EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111730/2021

Preliminary Hearing held by CVP on 27 July 2022

Employment Judge McFatridge

Miss K Andrzejewska	**Claimant** **In person**
Balhousie Care Limited	**Respondent** **Represented by** **Mr Muirhead,** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Tribunal does not have jurisdiction to hear the claim as it is time barred.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondent. Her ET1 was submitted on 13 October 2021. She stated that her employment had ended on 27 January 2021. She attached an ACAS Conciliation

Certificate which confirmed that she had notified ACAS in terms of the Early Conciliation Regulations on 3 August 2021 and ACAS had issued their certificate on 14 September 2021. In box 15 of the ET1 she acknowledged that her claim had been submitted outwith the three-month time limit and stated that she wished to make a claim nonetheless. The respondent submitted a response in which they denied the claim. They made the point that the claim was time barred. It was their position that the effective date of termination of the claimant's employment was in fact 1 August 2020 and not 27 January 2021 as she stated. Their position was that the claimant had been an employee but had resigned her employment on 1 August 2020 and had thereafter made herself available to the respondent on the respondent's bank. It was their position that as a member of the bank the claimant was not an employee and therefore could not make a claim of unfair dismissal. In any event, any claim of unfair dismissal based either on the respondent's date (1 August 2020) or the date given by the claimant (27 January 2021) was time barred. The Tribunal fixed a preliminary hearing in order to decide the issue. It was initially intended that the hearing take place in person however unfortunately due to the rail strike the interpreter was unable to travel to Dundee. The parties were contacted and agreed at the last minute to convert the hearing to an online hearing using the Tribunal's CVP system. At the hearing the claimant gave evidence on her own behalf. She was cross examined by the respondent but no evidence was led on behalf of the respondent. Both parties made submissions. On the basis of the claimant's evidence and the productions I found the following factual matters relevant to the issue of time bar to be proved or agreed.

Findings in fact

2. The claimant was employed by the respondent from around 2014. In 2020 the claimant had a baby. She was looking after the baby in addition to two older children and decided that rather than work the shifts she had been working up to that date she would go on to the respondent's bank. She contacted the respondent and it was agreed that she would go on to the bank from 1 August 2020. The effect on going on bank was that the claimant was no longer under an obligation to do any shifts and the

respondent were no longer under any obligation to provide the claimant with work. What would happen is that if the respondent needed someone to cover a shift because of staff illness or holiday then they would contact workers who were on their bank. There were a number of employees on the bank apart from the claimant. The respondent could choose to whom they decided to offer work. If the claimant did not wish to accept the shift then she was free to do so. If she did the shift then she would say yes and do it. The flexibility of this suited the claimant. It was a much more convenient work pattern for her to simply await calls from the respondent and then have the option to either agree to take the shift or to turn it down.

3. On or about 27 January 2021 the respondent wrote to the claimant sending her her P45. The respondent's position was that the reason for doing this was because the claimant had not actually worked any shifts for them for a certain period of time. I understood the claimant to dispute this but in any event it was clear that both parties believed that sending the P45 had the effect of terminating whatever the arrangement was between the parties as at that date.

4. The claimant sent a text to the respondent on 17 February 2021 asking a member of the respondent's staff to phone her and asked why she had been sent her P45. She was told the reason was "because I had to take you off the system as you haven't done any shifts".

5. The claimant was extremely shocked and surprised to receive her P45. She started asking her friends for advice. The claimant has no knowledge of Scots law and has not been involved in Employment Tribunal proceedings before.

6. The claimant's birthday was on 4 March. Shortly thereafter she decided to take her children out to a local ice cream shop for ice cream. Whilst there she met the person selling ice cream who she knew through being a former employee of Balhousie. She discussed the matter with that person and was told that she might have a claim.

7. Thereafter the claimant decided to do some research on the internet. The claimant simply typed in "Scottish employment law" in Polish into a search engine. The search results disclosed a company which were able to

provide employment law advice to individuals in Polish. The claimant contacted that company. The claimant's position in evidence was that she contacted the company in March 2021.

