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# THE EMPLOYMENT TRIBUNAL

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BETWEEN

Claimant

and

Respondent

Miss S McCalla

The Participation People Limited

Held at London South

On 30 November 2020

BEFORE: Employment Judge Siddall (Sitting Alone)

## Representation

For the Claimant: Mr Sprack

For the Respondent: Ms Bowen

## JUDGMENT UPON PRELIMINARY HEARING

The decision of the tribunal is that:

1. The claim for unfair dismissal is struck out as the claimant did not have two year's continuous employment;
2. The claims are out of time; and
3. The application for amendment is refused.
4. All the claims are therefore dismissed.

## **REASONS**

1. The Claimant claimed unfair dismissal and discrimination on the basis of the protected characteristics of race, sex and age. Her ET1 was received on 28 February 2020.
2. At a preliminary hearing on 14 August 2020 Judge Khalil ordered that a second preliminary take place to consider:
  - a. Whether the claims had been made in time and
  - b. An application for amendment made by the Claimant.
3. This has been a remote hearing which was not objected to by the parties. The form of remote hearing was audio-visual (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a joint bundle of documents provided electronically along with other documents, the contents of which I have recorded. The order made is described at the end of these reasons.
4. I heard evidence from the Claimant and from Ms Antonia Dixey on behalf of the Respondents.
5. The facts I have found that are relevant to the time issues and the conclusions I have drawn from the evidence of both parties is as follows.
6. The Claimant was employed as a Youth Participation Officer on 22 August 2018 by the Respondent which provides youth engagement services, training and consultancy. She was dismissed with immediate effect on 20 November 2019.
7. On 25 November 2019 the Claimant telephoned ACAS for advice and she was advised to lodge an appeal and a grievance.
8. On the advice of ACAS the Claimant also contacted the Equality Advisory and Support Service for advice on 4 December 2019.
9. On 6 December 2019 the Claimant sent the Respondent her appeal against her dismissal, followed by a written grievance on the 12 December 2019.
10. On or around the 15 December 2019 the Claimant called ACAS again enquiring about next steps. She records their advice at paragraph 7 of her witness statement as follows: 'they said that the appeal would be my chance to resolve the situation without the need for court or lawyers. Then once a

decision was made, I'd decide whether I was happy with the outcome. If I was not, I could then start conciliation but that had to be done within 3 months, minus one day of my claim which would be (19/02/20). ACAS then said that once conciliation starts my 3-month clock would pause until the end of conciliation'.

11. In the next paragraph the Claimant explains that she believed that her action of sending through the appeal, and setting up a meeting in an attempt to resolve the dispute and discuss a desired outcome 'amounted to an official conciliation' and that this 'paused the clock' from the date of the appeal meeting until the outcome.
12. As well as taking these steps the Claimant advised that she had googled information about her rights, she had looked at the ACAS website, she had sought advice from a friend who had knowledge of employment law, and she had contacted a trade union. The union was able to send a representative to attend the appeal hearing with her although she says and I accept that this person did not represent her on an ongoing basis and did not discuss time limits with her.
13. On 16 January 2020 the Claimant attended a hearing called to consider her appeal and grievance conducted by Ms Dixey. Following that hearing, the Claimant provided additional information and documents to the Respondent on 26 January 2020. On 5 February 2020 Ms Dixey emailed her to acknowledge the information and to tell her that she would consider everything before reaching an outcome. She would respond to the Claimant within the 'next few weeks'.
14. The preliminary time limit for bringing a claim to the tribunal in relation to the dismissal expired on 19 February 2020.
15. On 24 February 2020 the Claimant contacted ACAS again and was advised that she was out of time to bring her claim. She could still submit it but it would be at the discretion of the tribunal whether it was accepted.
16. The Claimant submitted an early conciliation request form on 25 February 2020 and obtained a certificate on 26 February. She lodged her claim on 28 February 2020.

