EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111531/2021

Held on 24 March 2022

Employment Judge J M Hendry

Mrs L Mackenzie	**Claimant** **In Person**
Nansen Highland	**Respondent** **Represented by** **Ms R Page,** **Worknest Law**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant not having been demonstrated that it was not reasonably practicable to make the claim on time the Tribunal has no jurisdiction to hear the claim and it is dismissed.

REASONS

1. A preliminary hearing took place in person at the Aberdeen Employment Tribunal office on 24 March 2022. The purpose of the preliminary hearing

was to consider whether or not the claim made by Mrs Mackenzie for unfair dismissal was time-barred.

2. The issues for the Tribunal were whether or not it had been reasonably practicable for the claimant to lodge the claim in time and if not whether or not it had been lodged thereafter within a reasonable period.

Evidence

3. The Tribunal heard evidence from the claimant in relation to the circumstances surrounding the lodging of her claim. It also considered the bundle of documents prepared by the respondent's lawyers to which, of consent, was added a copy of a medical report from the claimant's G.P. (JB22).

Facts

The Tribunal found the following facts established or agreed:

4. The claimant worked as a support worker for the respondent for approximately three and a half years. She had worked as a care worker for approximately six years in total.

5. The claimant provided support for individuals with learning needs at various houses in her local area which were run by the respondent.

6. Difficulties arose at work between two of her colleagues. The claimant felt that she was "caught in the middle" of these disputes. She raised concerns with her employers. The situation at work impacted on her mental health and she had a breakdown in 2016. At that point she was prescribed anti-depressants by her G.P. Her condition deteriorated in February 2021 with further work difficulties. Her G.P. in a letter dated 28 January 2022 (JB22) wrote:

"*Lisa was first described anti-depressant medication in 2016. Her condition has been stable for some time but deteriorated in February 2021 when she sought medical advice. She was reviewed on 5 May 2021 when I gave her advice regarding supportive service for her mental health difficulties.*

Her condition deteriorated significantly in August 2021 secondary to work-related stress and on 26 August 2021 I gave her a medical certificate for 2 weeks. Her anxiety and depression had a subsequent exacerbation to back pain which made her unfit for work at that time."

7. The claimant believed that her employers were not sufficiently pro-active in dealing with the work-place difficulties. Throughout August and September 2021 she was highly emotional and upset and contacted her G.P. for support.

8. The claimant provided the respondent with a sick line dated 26 August 2021.

9. On the same date the claimant contacted Mr Lefere, a Director, and explained that she was signed off because of her mental health and physical wellbeing. She was very emotional. She said that she felt let down by her employers.

10. On the same date the claimant e-mailed Mr Lefere (JBp.64):

"*It's really been a tough decision for me to me. As I felt part of the team for a while. The last year has been unbearable and I think on mass management know how I've struggled working alongside this person. I do however feel all my points and issues I've brought forward to use I hope YA's will get the most upright outcome just because I will be leaving on 30 September doesn't mean the issues won't be dealt with. Whoever replaces me get full support….*"

Mr Lefere responded:

"*Thank you for your e-mail and I respect your decision if you feel that's the best for you. In the light of your decision we will need to prepare/adapt the staffing schedules for the Housing Support Service. When people ask questions is it ok for me to inform the staff that you have decided to leave Nansen?*
And yes you can share my contact details for your future employer if you wish to do so.

Take care. Stay safe.
Bart"

11. The claimant reflected on what she had done overnight. She felt that she had acted in haste. Whilst still upset and unhappy with the situation she decided that she would prefer to allow the respondent another opportunity to address her concerns and sought to withdraw her resignation. She e-mailed on 27 August:

"*I have decided that I will wait to see the outcome of the investigation before I hand in my notice. I shouldn't be pushed out the door for been (being?) hunset (honest) to the company.*
If you can set up a meeting on 9 September I will be happy to sit down and tell you everything in a professional manner.

I am thinking very clearly I shouldn't have to leave my job I enough due to a few rotten apples in the company.
I don't need an e-mail
Back as I know I am off sick with stress due to Nansen and my sciatica which can't be helped."

12. The respondent wrote:

"*In consultation with our employment advisors we accept your resignation from your e-mail/letter dating 26/8/2021.*

Please find attached our letter.
A hard copy will be posted to you."

13. The claimant responded:

"*Ulrika should still had the text I sent to her stating that I would not be leaving Nansen Highland as had started my SVQ level 3. This job was meant to be in my spare time. My employer knew this. You accepted my resignation knowing how emotional and distressed I was. The e-mail indicated the claimant had contacted ACAS.*"

14. The respondent's management wrote on 30 August (JBp.69) accepting the claimant's resignation.

15. The claimant accepted that her employment had been terminated. Shortly after this she discovered that the respondent had given her a poor reference when she had applied for other work. Previously her line manager Mr Lefere

had given her a good reference for a different post she had applied for. She believed that she had been given a bad reference because she had raised concerns with the Care Inspectorate which her employers had become aware of.

