Case Number: 3327633/2019

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms K Storey	v	(1) Leisure Employment Services Limited (2) Bourne Leisure Limited (3) Bourne Holidays Limited

Heard at: Norwich (by CVP) On: 14 January 2022

Before: Employment Judge M Warren

Appearances

For the Claimant: Mr D Frame, Solicitor.

For the Respondent: Mr Liberadzi, Counsel.

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The Claimant's claims of disability discrimination are dismissed upon having been withdrawn.

2. The Claimant's claims of unfair dismissal and breach of contract against the First Respondent are struck out for want of jurisdiction, having been issued out of time.

3. The Claimant's claims against the Second Respondent and Third Respondent are struck out on the grounds that they have no reasonable prospects of success.

4. The Claimant's claims against the First Respondent for Sex Discrimination proceed.

5. This Judgment is the subject of an application for reconsideration, see below.

REASONS

Background

1. Ms Storey's employment with the respondent began on 9 April 2018. She was dismissed on 4 September 2019. There are three early conciliation certificates; for the First Respondent dated 13 December 2019, for the Second and Third Respondents, they are dated 13 November to 9 December 2019. These proceedings, naming all three respondents, were issued on 16 December 2019. The claims were of automatic unfair dismissal for whistleblowing, sex discrimination, disability discrimination and breach of contract for notice pay.

2. Today, Ms Storey has withdrawn her disability discrimination claim and I will issue a Judgment dismissing that claim upon withdrawal.

3. Time on the unfair dismissal claim would ordinarily have expired, ignoring conciliation, on 3 December 2019. The last act of sex discrimination relied upon we established today with Mr Frame, was the appeal hearing which took place on 27 September 2019. 3 months from then takes us to 23 December 2019; the sex discrimination claim against the first respondent is therefore in time, if there was a continuing act.

4. It is unfortunate in this case that although the proceedings were issued on 16 December 2019, it was not processed by the administration until April 2021, that is notwithstanding at least 10 attempts by Mr Frame to chase the tribunal to deal with the matter. Nothing arises from that, I simply explain why there has been such a long delay.

5. The proceedings were resisted. The respondents have said that the First Respondent is the employer and the correct respondent. That is agreed. The respondents plead that the claims are out of time.

6. A Notice of Hearing was despatched for an Open Preliminary Hearing today on 26 September 2021. The stated purpose of the hearing is to decide whether it was reasonably practicable to have issued the claim in time. The words, "reasonably practicable" identifying that what is at issue is whether the unfair dismissal and breach of contract claims were issued in time.

7. By an email dated 16 October 2021, Mr Frame put forward submissions and suggested that the matter be dealt with on the papers. That was not a practicable suggestion. In essence, the suggestion of Mr Frame in his submissions was that the tribunal should substitute the First Respondent for the Second and Third Respondent. From Mr Frame's email, one is able to see points put forward on behalf of Ms Storey on the time point, in particular that her dismissal letter appeared to come from the Second Respondent and that an invitation to an investigatory meeting, whilst not expressly being from

any particular company, included within it a contact email address for the Second Respondent. We learned that following a Subject Access Request, a copy of the contract of employment became available to Ms Storey and Mr Frame, identifying the First Respondent as the employer, on 13 December 2019, which is why they then sought an early conciliation certificate that day.

8. On 21 December 2021 a letter was written on the instructions of Employment Judge Postle, directing that the Open Preliminary Hearing would also consider the question of jurisdiction as to the identity of the correct employer.

9. It is unfortunate that no case management orders have been made in relation to today's hearing. I did not have before me a witness statement from Ms Storey. Fortunately, I did have a bundle which had been put together by the respondents' solicitors. Clearly I needed direct evidence from Ms Storey as to why she says it was not reasonably practicable for her to have issued the claim in time. It is surprising that notwithstanding the absence of a case management order, a witness statement has not been prepared for her.

10. I was then faced with a dilemma. Either I proceeded today, taking evidence the old fashioned way from Ms Storey, or I adjourned and made case management orders. Ms Storey wanted to proceed. It was really then a matter for Mr Liberadzi; we had a short adjournment so that he could take instructions and after that adjournment, he confirmed that his instructions were, (very sensibly) that we should get on and sort it out today, which we did.

Findings of Fact

11. Just before the start of her employment, Ms Storey was provided with a number of documents. These were not in the bundle. They were emailed to me during the course of the hearing by the respondent.

