EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Ms Bentley	Horizon Care and Education Ltd

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING

HELD AT Birmingham **ON** 25 August 2021

EMPLOYMENT JUDGE Harding

Representation
For the Claimant: In Person
For the Respondent: Mr Ashwood, Solicitor

REASONS

An oral judgment and reasons having been delivered to the parties at the end of the preliminary hearing, these written reasons are provided following a request from the claimant for written reasons sent by email on 26 August 2021.

The Issues

1 This was a hearing to decide if the claimant's claim of unfair dismissal was out of time, and if it was whether it was not reasonably practicable for the claim to be submitted in time, and if it was not reasonably practicable whether it was submitted within a reasonable period thereafter.

2 There was disagreement between the parties as to whether the claimant's claim contained only an ordinary unfair dismissal claim (respondent's position) or whether it also contained a claim for unfair dismissal contrary to section 103A of

the Employment Rights Act (claimant's position). That was not a disagreement that I needed to resolve for the purposes of this hearing as the time limit provisions for either claim are identical. However, I was prepared to assume, for the purposes of determining this application only, that there was a 103A claim before the tribunal.

Evidence and Documents

3 I had before me an electronic bundle of documents which had been prepared by the respondent. This, I was told by the respondent, comprised both the respondent's documents and the claimant's, insofar as they were relevant to the time limits issue. The claimant had also sent a bundle of documents to the tribunal in both electronic form, in a zip file, and hard copy. I explained that I did not have access to the claimant's hard copy bundle, as the hearing was being conducted remotely, but that I did have the electronic version of the claimant's bundle. I explained that the claimant's electronic bundle would be difficult to use as the main bundle during this hearing as each document in the zip file had to be opened up individually, and the bundle did not contain page numbers. It was also evident from looking at this bundle that many of the documents contained within it were not relevant to the time limits issue (for example the claimant had included in her bundle OFSTED reports from 2019 and 2020 relating to the school at which she had worked), and it was evident that there was duplication between the claimant's bundle and the respondent's bundle.

4 I reminded the claimant that the only issues that were being dealt with today were the time limits issues and the claimant acknowledged that much of what was contained within her bundle was not relevant to this. I asked the claimant if there were any documents from her bundle, relevant to the preliminary issues, which she wanted me to read which were not already included in the respondent's bundle. She told me that there were. I asked the claimant to identify those documents from her bundle in order that I could read them, which she did. The claimant also asked me to read a further document that was not contained within either her bundle or the respondent's bundle, namely an email that the claimant had sent to the tribunal on 20 August 2021. The respondent likewise provided me with a brief reading list of documents and both parties then agreed that the documents identified comprised a complete list of all the documents that needed to be read for this hearing. I duly read all of these documents.

5 Although the respondent's PDF bundle of documents was paginated and indexed the claimant stated during evidence that she would prefer to refer to her own bundle as she was more familiar with it and could identify the relevant pages more readily. Accordingly, the hearing proceeded with the claimant using her bundle and myself and the respondent primarily using the respondent's bundle.

Relevant background

6 I make no findings of fact in relation to the background to this case, as I have not heard any evidence which would enable me to do so. However, in order to provide context to the matters which I was required to decide, I summarise what I was told about the relevant background as follows;

7 The claimant worked as a teacher. Prior to joining the respondent she was a teacher at Oldbury Academy. She left her employment at Oldbury Academy under a compromise agreement. During her time at Oldbury Academy a number of safeguarding concerns were raised against the claimant, all of which the claimant strongly maintains are untrue.

8 The claimant started working for the respondent as an English teacher in either April or July 2019 (there is a dispute between the parties in relation to the claimant's start date). In the autumn of 2020 the respondent received anonymous letters about a number of teaching staff, including the claimant. The letters included complaints that there had been safeguarding concerns raised about the claimant at her previous school.

9 The respondent held a fact finding meeting with the claimant and then decided that there was a disciplinary case for her to answer. In summary the disciplinary charges which the claimant faced were that she had failed to disclose to the respondent during the recruitment process that safeguarding concerns had been raised about her whilst she was at Oldbury Academy, and she had not informed them of her reasons for leaving her previous school. Most of the anonymous complaints that were made about the claimant were not disclosed to her during the disciplinary case that followed.

