



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4107617/2019

10

**Preliminary Hearing Held in Edinburgh
on 2 October 2020**

Employment Judge A Jones

15

Miss A Reidy

**Claimant
In Person**

20

First Scotland East Limited

**Respondent
Represented by
Miss R Smith, solicitor**

25

JUDGMENT

The Tribunal does not have jurisdiction to consider the claimant's claim in terms of section 47B Employment Rights Act 1996.

30

Introduction

1. A preliminary hearing took place in this case in order to determine two matters.

35

- a. In the first instance, the claimant had intimated that she wished to amend her claim to include a claim of sex discrimination. The terms of that application were set out in an email from the claimant dated 29 June 2020. The amendment application related to an allegation

that the claimant was treated less favourably than a male colleague in that she was dismissed for allegedly using her mobile phone while at work (an allegation which she denied), while a male colleague had admitted the use of a mobile phone in similar circumstances and had not been dismissed. The application to amend was resisted by the respondent.

5

b. The second matter was whether the Tribunal had jurisdiction to consider the claimant's claim under section 47B of the Employment Rights Act 1996 ('ERA') that she had been subjected to various detriments as a result of having made protected disclosures. The jurisdictional matter at issue related solely to whether the claims under section 47B had been lodged in time and, if not, whether in terms of section 48 ERA it had been reasonably practicable to raise the claims within the required time period and if it had not been reasonably practicable, whether the claims had been lodged within such further period as the Tribunal determined was reasonable.

10

15

2. At the commencement of the hearing, the Tribunal sought to clarify with the parties that they understood the purpose of the hearing. The claimant appeared in person and the respondent was represented by Miss Smith, solicitor.

20

3. On questioning the claimant's understanding of the purpose and scope of the hearing, it became apparent that the claimant had sought to amend her claim to include a claim under the Equality Act 2010, under a misapprehension that if she did not seek to raise a specific claim of sex discrimination, she would be unable to lead evidence in relation to the difference in treatment she alleged took place. In particular the claimant had been of the view that if she did not include a claim of sex discrimination, then she would be unable to lead evidence about what she said was differential treatment of a male colleague in similar circumstances to her. The claimant indicated that she had found participating in a conference call preliminary hearing which led to the making of this application difficult. The respondent's agent accepted that if the claimant

25

30

did not insist on her application amendment, then she would still be entitled to lead evidence in relation to alleged differential treatment of a male colleague.

4. The Tribunal then explored with the parties the second issue to be determined and sought clarity that the claimant was seeking to include in her claim allegations of being subjected to detriments in terms of section 47B ERA. The alleged detrimental treatment was set out in the List of Issues which had been provided to the Tribunal and took place between April and November 2018. The claimant's claim also includes a claim of automatically unfair dismissal for having made a protected disclosure in terms of section 103A ERA.
5. Once the Tribunal was satisfied that the claimant properly understood the issues, there was a short adjournment for the claimant to consider her position.
6. Thereafter the claimant confirmed that she did not now wish to insist on her amendment application to include a claim of sex discrimination in terms of the Equality Act 2010. She was content that she would be in a position to lead evidence of alleged differential treatment in the context of her unfair dismissal claim. The respondent's agent confirmed that this was in keeping with their understanding. The hearing was therefore limited to consideration of the second matter relating to time bar.
7. The claimant then gave evidence on the circumstances surrounding her application to the Tribunal. The claimant was a credible witness. The claimant accepted that on the face of it the claim in terms of section 47B was out of time as the alleged detriments took place in 2018 and her claim was not lodged until 10 July 2019, early conciliation having commenced on 4 June 2019.

Findings in fact

8. On the basis of that evidence, the Tribunal found the following facts to have been established.

9. The claimant had been employed by the respondent as a bus driver from 2009 until her dismissal in March 2019.
10. The claimant was dismissed with notice on 24th August 2018 due to sickness absence.
11. That dismissal was overturned and the claimant returned to work in January 2019.
12. The claimant was a member of Unite the Union and had been represented by the union during the disciplinary process regarding her sickness absence and her dismissal for alleged gross misconduct.
13. The claimant submitted a complaint regarding her trade union representation following the appeal against her dismissal.
14. The claimant contacted ACAS around March 2019 following her dismissal for gross misconduct.
15. The claimant had been attending her GP since 2016 for anxiety, but had been unable to consult with him for the last year due to being transferred to a new health centre.

