

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105539/2017

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Held in Glasgow on 19th March 2018

Employment Judge M Whitcombe

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Miss L Kinloch

Claimant

Represented by:

Mr K Turnbull

(PCS Branch Secretary)

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Ministry of Justice

Respondent

Represented by:

Dr A Gibson

(Solicitor)

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Claimant brought her claim for unfair dismissal outside the period specified in section 111 of the Employment Rights Act 1996. The claim is therefore dismissed because the Tribunal has no jurisdiction to hear it.

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REASONS

Introduction

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1. Miss Kinloch (the Claimant) was formerly employed by the Ministry of Justice (the Respondent) at Higher Executive Officer grade and worked as a Customer Service Manager at the Criminal Injuries Compensation Authority office in Glasgow. On 24th August 2016 Miss Kinloch was sent home from work because she was believed to be unfit to work due to alcohol intoxication.

E.T. Z4 (WR)

5 Ultimately, Miss Kinloch was summarily dismissed for gross misconduct on 3rd August 2017 on the basis that she had been under the influence of alcohol at work and had abused her medication. Miss Kinloch argues that her dismissal was unfair. She has not brought any other claims arising from her dismissal or her employment with the Respondent.

10 2. This Preliminary Hearing was listed in order to determine a jurisdictional time point. In the Respondent's Paper Apart it was argued that the claim is time-barred because it was not brought within the period of 3 months beginning with the effective date of termination.

15 3. The issues were discussed and agreed at the start of the Preliminary Hearing. A good deal of the applicable law and most of the key dates were common ground. They are set out below.

4. At the end of the Preliminary Hearing I gave oral reasons for my decision in the presence of the parties. These written reasons were requested on behalf of the Claimant, Miss Kinloch.

20 **Applicable law and issues arising**

Relevant legislation

25 5. The Tribunal's jurisdiction to hear a claim of unfair dismissal is subject to the time limit set out in section 111(2) of the Employment Rights Act 2016:

...an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal -

30 (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.*

5 6. It was common ground that Miss Kinloch did not benefit from any extension of that three month period under section 111(2A) of the Employment Rights Act 1996 by virtue of early conciliation.

10 7. The issues for determination at this Preliminary Hearing were therefore agreed to be:

(a) Whether it was “not reasonably practicable” (or alternatively “not reasonably feasible”) for Miss Kinloch to present a complaint of unfair dismissal within the three month time limit defined above.

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(b) If not, whether the complaint of unfair dismissal was presented within a reasonable further period.

Burden of proof

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8. On both issues Miss Kinloch has the burden of proof on the balance of probabilities.

Claimant's arguments

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9. On behalf of Miss Kinloch, Mr Turnbull advanced two distinct arguments on the issue of reasonable practicability. They are set out in an email to the Tribunal dated 13th March 2018 and were developed at the hearing. Miss Kinloch argued that the combination of two factors meant that it was not reasonably practicable for her to submit a complaint of unfair dismissal within
30 time.

- (a) Miss Kinloch's health and state of mind.
- (b) An arithmetical error on the part of Mr Turnbull, her representative. Mr Turnbull had miscalculated the time limit and had thought that 3rd November 2017 was the last day on which a claim could be made in time whereas the correct date was 2nd November 2017.

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Evidence

io 10. The only witness to give evidence was Miss Kinloch. She gave her evidence on oath and was cross-examined and re-examined. I also asked some questions of my own.

11. Each party also relied on a very small pack of documents.

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Agreed Facts

12. The following facts were agreed at the commencement of the Preliminary Hearing.

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- (a) The effective date of termination was 3rd August 2017.
- (b) The last day on which a complaint of unfair dismissal could be presented in time was therefore 2nd November 2017.
- (c) ACAS received an early conciliation notification on 3rd November 2017 and issued a certificate the same day. That was too late to result in an extension of the three month time limit by virtue of section 111(2A) of the Employment Rights Act 1996.
- (d) The claim form was submitted to the Tribunal on 3rd November 2017, one day out of time.

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Findings of Fact

13. Having heard the evidence and the parties' submissions I made the following additional findings of fact on the balance of probabilities.
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14. Miss Kinloch and her representatives knew all of the facts necessary in order to bring an unfair dismissal claim from the date of dismissal onwards. This is not a case in which relevant information was discovered late, or in which there was any lack of awareness of rights, or in which Miss Kinloch was unaware of the right to claim unfair dismissal. Miss Kinloch had conversations with Mr
- 10 Turnbull about the three month time limit well before its expiry.
15. Miss Kinloch had the support and assistance of the PCS trade union since well before the effective date of termination, and at all subsequent times up to and including this Preliminary Hearing. That period obviously includes the date on which the claim was presented to the Tribunal and the whole of the period defined by section 111(2) of the Employment Rights Act 1996.
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16. The PCS provide skilled and experienced trade union representatives to assist their members. Mr Turnbull is the Branch Secretary for the MoJ Scotland branch of the PCS. Full time officials and retained lawyers are also available to offer additional advice and support if required. For those reasons, I am satisfied that in this case Miss Kinloch was assisted by a "skilled advisor" in the sense considered in cases such as *Dedman v British Building and*
- 20 *Engineering Appliances Ltd* [1974] ICR 53 (CA), *Times Newspapers v O'Regan* [1977] IRLR 101 (EAT), and *Northamptonshire County Council v Entwistle* [2010] IRLR 740 (EAT).
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17. Miss Kinloch did not rely on any medical evidence, whether from her GP or from any other medical expert. There were no medical notes in the documents relied upon by either party. I queried that with Mr Turnbull, who indicated that he would not object if I wished to adjourn the hearing and to
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request evidence of that sort on my own initiative. I made it clear that decisions about the evidence to be relied on, or applications for adjournments in order to obtain evidence, should normally be a matter for the parties. I would of course hear submissions from both sides and make a decision if any application were to be made. Having reflected, Mr Turnbull was clear that he did not wish to make any application and the Preliminary Hearing proceeded without medical evidence.