Findings of fact

10 I heard verbal evidence from the claimant and, as set out above, read the documents which both the claimant and the respondent asked me to read. From the evidence that I heard and the documents that I was referred to I made the following findings of fact:

10.1 The claimant was invited by the respondent to attend a disciplinary hearing to take place on 28 January 2021. She was represented by her union throughout the disciplinary process.

10.2 The union provided the claimant with advice on her case. The claimant formed the view early on in the disciplinary proceedings that she was being treated grossly unfairly by the respondent because she had not been given all of the evidence against her, and in particular had not been provided with a copy of all of the anonymous letters.

10.3 The claimant was aware of the requirements of the ACAS Code and she complained to the respondent on 19 January 2021 that they were acting in breach of these guidelines, page 34, and that their treatment of her was “grossly unfair”. She also complained in this email that the disciplinary case had been brought against her since she had “blown the whistle” regarding bullying and safeguarding.

10.4 I accept the respondent’s evidence and find that the claimant was informed over the telephone by Mr Adam Wells on 28 January 2021 that she was dismissed for gross misconduct. I do so because that is consistent with the claimant’s email of 2 February, page 35, and consistent with the claimant’s verbal evidence before me. I find, based on the claimant’s verbal evidence, that the claimant has always believed her dismissal to be unfair, in particular because of what the claimant perceives to be a failure to provide her with all of the relevant evidence.

10.5 A few days after the telephone call with Mr Wells, the claimant could not be sure when, the claimant received a letter from the respondent. The respondent set out in the letter that the claimant had been summarily dismissed for failing to fully disclose her reasons for leaving Oldbury Academy and failing to disclose that safeguarding concerns had been raised about her whilst at Oldbury Academy.

10.6 The claimant was informed of her right to appeal. She did appeal. She continued to be supported by the union throughout this process. The claimant was informed that her appeal had been rejected on 9 March 2021. The claimant chose not to continue with the union at this point because she had not found them to be very useful.

10.7 The claimant was aware from around the date of her dismissal that she could pursue a tribunal claim for unfair dismissal and whistleblowing. She also knew that there was a three month time limit for pursuing such a claim.

10.8 The claimant presented her claim to the employment tribunal on 20 May 2021. The claimant both entered and finished early conciliation with ACAS on 20 May 2021.

10.9 Since December 2020 the claimant has put in a numerous requests to the respondent asking to be provided with copies of the anonymous letters. These were not forthcoming and on 17 February 2021 she put in a DSAR request, again for the letters, and for any other information held by the respondent relating to her case, see claimant’s bundle.

10.10 The respondent’s response to the DSAR request was slow and the claimant was finally sent heavily redacted copies of the letters on 17 May

2021, see claimant's bundle. The claimant found the content of the letters extremely distressing and hurtful and has contacted the police about them.

10.11 That is not the first time the claimant has been in contact with the police about this matter; she first spoke to the police around December 2020 and she also made a report to the police about various matters related to her dismissal and the anonymous letters. She has a crime reference number.

10.12 Since her dismissal the claimant has set up her own business and she started steps to bring this about in April 2020. This included applying for bank loans to fund the company.

The Law

11 Section 111(2) of the Employment Rights Act 1996 provides that:

'... 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.'

12 Whilst the judgment as to what is reasonably practicable is one of fact, I have to bear in mind the principle set out in the authorities that "reasonably practicable" means "reasonably feasible" **Palmer v Southend on Sea Borough Council [1984] IRLR 119**. The Court of Appeal's guidance in **Palmer** is to the effect that the question of whether it was reasonably practicable for a complaint to be presented in time is a matter of fact for the tribunal, taking into account all the circumstances of the case. The EAT in the case of **Asda Stores Ltd v Kauser UKEAT/0165/07**, and subsequently in **Norbert Dentressangle Logistics Ltd v Hutton UKEATS/0011/13**, has confirmed that this requires a consideration of whether on the facts found it was reasonable to expect that which was possible to have been done.