11.1 The usual waiver of the maximum 48 hour week in accordance with the Working Time Regulations. On that document, one can see that in the opening paragraph are the words "Welcome to the Bourne Leisure Team" but also at the end of the document, where Ms Storey has signed and dated her signature, (13 March 2018) there is a reference to the employer being Leisure Employment Services Limited, (that is, the First Respondent). The signature is to confirm that Ms Storey had read and understood the offer letter, the attached statement of terms and conditions of employment and to acknowledge that she had been issued with a copy of the Team Handbook and agreed to comply with the content.

11.2 The handbook was not directly before me in evidence, but Ms Storey held up a copy of it to the camera during the hearing and on the front of it there is in the title “Bourne Leisure”.

11.3 The terms and conditions of employment refer to the First Respondent as the employer. Ms Storey says that she did not recall whether she had received a copy of this at one point during her evidence but also in cross examination, acknowledged that she had. She said she showed that to her solicitor after she was dismissed.

12. During her employment, Ms Storey received monthly payslips. On the front sheet of those payslips were the words “Bourne Leisure” but within the payslips, the employer is identified as the First Respondent. Ms Storey said that she did not always open the payslips because the amount she received each month was the same. She said she had left her payslips at work and could not go back to work to get them after she had been dismissed. In cross examination, she said that she did have some payslips with her when she sought legal advice.

13. Ms Storey says that she thought she worked for Bourne Leisure because their logo was everywhere.

14. The dismissal letter is on headed notepaper which states at the top, “Warner Leisure Hotels”. In the footer appears, “Bourne Holidays Limited trading as Warner Leisure”.

15. In an email Ms Storey received inviting her to an investigation meeting, dated 14 August, there is no header and footer, but there is a reference to a Jonny Ball who she was to contact. The email address for that person was at Bourne-Leisure.co.uk.

16. When Ms Storey sought advice, she told her solicitor that she believed the Second Respondent was her employer. She was not well at the time; she was suffering from anxiety and seeking treatment from her doctor in that regard.

17. As I have mentioned, early conciliation was entered into with the Second and Third Respondents starting on 13 November and lasting for almost a month. At no point during the conciliation, did the Second and Third Respondents say that they were not the employer and that the correct respondent would be the First Respondent. Because early conciliation with the Second and Third Respondents had started on 13 November, the claims against those two companies were in good time.

18. Documents pursuant to a Subject Access Request were received by Ms Storey on 13 December, they included apparently a copy of a payslip and the 48 hours waiver document, from which Mr Frame says he discerned that the First Respondent was the employer. That was on a Friday. He

immediately obtained an early conciliation certificate and issued proceedings the following Monday.

Law

19. Section 23 of the Employment Rights Act 1996 and Regulation 7 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 in respect of unfair dismissal and breach of contract claims respectively, require that such claims be issued within 3 months of the end of the claimant's employment, unless it was not reasonably practical to have done so.

20. The question of whether it was reasonably practicable to bring a claim in time is a question of fact for the tribunal, but the onus is on the claimant to show that it was not reasonably practicable, see Porter v Bandridge Ltd [1978] ICR 943.

21. The expression, "reasonably practicable" has been held to mean reasonably feasible, see Palmer v Southend Borough Council [1984] IRLR 119.

22. What the tribunal should do is ask what the claimant ought to have known if she had acted reasonably in the circumstances, see Marks & Spencer plc v Williams-Ryan [2005] IRLR 565.

23. If a claimant is using a professional advisor, then generally speaking the claim should be brought in time. The primary authority for that is Dedman v British Building & Engineering Appliances Ltd [1975] ICR 53. Therein Lord Denning said, "If a man engages skilled advisors to act for him and they mistake the time limit and present it too late he is out, his remedy is against them". Whether that still applied was considered by Mr Justice Underhill as he then was, as President of the Employment Appeal Tribunal in Northamptonshire County Council v Entwhistle UKEAT/0540/09; he confirmed that the principal in Dedman is still very much good law, but with the caveat that it is possible to conceive of circumstances where a skilled advisor may give incorrect advice but that it was not reasonably practicable for the claim to have been brought in time. However, in general terms the principle remains that if a claim is late because of a solicitor's negligence, that will not render it not reasonably practicable for the claim to have been brought in time.

24. If the claimant shows that it was not reasonably practicable to issue a claim in time, she must then go on to satisfy the tribunal that the proceedings were issued in such further period as the tribunal considers reasonable.

