EMPLOYMENT TRIBUNALS

Claimant: Miss A Morawska

Respondent: Foundation Catering Ltd

Heard at: **London South Employment Tribunal (on the papers)**

Before: **Employment Judge Ferguson**

JUDGMENT

The parties having agreed that the preliminary issue of jurisdiction be determined on the papers, and written representations of the parties having been considered

It is the judgment of the Tribunal that:

1. The Tribunal does not have jurisdiction to consider the complaint of ordinary and/or automatic unfair dismissal and it is therefore dismissed.

2. It is just and equitable to extend the time limit in respect of the complaint of discrimination under s.18 of the Equality Act 2010.

REASONS

INTRODUCTION

1. By a claim form presented on 18 April 2019 (following a period of early conciliation from 8 to 12 April 2019) the Claimant presented complaints of unfair dismissal and maternity/ pregnancy discrimination. She also brought claims for redundancy pay, notice pay and unpaid wages, but these have subsequently been dismissed upon withdrawal.

2. The complaints of unfair dismissal and maternity/ pregnancy discrimination were presented outside the applicable time limits. A preliminary hearing was listed on 6 May 2020 to determine whether the Tribunal had jurisdiction to consider the claim, but the hearing could not take place due to the Covid-19 pandemic. The parties agreed that the issue should be determined on the papers.

3. I have considered the pleadings and all other correspondence from the parties,

namely:

3.1. Email and enclosures from the Claimant dated 30 December 2019

3.2. Email and enclosures from the Respondent dated 28 January 2020

3.3. Email and enclosures from the Claimant dated 14 February 2020

3.4. Email from the Respondent dated 28 February 2020

3.5. Email and enclosure from the Claimant dated 30 October 2020

3.6. Email and enclosures from the Claimant dated 1 May 2021

3.7. Email from the Respondent dated 7 May 2021.

BACKGROUND

4. According to the claim form the Claimant commenced employment with the Respondent as canteen manager on 2 February 2015. She worked 40 hours a week at a canteen in Liverpool Street, London. In June 2018 the Claimant gave birth to her daughter and went on maternity leave. The claim form states "Maternity Leave till June 2019". In October 2018 the Claimant's employment was terminated due to redundancy with effect on 9 November 2018. The claim form states that the redundancy letter informed her that all London canteens were closing, including Liverpool Street, but the Claimant recently found out that this was untrue. She said the Liverpool Street canteen had not closed and the Respondent was opening several new canteens in the London area and recruiting more employees. The Claimant believes she was made redundant because the Respondent was "not interested in having an employee on maternity leave". She asked the Tribunal to accept her claim despite missing the deadline. She said:

> "I contacted Acas for advice and decided to go The Employment Tribunal as soon as I could, to defend my rights. I admit that I didn't make a claim within 3 months and 1 day, as required. This was only because I thought that my employer was honest with me and that the business was closing down. At the time I didn't know that I could turn to Acas and use gov.uk. As time was running out, I was advised by Acas to make a claim and to ask the Tribunal to allow me the additional time."

5. The Respondent defended the claim. The dates of employment were originally disputed but are no longer in dispute. The Respondent asserted in its response that the company had been given a November 2018 date of closure for Liverpool Street, but "it has since been extended on a monthly basis as Crossrail have not completed their work on time." It is asserted that they had no way of knowing this at the time the Claimant was made redundant. The Respondent also says it is untrue that they have opened several new sites across London. They said one has been opened at Wood Green recently, which is the only new site in London.

6. The Claimant submitted a signed statement and documents in advance of a

preliminary hearing (case management) on 6 February 2020. She asserted in the statement that the person who covered her maternity leave, EG, and another employee, M, were still working at Liverpool Street at the time of the Claimant's dismissal and as far as the Claimant was aware they were later transferred to a new canteen in Paddington. The Claimant provided a copy of her appointment letter which states the period of the appointment was "2nd February 2015 until the expiry of the designative canteen – suitable future canteens will be offered upon expiry". She also provided a copy of the redundancy letter from Tony Coup, managing director of the Respondent, which is dated 8 October 2018 and states:

> "It is understood you are away from London until December – so sorry you were not able to meet me in London this week to discuss the redundancies at all London sites.
>
> As you know most London canteens are closing very soon including Liverpool Street and it is with much regret the company has taken the decision to terminate your employment with one months notice as per your contract.
>
> London is very quiet at the moment and any prospective sites will not come on stream until the second half of 2019.
>
> Your employment with the company will cease on Friday 9th November 2018."

7. It is no longer in dispute that the Claimant was paid statutory maternity pay until the termination date and statutory redundancy pay.

8. The Respondent responded to the Claimant's statement on 28 January 2020. It asserted:

> "When the contract to provide catering services to Laing O'Rourke and Crossrail were signed the closing date was to be November 2018. In September 2018 we asked for confirmation of the closing date and was given January 2019".

9. The Respondent disputed that Paddington was a new site, saying it had opened 5 years previously and closed in December 2018. The only other sites at that time were in Wales and Brighton. It also denied that anyone was employed as maternity cover, saying that cover was provided by existing employees. The Respondent said that Laing O'Rourke finished their work in or around November 2018 and "it was the Crossrail part of the project that was over running. The numbers of workers were greatly reduced." It was asserted that Mr Coup felt that paying the Claimant's maternity pay and redundancy pay before Christmas "would actually benefit" her.

10. The attached email exchange shows an email from the Respondent to Laing O'Rourke dated 6 September 2018 which states: "please let me know very quickly if you require an extension to the catering service beyond the projected closure of December. Should you require the service into next year please confirm the number of operatives." The response from Laing O'Rourke on 17 September 2018 states "At this time we would expect the catering service

would end at the end of January 2019. Expected number would be in region of 50-75 operatives."

11. In further correspondence to the Tribunal on 18 February 2020 the Respondent said that in December 2018 they were given a ceasing date of March 2019 and "this continued until it was agreed on 5th June 2019… [the Respondent] would be given 5 weeks' notice of closure".

12. By letter dated 9 December 2020 the Tribunal wrote to the parties requesting written representations on the jurisdiction issue by 23 December 2020. On 1 May 2021 the Claimant provided written representations, saying that she had not received the Tribunal's letter until 28 April 2021 after having made enquiries with the Tribunal. It appears from the Tribunal file that the letter of 9 December 2020 was sent to the Claimant by email. Given that the matter has taken some considerable time to be referred for a decision in any event, and the Respondent has had an opportunity to respond to the Claimant's submissions (and did so on 7 May 2021) I have considered both sets of written submissions albeit submitted late.

13. The Claimant in her email of 1 May 2021 states that she only found out in March 2019 that the canteen at Liverpool Street had "neither closed down nor changed its operating model". She said she had received a call from one of her customers asking when she would be back to work after maternity leave. As the canteen was located "outside public reach, in a gated area", it was not possible for her to check in person whether it was open or closed. She was only able to submit her claim once she "discovered the truth". The Claimant enclosed a number of text messages and photos to show that the canteen remained open until 2020. None of these text messages appears to be relevant to the issue of the Claimant's knowledge between her dismissal and the date on which she brought her claim. As it is not in dispute that the canteen remained open it is unnecessary to give any details of the evidence on that issue.

14. The Respondent responded objecting to a suggestion by the Claimant that the Respondent had misled her and/or the Tribunal by failing to confirm until February 2020 that the canteen remained open. The Respondent reiterated that at the time of the Claimant's dismissal they had been told their services would no longer be needed.

THE LAW

15. Pursuant to s.111 of the Employment Rights Act 1996 complaints of unfair dismissal must be brought before the end of the period of three months beginning with the effective date of termination. This period may be extended if early conciliation is commenced within the time limit. The Tribunal only has jurisdiction to consider a complaint of unfair dismissal presented outside the time limit if it was "not reasonably practicable" to bring the claim in time and it is brought within a further reasonable period.

16. Ignorance of important fact(s) may render it not reasonably practicable to present a claim in time. In Machine Tool Industry Research Association v Simpson [1988] ICR 558 the employee was dismissed for redundancy but then heard at the end of the limitation period that another employee had apparently been taken on to do her work (which the employer denied). She brought an

unfair dismissal claim three days out of time. Upholding a finding that it had not been reasonably practicable for her to bring a complaint within the time limit, the Court of Appeal held that a claimant in such a case must establish three things:

16.1. that his or her ignorance of the fact(s) relied upon was reasonable

16.2. that he or she had reasonably gained knowledge outside the time limit that he or she reasonably and genuinely believed to be crucial to the case and to amount to grounds for a claim, and

16.3. that the acquisition of this knowledge was, in fact, crucial to the decision to bring the claim.

It was not necessary for the tribunal at this stage to establish the truth of the new fact(s) relied on by the employee. The relevant question was whether the employee reasonably and genuinely believed in the truth of the fact(s) at the time he or she was considering whether or not to present a claim.

17. As to what amounts to a "further reasonable period" for the purposes of s.111(2)(b), in Nolan v Balfour Beatty Engineering Services EAT 0109/11 the EAT stated that tribunals should always bear in mind the general principle that litigation should be progressed efficiently and without delay. Tribunals should have regard to all the circumstances of a case, including what the claimant did, what he or she knew, or reasonably ought to have known, about time limits, and why the further delay occurred.

18. Section 123 of the Equality Act 2010 provides:

> **123 Time limits**
> (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …

19. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123(1)(b) (Southwark London Borough v Afolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.

CONCLUSIONS

20. The Claimant has brought complaints of unfair dismissal and maternity/ pregnancy discrimination. Her claim form must be understood to include complaints of ordinary unfair dismissal, automatic unfair dismissal pursuant to

s.99 of the Employment Rights Act 1996 and pregnancy and maternity discrimination under s.18 of the Equality Act 2010. The act of discrimination relied upon is the dismissal, which took effect on 9 November 2018. The three-month time limit for both unfair dismissal and s.18 discrimination therefore expired on 8 February 2019. The Claimant did not commence early conciliation until 8 April 2019, two months out of time, and did not present her claim form until 18 April 2019, a further 10 days later, six days after the early conciliation certificate had been issued on 12 April 2019.

21. In her claim form the Claimant gave two reasons for the delay: the fact that she thought her employer was honest with her about the business closing down, i.e. ignorance of facts, and the fact she did not known she could "turn to Acas and use gov.uk", i.e. ignorance of rights and/or lack of professional advice.

22. The Claimant says that she did not find out until "March 2019" that the canteen at Liverpool Street had not closed down. She has not given a more precise date. She has described receiving a call from a customer, but has not explained what the customer said, other than asking her when she would be returning from maternity leave, and she has not provided any evidence of the call from telephone records or any evidence from the person who called her. Nor has she explained what steps she took on discovering this information and why she did not contact ACAS until 8 April 2019.

23. The Respondent has not disputed the Claimant's assertion that the canteen was located in a gated area not accessible to the public. Nor has it put forward any evidence to suggest that the Claimant knew before March 2019, or ought to have known, that the canteen remained open. On balance I accept that the Claimant did not know until March 2019 that the canteen remained open. I also accept that her ignorance of that fact was reasonable. She had been told the canteen was closing. She was on maternity leave at the time so would not have had access to "on the ground" information, and the canteen was out of public view. She would have had no reason to doubt what she had been told, and no easy means to verify the information.

24. I also accept that the Claimant reasonably and genuinely believed that information was crucial to her case and gave her grounds to bring a claim. She had been told in writing on 8 October 2018 that the Liverpool Street canteen was closing "very soon". The information she discovered appeared to directly contradict that assertion.

25. I also accept that the acquisition of the information was, in fact, crucial to the decision to bring a claim. It is clear from the claim form that the Claimant was relying almost entirely on the fact that she had been told the canteen was closing, and then discovered that was "untrue". She acknowledged the claim was late but said that was because she thought her employer had been honest with her.

26. The three-limb test suggested in Machine Tool is therefore satisfied. I accept that by 8 February 2019 the Claimant did not have the information that later led her to bring her claim. It was therefore not reasonably practicable for her to present her claim in time.

27. I must then consider whether the claim was presented within a further

reasonable period. I am not satisfied that it was. The Claimant has not given any detailed information about when or how she acquired the information in March 2019. If it was in early March 2019, there was a further delay of more than a month before the Claimant contacted ACAS. There was still further delay of six days after the early conciliation certificate was issued on 12 April 2019 before the claim form was presented. These delays, although not particularly extensive, are unexplained. I bear in mind that it appears from the claim form that the Claimant was aware of the deadlines once she spoke to someone at ACAS. She does not say when she first contacted ACAS (as opposed to commencing early conciliation), but even if it was 8 April 2019 she should have been aware of the need to present her claim form as soon as possible and she has not explained the additional delay after the end of the early conciliation period.

28. To the extent that the Claimant relies on ignorance of the time limits or the right to bring a claim before she spoke to ACAS, (a) she has not provided any information about when she first spoke to ACAS and (b) I do not accept that her failure to find out the information sooner was reasonable. The information is readily available online and the Claimant has not suggested there was any impediment to her conducting that research.

29. I therefore find that the unfair dismissal complaint, both ordinary and automatic, was not presented within a further reasonable period. The complaint is out of time and the Tribunal does not have jurisdiction to hear it.

30. The Tribunal has a broader discretion in respect of the complaint under s.18 of the Equality Act 2010. I bear in mind that there is an element of unexplained delay, but I consider there would be no real prejudice to the Respondent in allowing the claim to proceed. The Claimant brought her claim within, at most, around seven weeks from discovering that the Liverpool Street canteen was still open. The Respondent had not taken any steps to inform the Claimant that the canteen remained open, for example by asking her if she would be interested in working there again at least until it closed down. The Respondent has not suggested that the delay has caused it any difficulties in defending the claim. It seeks to rely on documents and emails which it claims show that it believed, at the time the Claimant was made redundant, that the canteen would be closing in January 2019. That evidence is not affected by the delay.

31. I also take into account the merits of the case only to the extent that the Respondent has not established that the claim has little prospect of success. The only evidence put forward by the Respondent relating to the decision to dismiss is the email in which Laing O'Rourke appears to have requested an extension to the end of January 2019. Without the contractual documents or other correspondence it is difficult to understand the significance of the email. The Respondent has also not evidenced the claimed reduction in numbers. What is not in dispute is that the Respondent chose to terminate the Claimant's employment at a time when the end date for the canteen service had already been extended from November or December 2018 to the end of January 2019. The only explanation offered for not waiting longer, until the actual closure of the canteen, or until a final decision on closure was made, was that the Respondent believed it was in the Claimant's interests to pay her the redundancy payment before Christmas. This does not appear to have been based on any conversation with the Claimant. Indeed the Respondent accepts

that it did not discuss the Claimant's redundancy with her before the letter of 8 October 2018 (although it is claimed that efforts were made to contact her). The Respondent has not disputed that the other staff at the canteen remained employed. The Claimant's case that she was dismissed because she was on maternity leave is, on the basis of the pleadings and documents before me, arguable.

32. In all the circumstances I consider it is just and equitable to extend the time limit in respect of the complaint under s.18 of the Equality Act 2010.

33. Case management orders are contained in a separate document.

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Employment Judge Ferguson

Date: 14 December 2021