13 As was explained in **Wall's Meat Co Ltd v Khan [1978] IRLR** 499 those circumstances can be quite wide and 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 claimant or a postal strike; or the impediment may be mental, namely the state of mind of the claimant in the form of ignorance on the one hand, or mistaken belief on the other, with regard to essential matters. Such

states of mind can only be regarded as impediments making it not reasonably practicable to present a complaint however if the ignorance on the one hand or the mistaken belief on the other is itself reasonable.

14 As to the effect of internal processes on whether it is reasonably practicable to present a claim within time the EAT in the case of **John Lewis Partnership v Charman UKEAT/0079/11** confirmed that **Palmer** and **Bodha v Hampshire Health Authority [1982] ICR 200** are good law. These cases are authority for the proposition that where the claimant or their adviser are aware of the time limits but do not put in a tribunal claim the pursuit of an internal appeal in itself does not render it not reasonably practicable for claim to be presented within time.

15 The burden of proof rests with the employee to prove that it was not reasonably practicable. Whilst the whole of the limitation period is to be considered there should be a particular focus on the closing weeks of that period, see **Schultz v Esso Petroleum Company [1999] IRLR 488** and **Hutton**.

Submissions

16 Mr Ashwood, for the respondent, reminded me that the claimant had accepted in evidence that she knew of her right to bring a tribunal claim and knew of the three month time limit. He reminded me that on 19 January 2021 the claimant had written to the respondent complaining that their treatment of her was grossly unfair, in particular highlighting an asserted failure to provide her with all of the relevant evidence. He reminded me that the claimant's evidence was that she had always believed her dismissal to be unfair. It was clear, he submitted, that it was reasonably practicable for the claimant to present her claim in time. She knew of the time limits, had the support of her union and had been able, during the relevant time frame, to appeal the respondent's decision, put in numerous requests to the respondent for copies of the anonymous letters, made a formal DSAR request, set up her own business and liaised with the police.

17 The claimant told me that she had not been given all of the relevant evidence (i.e. the anonymous letters) by the respondent until May 2021. She told me that there was no way she could have put the necessary detail into her claim form without these letters. She told me that the evidence had not been given to her and she needed that evidence in order to have a fair trial. She told me that the information contained within the anonymous letters was criminal and had led to her being unable to work in education. The anonymous letters had harmed her career and had a devastating emotional impact on her. She told me that her claim was impossible to present properly without this evidence. I took the claimant to the narrative section of her claim form and asked her which part of the narrative could not have been drafted without the anonymous letters. The claimant told me that she would have been unable to write the last sentence of the narrative which was as follows:

"I have also been sent four further anonymous letters two days ago and have had to go to the police as they are still trying to stalk and destroy me".
The claimant told me that the content of the letters was appalling and slanderous.

Conclusions

18 The claimant's effective date of termination was 28 January 2021. This, in turn, meant that the primary time limit for the claimant to submit her claims expired on 27 April 2021. The claimant does not receive any extension of time for early conciliation as she conciliated only after the primary time limit had expired and in any event both entered and finished early conciliation on the same day. The claimant's claim form was presented to the tribunal on 20 May 2021. It is, therefore, over 3 weeks out of time.

19 I concluded that it was reasonably practicable for the claim to be submitted in time for the following reasons. The claimant knew of her right to bring a tribunal claim and, significantly, knew that there was a three month time limit for doing so. She had access to advice and support from her union, who could have submitted the claim for her, but she chose not to continue with the union's help because she had not found them to be very useful.

20 I do not find that one of the reasons why the claimant did not present her claim straightaway was that she was waiting for the outcome of the appeal process because the claimant, when she was asked by the tribunal in a letter of 27 May 2021 to set out the reasons why her claim was late, did not mention the appeal, pages 38 – 39. But even if I was wrong on that and this had been a reason for delay it was not disputed that the appeal was concluded on 9 March 2021, approximately six weeks before the expiry of the limitation period. As set out above, whilst the whole of the limitation period is to be considered there should be a particular focus on the closing weeks of that period, and the appeal had no part whatsoever to play in the last 6 weeks of the limitation period.

21 Before me the claimant focused very much on the respondent's failure to provide her with a copy of four of the anonymous letters until May 2021 (it was accepted that she knew of the contents of one further letter as she was shown it by the respondent in September 2020). It is evident that the claimant remains very fixed on the content of these letters, which she has found extremely distressing and hurtful.