8. The individual the claimant spoke to on the telephone was not a solicitor but indicated that he was in touch with solicitors. She arranged to send him some papers but very shortly thereafter the claimant was advised that she was out of time for making a claim and there was nothing that could be done.

9. Subsequent to this initial call the claimant was advised that there may be a way of persuading the Tribunal to accept her claim and that she should contact ACAS.

10. The claimant then sent a text to the respondent on or about 28 July 2021 when the claimant asked for all of her contracts with Balhousie.

11. The claimant contacted ACAS as noted above on 3 August 2021. ACAS issued her certificate dated 14 September 2021. Thereafter the claimant completed her ET1 form. She completed this herself in Polish. She then sent it to the firm she had contacted who translated it into English and it was thereafter submitted as noted above on 13 October 2021.

12. During the period from January 2021 onwards the claimant was feeling stressed about the situation. She was very busy having a young baby as well as two older children at home. She felt upset at the way she had been treated. She did not seek any medical advice until late October 2021 after the date she had submitted her ET1. The first time she contacted her doctor was 25 October 2021. An excerpt from her medical certificate showing this encounter was lodged (page 52). The GP notes state that this "sounds like adverse life events/stress contributing to mental health …". Thereafter an appointment was arranged for the claimant to have a meeting with a Mental Health Nurse who gave her various techniques for dealing with her situation.

Observations on the evidence

13. I found the claimant to be an honest witness who was sincere in the evidence she was giving to the Tribunal. There was some confusion about her evidence as to the date when she had first carried out an internet search and contacted the Polish company offering advice to her. The claimant was adamant that this was around about March although later in her testimony she said it may have been as late as April. In any event, she was clear that as soon as she contacted this company they advised her virtually straight away that her claim was time barred and that they had contacted her two weeks later to say that she should contact ACAS and obtain an EC number in any event so that she could put in her claim and thereafter argue that the Tribunal should hear the claim nonetheless. The claimant's evidence was that her decision to do research on the internet was linked to the discussion she had with the lady selling ice cream and that this happened shortly after her birthday which was in March. I felt that on balance therefore I should take it that she probably did contact this company in March rather than at a later date albeit nothing very much hangs on this and even if it had been later when the claimant contacted the Polish company it would not make a great deal of difference to the outcome.

Submissions

14. The respondent's representative had noted that the law on the subject was contained in paragraph 111 of the Employment Rights Act 1996. This states at sub-paragraph (2)

> "An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –
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> (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. The claimant's position was essentially that she had been dismissed in January for no reason and that this had shocked her. It was not reasonably practical for her to submit her claim between the three-month limit because she had no knowledge of Scottish employment law and had not known whether she could make a claim or what the time limits were.

16. With regard to the dispute over the effective date of termination, the respondent's position was that the effective date of termination of the employment was 1 August 2020 whereas the claimant's position was that it was 27 January 2021. The respondent's position was that although they accepted the claimant may not have realised this at the time the effect of the change made in August 2020 was that the claimant ceased to be an employee of the respondent. Their position was that after that date the contract between the claimant and the respondent no longer had the required mutuality of obligation. There was no obligation on the employer to provide work and no obligation on the claimant to take work if it was offered.

17. The respondent said that even if the claimant was correct in stating that her employment ceased in January 2021 her claim form would have required to have been lodged with the Tribunal no later than 26 April 2021 or at least early conciliation started before then. The claimant had not started early conciliation until August 2021 and the claim was therefore submitted considerably out of time. With regard to the claimant's reasons for the delay it was clear that the claimant had access to advice since as soon as she started doing research on the internet she was able to be put in contact with a company providing employment advice in her own language. There was no real explanation from the claimant as to why it had taken her so long to take this step. The burden of proof is on the claimant to show that it was not reasonably practicable for her to have submitted her claim in time. She had not done so. Furthermore, even after the claimant had been in contact with ACAS the respondent considered that the delay between receiving her early conciliation certificate and lodging her ET1 form of just under a month was itself unreasonable.

