that it was therefore reasonably practicable for her to present her claim within time. The unfair dismissal claim is

therefore out of time and the tribunal has no jurisdiction to consider it. I appreciate how disappointing this decision will be for the claimant.

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Employment Judge Elliott

24 August 2020

Sent to the parties on:

24/08/2020.

For the Tribunal: