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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109922/2021 (A)

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Held by CVP on 7 December 2021

Employment Judge E Mannion

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Mrs G Forrester

**Claimant
In Person**

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The Crystal Bar

**Respondent
Represented by:
Mr John Lynch, lay
representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant's claim of unfair was not lodged in time and is dismissed.

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REASONS

Introduction

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1. This is a claim of unfair dismissal. However, the issue of whether the claimant lodged her claim in time in terms of section 111 of the Employment Rights Act 1996 ("the ERA") was to be determined as a preliminary issue at this hearing.
2. The claimant gave evidence on her own behalf. A joint bundle of documents was lodged with the tribunal, and both parties had a copy of this bundle.

Relevant law

3. Section 111 of the ERA states as follows:

- 5 (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 –
 - 10 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.

15 **Issues**

4. The Tribunal has to determine the following issues:

- 4.1 Did the claimant lodge her claim within the three months minus a day of her dismissal taking effect?
- 20 4.2 If not, was it reasonably practicable for her to lodge her claim within that time?
- 4.3 If not, did she lodge her claim within a further reasonable period?

Findings in fact

5. The Tribunal makes the following findings in fact:

- 25 5.1 The claimant was employed by the respondent as a bar maid. The respondent employed a bar manageress and 5 barmaids at the time of the claimant's dismissal.

5.2 The claimant was dismissed on 13 November 2020 by reason of redundancy. This was her last day of employment with the respondent.

5.3 Prior to her dismissal, the claimant had concerns that the respondent was trying to “push [her] out the door”. The bar manageress had taken on new barmaid and the claimant questioned whether the new barmaid was after her job.

5.4 The claimant was informed in November 2020 that she was selected for redundancy on the basis of last in first out. She questioned whether others were also being made redundant and was informed that this was the case.

5.5 At the time of her dismissal, the claimant was furloughed and was not at her place of work. The respondent’s premises was closed and continued to be closed until on or around 17 May 2021.

5.5 The claimant was aware that there are time limits for raising a claim in the employment tribunal and that claims should be lodged 3 months minus a day from the date of dismissal. She was aware of this in the immediate aftermath of her dismissal.

5.6 She undertook some research on Acas but presumed that everything was shut due to the Covid-19 pandemic. She did not know how to get in touch with Acas.

5.6 The respondent’s premises re-opened on or around 17 May 2021. The claimant became aware at the time of re-opening that her former colleagues were working for the respondent. She no longer believed that the respondent applied ‘last in first out’ criteria to the redundancy process in November 2020.

5.7 The claimant sought legal advice in respect of her dismissal on or around the 20 May 2021.

5.8 The claimant contacted Acas and made an Early Conciliation claim on 27 May 2021. The Early Conciliation certificate was issued on the same day. The claimant submitted her employment tribunal claim on 11 June 2021.

5 **Observations on the evidence**

6. The claimant gave her evidence in a clear way and I considered she gave an honest account of events as she remembered them.

Claimant's submissions

7. The claimant submitted that the claim should be accepted late as it was lodged under exceptional circumstances. She submitted that the bar was shut after her dismissal until May 2021 and as a result she was not aware of what was happening in respect of the other employees. She got in touch with a lawyer and then Acas and tried to do something about her dismissal. It was only at that time in May that she was aware other members of staff were still employed and that the respondent had not operated a last in first out approach to the redundancy process as she had previously been advised.

Respondent's submissions

8. Mr Lynch on behalf of the respondent replied that from the evidence heard it was clear that the claimant was well aware of the time limits which were in existence for raising a tribunal claim. He submitted that the claimant took no steps whatsoever to lodge a claim or to seek representation timeously. He submitted that the claimant has not complied with the statutory time limits and as such submits that the claim is time barred and cannot continue.

Decision

25 *Did the claimant lodge her claim within the three months minus a day of her dismissal taking effect?*

9. It is accepted that the claim was not lodged within the prescribed time period. The Acas Early Conciliation process began and ended on 27 May 2021. The

ET1 was lodged on 11 June 2021. The claimant's dismissal took effect on 13 November 2020.

If not, was it reasonably practicable for her to lodge her claim within that time?

- 5 10. Turning to the question of whether it was reasonably practicable for the claimant to lodge her claim within the statutory time limit, this is a question of fact. I note that the claimant was aware of her rights and was aware of the requirement to raise an unfair dismissal claim within a set time period. She was also aware of what that time period was. This was known to her in or around the period of her dismissal.
- 10 11. The claimant gave evidence that prior to her dismissal, she had concerns the respondent wished to "push her out", a claim she also included in her ET1 form. When cross examined by Mr Lynch, she stated that she did not accept the dismissal "willingly" and questioned the bar manageress at the time. She was informed that others would also be made redundant. She accepted this explanation and the selection process of 'last in first out' and did not challenge the decision further on that basis.
- 15 12. The claimant sought legal advice in or around 20 May 2021 and was informed again of the statutory time limits. She raised an Acas Early Conciliation claim on 27 May 2021, receiving the certificate on the same day and lodged her unfair dismissal claim on 11 June 2021.
- 20 13. In considering whether it was reasonably practicable for the claimant to raise her claim within the time period, I have considered the leading case of ***Machine Tool Industry Research Association v Simpson 1988 ICR 558 CA***. That case also concerned a redundancy dismissal. The claimant initially accepted her redundancy but raised a claim of unfair dismissal when she heard that another employee had apparently been taken on to do her work. The claim was made 3 days after the expiry of the time period. In considering whether the claim could be accepted late, the Court of Appeal found that the claimant must establish the following:
- 25 (i) That their ignorance of the facts relied upon was reasonable;
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(ii) That they reasonably gained knowledge outside of the time period that they reasonably and genuinely believes to be crucial to the case and to amount to grounds for a claim; and

(iii) That the acquisition of this knowledge was in fact crucial to the decision to bring the claim.

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14. The crux of the claimant's case is that the respondent did not apply a 'last in first out' approach and that she was the only employee made redundant. She gave evidence that she was furloughed and that the respondent's premises were closed at the time of her dismissal. The premises remained closed until on or around the 17 May 2021 when it reopened. This was not disputed by the respondent. It was only at that time, when the premises reopened, that she was made aware that four colleagues, who did not have the same length of service as the claimant, were working for the respondent. I accept that it was reasonable, given the closure of the respondent's premises that the claimant was unaware of who had or had not been made redundant in November 2020.

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15. The claimant confirmed in evidence that when the premises reopened, a number of people telephoned her to make her aware that former colleagues were working in the respondent's bar. I find that it is reasonable, given the closure of the respondent's premises that the claimant gained this information outside of the time limit. I also accept that the claimant reasonably and genuinely believes this information to be crucial and amount to grounds for a claim given that her claim outlines this as the reason why she believes her dismissal to be unfair.

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16. I accept the claimant's evidence that it was not until May 2021 that she began to question the fairness of her dismissal. While she had concerns prior to her dismissal that the respondent wished to "push her out" of her job, the catalyst for questioning the fairness of her dismissal was the reopening of the bar when she became aware of who was working for the respondent. I accept the claimant's evidence that she initially believed the respondent's explanation that they were applying a 'last in first out' approach and that other employees

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would also be made redundant. She no longer believed this to be true when the premises re-opened. Finding out this information, namely that colleagues were working for the respondent, was crucial to the decision to raise an unfair dismissal claim.

- 5 17. Having considered the evidence of the claimant and the submissions by both parties, and in light of the Court of Appeal decision above in Simpson, I am satisfied that it was not reasonably practicable for the claimant to raise her claim within the statutory time period.

10 *If not reasonably practicable, did she lodge her claim within a further reasonable period?*

18. I then have to consider whether the claimant lodged her claim within such further period as considered reasonable and so require to look at the period between 17 May and 11 June 2021. She acted with some haste initially, seeking legal advice on or around 20 May 2021. She was already aware of the statutory time limit and she was informed again of this limit. She then raised an Acas Early Conciliation claim on 27 May 2021 and received the certificate on the same day. The ET1 was not lodged until 11 June 2021. Both the Acas Early Conciliation claim and the ET1 were completed and lodged by the claimant.

- 20 19. I refer to the EAT's decision in ***Mr H Nolan v Balfour Beatty Engineering Services UKEAT/0109/11/SM*** which considered whether a claimant presented his claim within a reasonable time frame once he was aware of relevant facts. In coming to her decision Lady Smith referred to the intention of Section 111 that claims should be presented promptly, noting that "it is in the public interest that litigation should be progressed as efficiently as possible and that claimants should not be permitted to delay in presenting them once whatever the obstacle was that prevented timeous presentation has been removed."

- 25 20. I consider that it was not reasonable for the claimant to lodge her claim on 11 June 2021 after becoming aware of the potential claim on 17 May 2021. The
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claimant knew of the specific time limits which apply to unfair dismissal claims and that by 17 May, this time limit had long since passed. She sought legal advice within days of the respondent's premises reopening but waited until 11 June to lodge her ET1. She did not act as efficiently as possible and the delay of almost 3 and a half weeks is not reasonable.

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21. The claimant's claim of unfair dismissal is therefore dismissed.

Employment Judge: Eleanor Mannion

Date of Judgment: 04 January 2022

10 Entered in register: 10 January 2022
and copied to parties