Judgment and decision

18. I considered that the first step I required to take was to establish the effective date of termination of employment. In my view having heard the evidence of the claimant it is quite clear that after 1 August 2020 the claimant was no longer an employee. The claimant's evidence on the subject was quite clear. The respondent were not under any obligation to offer her work and the claimant was free either to accept the work offered or to turn it down. These provisions are inconsistent with the existence of a contract of employment. It therefore appears to me that the effective date of termination of employment with the respondent was 1 August 2020 and that ACAS conciliation first started approximately nine months later than it should have. I did consider the question of the claimant's knowledge. The claimant indicated at several points in her evidence that she has no knowledge of Scottish employment law. It appeared that the claimant did not understand that when she moved on to a new type of contract this meant that her right to claim unfair dismissal on termination of that contract ceased. I did not consider that this lack of knowledge assisted the claimant however. I did not consider this case to be analogous with those cases where a claimant is dismissed but is unaware of her dismissal for some days due to delays in the post etc. The position is that the claimant was well aware that she had moved on to a bank contract. The only matter which she was unaware of was that if the respondent terminated her bank contract she would no longer have the right to claim unfair dismissal.

19. Looking at the reasons for delay I considered there were really a number of different periods to take into consideration where the reason was different. The first was the period between 1 August and 27 January. The reason the claimant did not submit her claim for unfair dismissal during this period was because so far as she was concerned she had not been dismissed. She had agreed with the respondent to move over to a bank contract. She knew that this meant that she would have to wait on a call from the respondent who would call her as and when they required her. She was aware that she had the opportunity to either accept work offered or refuse it.

20. After 27 January the claimant's position appears to have been that she was ignorant of Scots law relating to unfair dismissal and in particular she was unaware of the time limit. I accepted the claimant's evidence that she had no knowledge of Scottish employment law. The case of ***Walls Meat Company Limited v Khan*** [1979] ICR 52 makes it clear that the question for the Tribunal is not just to consider whether or not the claimant was in fact ignorant of the time limit, either the fact there was a time limit or when the time limit started but whether such ignorance was reasonable. I also note that in general terms the onus is on the claimant to show it was not reasonably practicable for her to submit her claim in time. I did not consider that the claimant had demonstrated to me that her ignorance was reasonable. As noted above there was some doubt as to precisely when the claimant first contacted the Polish speaking employment law advisers but the claimant's evidence was quite clear that she was able to find them the first time she Googled Scottish employment law in Polish and that she contacted them straight away after she had done this. There was nothing in the claimant's evidence to suggest that it would not have been reasonably practicable for her to do this long before she did. It is therefore my view that the claimant failed to demonstrate that it was not reasonably practicable for her to submit her claim within the three-month time limit. I also considered that this applied even if I am wrong about the start date and the start date was in January. There was nothing before me to suggest that the claimant could not have Googled and found the Polish speaking employment law advisers long before she did. Furthermore, there is an inexplicable delay between the claimant receiving advice from these advisers which she variously indicated as being in March or at the latest the end of April and August when she finally contacted ACAS.

21. I also considered that the respondent's argument that the claimant had delayed after receiving her early conciliation certificate to be well-founded. In order to take advantage of section 111(2)(b) the claimant requires to demonstrate not only that it was not reasonably practicable for her to submit her claim in time but also that she submitted her claim within a reasonable time thereafter. By the date the claimant received the ACAS certificate she had been well aware that her claim was out of time and that she would require to persuade the Tribunal to extend time to receive it.

Whilst I appreciate there was some additional time required in order to have her ET1 form translated from Polish, I still feel that the time taken by the claimant of almost a month was unreasonable. For the above reasons therefore I find that the claim is time barred and the Tribunal does not have jurisdiction to hear it.

Employment Judge:	**I McFatridge**
Date of Judgment:	**09 August 2022**
Date sent to parties:	**09 August 2022**