22 As set out above, the claimant told me that she was not able to put her claim in to the tribunal until she had a copy of those letters. I reject that explanation; I do not find that was the reason why the claim was submitted late. I do so because the claimant had clearly formed the view, independently of access to these letters, that the disciplinary process was unfair, because she said that in an email to the respondent sent on 19 January 2021. She was also clearly aware of what the ACAS guidelines required of an employer when implementing a fair

process and was able to identify the areas where she considered a fair process had not been followed. She considered, as set out above, her dismissal to be unfair from the moment she was dismissed. None of this was dependent on access to the letters, i.e. she knew the asserted facts on which her unfair dismissal claim was based without access to the letters. Additionally, her whistleblowing claim was not in any way dependent on access to the letters; the claimant had already formed the belief that the case against her had come about as a result of her blowing the whistle with regard to safeguarding matters and bullying. It is evident that she had formed this belief early on in the process because she told the respondent this in January 2019, see above.

23 As set out above, when I asked the claimant if there was any part of her claim form which she felt she would not have been able to write without the four letters the only part of the claim form that she referred me to was the last sentence of the narrative section in which she said that she had also been sent four further anonymous letters two days ago and had had to go to the police. That sentence was not, in fact, about her claims of unfair dismissal at all therefore; it was a complaint about the content of the letters.

24 Moreover, whilst the letters triggered the disciplinary process against the claimant, they did not, it would appear, form the basis for her dismissal. The claimant was not dismissed, on the face of the documents at least, because safeguarding concerns had been raised about her previously whilst she was at Oldbury Academy, she was dismissed for failing to disclose that safeguarding concerns had been raised about her whilst she was at Oldbury Academy. The claimant knew this. That was set out clearly to her during the disciplinary case. On the face of the documents the dismissal relates to the claimant's actions during the recruitment process, and what the respondent concluded in respect of this, not the anonymous complaints. Even if, as appeared from the documents to be the case, the claimant believed that the anonymous complaints in some way influenced the respondent when reaching the conclusions it did she did not need to see the letters in order to assert that as part of her tribunal claim.

25 When this was pointed out to the claimant during the hearing her evidence seemed to become that she believed that she was, in fact, dismissed because of the allegations made about her in the letters. I reject that this is what the claimant believed at the time for the following reasons. Firstly, her verbal evidence was inconsistent; prior to making this statement the claimant had, just moments earlier in cross examination, accepted that the reason for her dismissal was because the respondent believed she had failed to disclose to them that safeguarding concerns had been raised about her at her previous school. Secondly it was inconsistent with her pleaded case. In her claim form the claimant had written "I … basically have been chastised and dismissed for not disclosing the contents of a non disclosure agreement".

26 I find that the tribunal claim was not the claimant's priority or main concern during the limitation period, and this is why it was not submitted within time. The claimant's focus was on getting access to the anonymous letters not because she thought they were needed for the tribunal claim but because, as she emphasised repeatedly before me, she knew they likely contained serious, potentially career ending allegations, and she wanted to know what had been written about her. It is evident that was her priority from her conduct during the limitation period; making what the claimant herself described as numerous requests of the respondent for the letters and also involving the police on a number of occasions, rather than submitting her claim to the tribunal. Indeed, before me, it was evident that the claimant's focus remains very much on the allegations that have been made in the letters, rather than on her tribunal claim, because the content of the letters, and the impact of them on her, were referred to multiple times by the claimant during this hearing.

27 It was not the claimant's case that having these serious allegations hanging over her, and not knowing precisely what had been written, was in itself an impediment making it not reasonably practicable to submit her claim in time. But, for the avoidance of doubt, I would not have concluded this was such an impediment. Whilst I have little doubt that the dismissal and the circumstances surrounding it have been upsetting and distressing for the claimant she was clearly very well able to conduct her own affairs throughout the disciplinary case and the period after her dismissal. She was able to appeal the dismissal decision, report matters on a number of occasions to the police, make numerous requests for information from the respondent, make a DSAR request, apply for bank loans and set up her own business.

28 For these reasons I conclude it was reasonably practicable for the claims to be submitted within time, and accordingly the tribunal has no jurisdiction to hear the claims and they are dismissed.

Employment Judge Harding
13 September 2021