Conclusions

25. The question for me is whether it was reasonably feasible for the unfair dismissal and breach of contract claims against the First Respondent to have been issued in time? Ms Storey is not a litigant in person, she has had the benefit of advice from solicitors acting for her. It is right to say that the Respondents have obfuscated the identity of the employer in its own documents and by not mentioning this issue during conciliation. That said, one expects a solicitor acting for a client in these situations to identify who the employer is. It was perfectly feasible for that to have been done by reference to the contractual documents, the payslips, or indeed by simply asking the respondent or the respondent's advisors to confirm.

26. The claimant had her contract, she had payslips, her solicitor should and could have asked for those and looked at them. Inevitably therefore, I am drawn to the conclusion I am afraid that it was reasonably feasible and therefore reasonably practicable for her solicitors to have established in time who her employer was and to have issued in time against the correct respondent. For those reasons I am afraid I strike out the claims for unfair dismissal and for breach of contract against the First Respondent as they were issued out of time.

Consequences – substitution and strike out

27. That leaves extant, claims of sex discrimination against the First Respondent and claims against the Second and Third respondents, who are acknowledged not to have been the claimant's employer. Mr Frame has suggested that I should substitute the First Respondent for the Second and Third respondent. He refers me to rules 29 and 34 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

28. Mr Liberadzi says I should not do so. He puts forward two reasons:

    28.1 First of all, he says that I should strike out the claims against the Second and Third Respondents as having no reasonable prospects of success, because neither were the employer and so the allegations of sex discrimination are not against them.

    28.2 Secondly, he says there is a distinction between this case and the other case law about substitution of respondents in early conciliation certificate situations, in particular the case of Drake International Systems Ltd & Others v Blue Arrow Limited UKEAT/0282/15/DM. He says that distinction is that in this case, Ms Storey did issue a claim against the correct respondent, but unfortunately she issued it out of time.

29. This is a case management matter, it is a matter of case management decision making by me and I must apply the usual principles for amendment set out in Selkent and applying the overriding objective:

29.1 Mummery J, (as he then was) in the case of Selkent Bus v Moore [1996] ICR 836 said that in exercising discretion, a tribunal should take into account all the relevant circumstances and should balance the relative injustice and hardship of allowing or refusing the amendment.

29.2 Rule 2 sets out the Overriding Objective as follows:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

30. I have already made a finding that in fact, this claim of unfair dismissal and breach of contract is out of time; it had been reasonably practicable for it to have been brought in time. The claims against the Second and Third Respondent should not have been issued, because they are not the employer. Those claims should be struck out; they have no prospects of success.

31. Ms Storey had the opportunity to bring claims of unfair dismissal and breach of contract against the First Respondent and errors have meant that it was not brought in time. She has still existing, her sex discrimination claim against the First Respondent. Those points ameliorate the prejudice to her. Prejudice to the respondent were I to carry out the substitution is that it then faces claims which would otherwise be statute barred. For these reasons therefore, I decline to substitute the First Respondent for the Second and Third respondent on the unfair dismissal and breach of contract claims. I strike out the claims against the Second and Third Respondent as having

no reasonable prospects of success, because those two companies were not the employer of Ms Storey.

Application for Reconsideration

32. On 19 January 2022, before I received for fairing, the typing on my ex tempore decision to the parties, I received from the claimant's representative, an application for reconsideration. Mr Frame attaches documents from Companies House in which the First Respondent states that it was dormant in the years ending 31 December 2018, 2019 and 2020. That would appear to make it impossible for the First Respondent to have been the claimant's employer.

33. I also have to say that having had the time to re-read Drake International, (not referred to me by Mr Frame) I have serious concerns as to whether my decision not to substitute respondents was the correct one. A point thrown into further confusion by the information from Companies House.

34. Rule 70 provides that a Judgment may be reconsidered where it is in the interests of justice to do so. That may be on the application of a party, or by the tribunal on its own initiative.

35. In accordance with Rule 72(1), this is not a situation in which I would say that there are no reasonable prospects of the original decision being varied or revoked and I therefore invite the parties' views within 14 days of this Judgment being posted to them by the tribunal, on whether my reconsideration should be on the papers or at a hearing.

36. My provisional view is that the finding that the unfair dismissal and breach of contract claims against the First Respondent were out of time is correct, but the balance of prejudice to the claimant is such that the claims against the Second and Third Respondents, (which includes claims of unfair dismissal and breach of contract) ought not to have been struck out. My provisional view is that the reconsideration should be at a hearing, as further case management is likely to be necessary.

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Employment Judge M Warren

Date: 2 February 2022

Sent to the parties on: 11/2/2022

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For the Tribunal Office