17. The outcome of the appeal and grievance was supplied to the Claimant on 12 March 2020.
18. A preliminary hearing was fixed for 14 August which was converted to an open preliminary hearing to consider whether the claims were out of time. The Claimant was able to obtain representation for that hearing and on 7 August 2020 Mr Sprack made an application to amend the claim. He sought leave:
  - a. To classify the discrimination claims as claims for direct discrimination, harassment and victimisation;
  - b. To add additional allegations including one allegation that post-dated the claim; and
  - c. To bring claims for automatic unfair dismissal on the grounds that the Claimant had made protected disclosures under section 103A of the Employment Rights Act 1996 and/or for a health and safety reason under section 100 and/or because she had asserted a statutory right under section 104.
19. Judge Khalil decided that the Claimant's representative was not on notice of the preliminary time point and that there was insufficient time to deal with all matters at the hearing in August. It was accordingly listed for a full day on 30 November.
20. I had the benefit of reading written skeleton arguments prepared by both representatives.

## **Decision**

### **Unfair Dismissal**

21. It does not seem to be in dispute that the Claimant was employed by the Respondent from 22 August 2018 to 20 November 2019, that is one year and three months. This point does not seem to have been addressed in the Response to the claim and neither representative raised it during their submissions. It would be easy for me simply to dismiss the claim for unfair dismissal on the basis that the Claimant had insufficient service to bring it. However, I am bearing in mind that the Claimant has applied to amend her claim to include three claims for 'automatic' unfair dismissal, none of which require two years' service. In light of this I will first consider whether it was reasonably practicable for the Claimant to bring her claim for unfair

dismissal within the period of three months of her dismissal; and if not whether it was brought within such further period as is reasonable (s 111(2)(b) ERA 1996). I will then consider the application to amend.

22. 'Reasonably practicable' has been described as meaning 'reasonably feasible' in *Palmer v Southend on Sea Borough Council* [1984] ICR 372. That case also confirmed the principle that the existence of an internal appeal is not in itself sufficient to justify a finding that it was not reasonably practicable to bring a complaint in time.
23. I have noted from the claim form provided by the Claimant that she described her role with the Respondent as her 'first graduate job after leaving University'. It is clear from her witness statement that following her dismissal she made considerable efforts to establish what her rights were and how to enforce them. She took advice from ACAS, EASS, a trade union representative and a friend who had relevant knowledge. She looked at the ACAS website.
24. In the light of this I have considered the Claimant's assertion that she was operating under a misapprehension that by lodging her appeal and grievance she had started 'conciliation' and that this had 'paused the clock'.
25. I do not find this plausible. The Claimant is well educated. Given the extent of research that she had done and the amount of advice she had obtained, I do not find it credible that she had failed to understand that starting 'conciliation' meant completing a form and notifying ACAS of her dispute. I note in particular that she had looked at the ACAS website where the process is set out very clearly.
26. I am struck by the contents of paragraph 7 of her witness statement where she records what ACAS told her on 15 December. This seems to set out the position accurately, suggesting that she had not misunderstood the advice she had been given. It also demonstrates that she was fully aware of the limitation date of 19 February 2020 by which she had to start conciliation.
27. On the basis of this advice it is very hard to see how the Claimant could have reached the conclusion that she was complying with the duty to undergo

early conciliation by lodging her appeal. The advice from ACAS recorded in paragraph 7 clearly identifies that the lodging of the appeal and grievance were separate actions that could be followed by conciliation if she was not happy with the outcome, they were not one on the same thing.