18. Miss Kinloch's own description of her difficulties was as follows. She described herself as a "hermit" during the relevant period. She shut herself away and found it difficult to communicate with others, including friends and family. She was depressed and anxious and suffered from panic attacks. She sometimes felt unable to answer the phone or the doorbell. She became paranoid, worked up and stressed and sometimes she only felt safe in the early hours of the morning. She saw her GP regularly and took medication, although not always in accordance with the prescribed regime. She admitted that she sometimes stopped taking her medication when she should have continued to take it.

19. I accept that Miss Kinloch experienced those difficulties after her dismissal, that she was at times extremely distressed and that her ability to communicate was impaired. However, the key issue is whether Miss Kinloch's difficulties were of such sustained severity that it was impracticable to present a complaint within time, with the assistance of the PCS. I return to that point below.

Reasoning and conclusion

20. I am not persuaded that Miss Kinloch's health or state of mind rendered it "not reasonably practicable" to present an unfair dismissal complaint within time. My reasons are as follows.

5 (a) There is no medical evidence to support that contention, and it ought reasonably to be available to Miss Kinloch, who saw her GP regularly. At an investigation meeting on 24th August 2016 Miss Kinloch made reference to her medication and therefore appears to have been treated for similar symptoms for around a year prior to dismissal, if not longer. I draw an adverse inference from the lack of supporting medical evidence, given the length of time for which Miss Kinloch has been under the care of her GP and taking prescription medication to control anxiety and low mood. I am not prepared to accept Miss Kinloch's own assertions on that point given that corroborative medical evidence ought easily to have been available if the contention were well founded.

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15 (b) I note that Miss Kinloch was able to present a claim one day late on 3rd November 2017. That begs the question whether something in her condition or her treatment regime had changed such that she became more able to present a claim towards the end of the three month period. Miss Kinloch's own evidence was that she "tried to communicate a bit more" in the week leading up to 3rd November 2017. In the absence of any medical explanation I infer that the timing was driven by the knowledge that the end of the time limit was approaching, and that Miss Kinloch would have been just as able (with assistance) to present a claim form to the Tribunal on or before 2nd November 2017 as she was on 3rd November 2017.

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25 (c) I find that Miss Kinloch's argument is inconsistent with undisputed objective facts. There is cogent evidence to demonstrate that Miss Kinloch was able to give instructions to the PCS, to complete forms with their help and to participate in formal processes during the three month period in which an Employment Tribunal claim ought to have been brought.

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i. On 3rd August 2017 Miss Kinloch attended a disciplinary hearing and was represented by the PCS. She was able to present her arguments to that hearing.

5 ii. On 24th August 2017 Miss Kinloch was able to lodge a formal appeal document on a standard form with the help of the PCS. That form contained a detailed narrative setting out the basis upon which Miss Kinloch challenged her dismissal. The process was similar to the process of completing and submitting an
io Employment Tribunal claim form.

iii. On 18th October 2017 Miss Kinloch was able to attend and to participate in an appeal hearing. With the help of the PCS, she was able to put forward her arguments at that hearing.

15 iv. I therefore infer that, with the assistance of the PCS, Miss Kinloch could equally have completed and submitted an Employment Tribunal claim form within three months beginning with the date of her summary dismissal.

20 21. To the extent that Mr Turnbull's error was relevant at all, the consequences of that error are visited on Miss Kinloch, in the sense that she cannot rely on the error of a skilled representative to show that it was not reasonably practicable to present a complaint within time. I reach that conclusion in the
25 light of well-known principles set out in **Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53 (CA), **Times Newspapers v O'Regan** [1977] IRLR 101 (EAT), and **Northamptonshire County Council v Entwhistle** [2010] IRLR 740 (EAT). See especially paragraph 5 of the latter case in which Underhill P summarised the principles to be derived from the
30 leading authorities.

22. I will deal with one other matter for the sake of completeness. Mr Turnbull did not rely on comments made in **Riley v Tesco Stores Ltd** [1980] ICR 323 or

London International College v Sen [1993] IRLR 333 in this case. Some have interpreted those cases as a relaxation of the strict principle in *Dedman* that mistakes by skilled advisors regarding time limits cannot be relied on to show that it was not reasonably practicable to present a complaint within time.

5 For the avoidance of doubt, my approach is that the decision of the Court of Appeal in *Marks & Spencer PLC v Williams-Ryan* [2008] ICR 193 confirms beyond argument that *Dedman* remains good law on this point (see the judgment of Lord Phillips MR at paragraphs 24-31, and the further observations of Underhill P in *Northamptonshire County Council v*

10 *Entwhistle* at paragraphs 5(3), (4) and (5)).

23. I therefore conclude that Miss Kinloch has failed to show that it was not reasonably practicable to bring her complaint within the three month time limit, and that it must therefore be dismissed on the basis that the Tribunal

15 has no jurisdiction to hear it.

Employment Judge: Mark Whitcombe
Date of Judgment: 20 March 2018
Entered in register: 22 March 2018
and copied to parties

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