Submissions

16. The Tribunal then heard submissions from the parties. The claimant's position was that she had not ever intended to raise a claim against her former employer. She had simply wanted her job back after she was dismissed in 2018 and had thought that matters had been resolved when she returned to work in 2019. She indicated that she was not aware of having a possible claim in relation to her treatment in this regard until she contacted ACAS in March 2019 following her dismissal for gross misconduct. She also indicated that she was stressed and anxious during this time but simply wanted to get back to

work. The claimant also indicated that she had waited to lodge her claim until the appeal process against her ultimate dismissal had been exhausted and that this had been delayed through no fault of her.

5 17. Miss Smith, for the respondent submitted that it had been reasonably practicable for the claimant to have lodged a claim under section 47B in time and in any event the delay in lodging the claim had not been reasonable.

10 18. In particular, the respondent highlighted that the claimant had the benefit of trade union representation during the relevant period and she ought to have explored with the union whether she could bring a claim in this regard. In addition, the grievance the claimant subsequently lodged in March 2019 articulated the issues which now form the subject matter of the subsequent claim under section 47B.

15 19. Miss Smith indicated that while the respondent was sympathetic to the stress the claimant had no doubt been under, that still did not mean that it was not reasonably practicable to lodge a claim in time. Reference was made to the case of Asda v Kauser UKEAT/0165/07 and in particular paragraph 24 where
20 Lady Smith highlighted that there needed to be 'something more' than stress to satisfy the not reasonably practicable test.

25 20. Reference was also made to Palmer v Southend on Sea Borough Council 1984 IRLR 119 as authority for the proposition that waiting the outcome of appeal proceedings did not by itself mean it was not reasonably practicable to lodge a claim (of unfair dismissal in that case) in time.

30 21. The respondent was of the view that the claim under section 47B was in fact simply tacked on as an additional claim once the claimant decided to submit a claim for unfair dismissal. It was submitted that the claimant ought to have taken steps to investigate whether she did in fact have a claim in relation to these matters in good time to allow her to have lodged a claim timeously.

22. Further the respondent submitted that the claimant was contemplating raising Tribunal proceedings in March 2019 and that delaying in raising a claim until July was not reasonable.

5 **Relevant law**

23. Section 48 (3) of ERA provides that a Tribunal shall not consider a complaint under section 47B unless it is presented within three months of the act complained of or such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the
10 complaint to be presented before the end of that period of three months. Where the complaint relates to a series of acts, the relevant date will be the date of the last act .

15 **Discussion and decision**

24. The Tribunal listened carefully to the evidence of the claimant and the submissions of the parties.

20 25. While the Tribunal had sympathy with the claimant's position that she had focussed on returning to work in early 2019 and accepted that she had been suffering from stress, the Tribunal could not accept that these circumstances rendered it not reasonably practicable to raise a claim within the period of three months. The Tribunal took into account that the claimant was represented by a
25 trade union during this period and until the conclusion of the appeal process in relation to her ultimate dismissal. While the claimant may not have been happy with the quality of that representation, she did not suggest that she raised with the union the question of whether she had a claim arising out of her earlier dismissal or prior issues. While the Tribunal accepted the claimant's evidence
30 that she was not was not aware of the specific provisions under which she could bring a claim alleging she had been subjected to a detriment for having made a protected disclosure, she ought to have taken steps to investigate the

matter. The Tribunal is also mindful that the claimant raised a grievance in relation to her treatment in relation to her first dismissal.

26. In these circumstances, the Tribunal concluded that it was reasonably
5 practicable for the claimant to have raised a claim in terms of section 47B
within three months of November 2018, being the last detriment alleged in her
claim. In any event, the delay in raising this claim was not reasonable. The
claim was not raised until July 2019, although early conciliation was
commenced in June 2019. However, the Tribunal was of the view that this
10 delay was not reasonable and that it would have been reasonable for the
claimant to have brought a claim prior to waiting for the outcome of the appeal
against her ultimate dismissal.

27. In these circumstances, the Tribunal does not have jurisdiction to consider the
15 claimant's claims under section 47B ERA. The case should be listed for a final
hearing in person to consider the claimant's claims of unfair dismissal and
automatically unfair dismissal.

20 Employment Judge: Amanda Jones
Date of Judgment: 05 October 2020
Entered in register: 05 October 2020
and copied to parties