28. In summary I do not accept the Claimant's evidence that she was confused or that she had misunderstood the position. She was fully aware of the limitation date and for whatever reason it passed her by. It was entirely feasible for her to have lodged her claim for unfair dismissal in time, especially when she was advised on 5 February that the grievance and appeal process might take 'a few more weeks'. The claim for unfair dismissal was brought out of time.
29. I go on to consider the Claimant's application to amend her claim to add three new claims for unfair dismissal: on the basis of protected disclosures, health and safety, or for asserting a statutory right. I consider this in light of the *Selkent* principles.
30. In his written submission Mr Sprack makes the point that on her ET1 form the Claimant ticked the box for 'unfair dismissal' but did not specify which statutory provision she brought this claim under.
31. He refers to the following sentence on the attachment to the claim form: "I was dismissed at a meeting I called to discuss TOIL procedures". (The question of who in fact called the meeting is in dispute). Mr Sprack appears to suggest that this is the basis for the three additional claims of unfair dismissal that the Claimant wishes to bring. It is to be noted that neither in the amended grounds nor in the written submission does the Claimant identify which type of qualifying disclosure under subsection 43B she relies upon; nor which subsection of section 100 is claimed; and nor does she identify the statutory right which she says she asserted prior to her dismissal.
32. I have also noted that the information provided by the Claimant in her claim form, appeal and grievance all assert that she was dismissed for reasons related to race, sex and age and she makes no allegation that there might be another reason for her dismissal.

33. For these reasons, if Mr Sprack is arguing that the amendment applied for is a 're-labelling' of matters already pleaded, I am not able to accept that. These are wholly new claims, not referred to previously by the Claimant, and not particularised by her in any of the material provided to date including the witness statement provided for this hearing.
34. These claims are also, of course, out of time.
35. It seems to me that the amendment has been sought to address the fact that the Claimant cannot claim 'ordinary' unfair dismissal because she does not have two years' service. That 'ordinary' unfair dismissal claim is itself out of time. Mr Sprack seeks to support the application with reference to one sentence set out on the claim form, but I fear that sentence will not bear the weight he seeks to place upon it. The amendments would amount to a significant expansion of the case and the basis for the additional claims has not been specified. In any event they are out of time. In all the circumstances the application for leave to include new claims of automatic unfair dismissal is refused.

### **Discrimination Claims**

36. In her claim form the last act complained of by the Claimant is her dismissal with effect from 20 November 2019. It is not in dispute that her time limit to bring claims under the Equality Act expired on 19 February 2019 but the Claimant argues that it would be just and equitable to extend time.
37. *Robertson v Bexley Community Centre* [2003] IRLR 434 makes it clear that there is no presumption in favour of exercising the discretion to extend time and says: 'Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule'.
38. I have set out above the reasons why I do not accept that the Claimant was acting under a misapprehension that she had started conciliation by lodging her grievance and appeal and attending a meeting with the Respondent. I have found that she was clearly aware of the three month time limit yet for whatever reason she failed to commence early conciliation before that date.

39. I have taken into account that on the date the initial three-month deadline passed, the Claimant was still waiting for a decision from the Respondent in relation to her grievance and appeal. She stated a number of times that she was seeking 'conciliation' through the respondent's processes. She had noted the advice from ACAS that this might mean that the matter could be resolved without her having to go to court.
40. I have noted the decision in *Robinson and Post Office* [2000] IRLR 894 that there is no general principle that it is just and equitable to extend the time limit where the Claimant was pursuing an internal grievance before commencing legal proceedings. Nevertheless it is a factor I have taken into account.
41. I have concluded however that this is not a case where an employee decides to complete an internal grievance before investigating their rights. The Claimant contacted ACAS soon after her dismissal. She sought advice from a number of sources and worked hard to ensure that she was fully informed about her rights. She was aware of the deadline of 19 February 2020.
42. I am not sure why the Claimant did not lodge her claim in time. Possibly she thought that the appeal and grievance process would be concluded at an earlier time. Possibly she made a simple error. In all the circumstances I have reached the view that it would not be appropriate to exercise my discretion and extend time in a situation where the Claimant was fully aware of the time limits but missed them without an adequate explanation. The time limits are important and I do not consider it is just and equitable to extend them where the Claimant either decided to wait a bit longer for the Respondent to reply to her complaints before proceeding or made an error. Therefore the discrimination complaints are out of time.
43. I have considered the application to amend the discrimination claims. It seems to me that Mr Sprack had made a valiant attempt to reorganise the allegations made in the original claim form and provide legal classification of them. However as the discrimination claims have been held to be out of time, that application must fall away.



44. As none of the claims can proceed, they are dismissed in their entirety and these proceedings will go no further.

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Employment Judge Siddall  
Date: 1 December 2020