16. The claimant contacted ACAS on the 1 September 2022. Early conciliation proceeded until the 14 September.

17. The claimant discussed her position with her husband who had some knowledge of employment law though his trade union activities. She decided to make a claim for constructive unfair dismissal. completed an application to the Employment Tribunal over 2 evenings. At the time she was upset because of her anxiety and found it difficult to concentrate. When she completed the form she filled in her own name and date of birth, then in the section headed "Your details" she gave the respondents' address, telephone number and the email address of her Manager.

18. The claimant was upset when she completed the form recalling the events that had led to her resignation. It was completed over two evenings. She completed it on her own without legal assistance. In error she did not put her own address, phone number or e-mail at points 1.5, 1.6 and 1.9 of the form.

19. The claim was received by the Central Office of Employment Tribunals in Scotland (Glasgow) on 28 September 2021.

20. In terms of Rule 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 the claimant's address was minimum information required by Rule 10(1)(b)(ii). The claim form was put before a Judge on 1 October and rejected as it did not contain the claimant's address.

21. The Employment Tribunal office wrote to the only address they had which was that of the respondent advising that the application was defective. They received no response from the respondent or the claimant. She was unaware of the correspondence. The respondent made no attempt to forward the

correspondence to the claimant, ask her to collect it or otherwise alert her to it.

22. The claimant was not unduly concerned at not hearing from the Tribunal Service once she had lodged the claim. She thought that she had completed the form correctly. She suspected that because of Covid there might be a delay in processing her claim. She also looked at the guidance that was available online from the Tribunal Service and noted that there was reference to a 26 week target. This reassured her. However, as she had heard nothing further on the 14 December she contacted the Glasgow Office on 14 December 2022. She discovered that the claim had been closed. She quoted the reference number she had been given when submitting the digital application form. She explained she had never received any correspondence or e-mail. She discovered that the information had gone to her former manager Mr Lefere and that she had made an error in putting in the respondent's address instead of her own (JBp.20). The claim was treated by the Tribunal Service as having been presented on that date by Employment Judge McPherson.

23. The respondents lodged an ET3 submitting that the claim was lodged out of time.

Witnesses

24. The claimant gave evidence about the circumstances surrounding the lodging of her application. She gave her evidence in a clear and straightforward manner accepting fully that she had made an error and that she had not taken the opportunity of checking over the application because the matter upset her.

Submissions

25. Ms Paige submitted a Skeleton Argument. In the course of discussing the skeleton argument I made reference to the case of ***Adams v BT***

Telecommunications. I gave Ms Paige an opportunity of reading the case and considering its terms. She sought to distinguish the case from the current circumstances on the basis that the mistake here was a major one rather than a minor one and secondly there was no good reason why the claim could not have been lodged in time. The defective ET1 was lodged well in advance of the expiry of the primary three-month time limit. The claimant was alerted to the fact that she had to complete the section of the form which referred to "Your details". She accepted that she should have looked more closely at the form and perhaps downloaded it.

26. Ms Paige referred the Tribunal to section 111(2), (2A) and 3 of the Employment Rights Act 1996. The effective date of termination was the 1 September 2021. Taking into account the conciliation period which would have extended the time limit by 8 days it would run out on the 8 December 2021.

27. Ms Paige then discussed the decision to reject the claim form. She referred the Tribunal to the well-known case of ***Walls Meat Company Limited v Khan*** (1979) ICR 52 CA. She also referred to ***Marks and Spencer Plc v Williams-Ryan (****2005) EWCA Civ 470.*

28. The solicitor referred to the principle of "reasonable ignorance". The Tribunal would have to accept that the claimant was under some impediment preventing her presenting the claim form in time before the second leg of the statutory test could be engaged. The claimant did not contact the Tribunal to find out what was happening to her claim. Ms Paige concluded that firstly it was reasonably practicable for the claimant to have presented the claim in time with the requisite information and her ignorance of the defect was not reasonable. She had not checked the form nor enquired what was happening. Ms Paige accepted that the claimant did appear to have acted promptly once the error came to light.

29. The claimant did not make any legal submissions but asked the Tribunal to take account of the circumstances around the lodging of the form.

Discussion and Decision.

30. It was not in dispute that Tribunal claims have to be lodged within strict time limits. The primary statutory time limit provides that a claim must be lodged within three months of the dismissal and this period is extended by the Early Conciliation process. There was no dispute that the claim as amended was out of time and that the original claim was in time but defective. Section 111 of the Employment Rights Act 1996 is in the following terms:

"***111 Complaints to employment tribunal.***

(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—

(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."

31. In order to accept a late claim there has to be some impediment or difficulty with lodging of the claim on time that meets the ''not reasonably practicable'' test set out above. The onus is on the claimant to demonstrate that the test is met. Whether something is reasonably practicable or not is a factual matter for the Tribunal to determine.

32. This is not a case where the claimant delayed making the claim having been unaware of the time limits. She is an able and intelligent person who set about making her claim in time through the digital 'portal' designed for that purpose. The first issue is whether the mistake she made in not putting her own details in the form thus rendering it defective could meet the test because she was unwell. The claimant while clearly upset and in receipt of medication was nevertheless, able to otherwise complete the form in a proper manner. To be

fair to her she did not, in her evidence, seek to minimise her error accepting that it was a mistake and accepting that she did not check over the form again once completed before sending it. Nor did she print it out or get her husband to look over it. It was completed by her over two evenings.

33. The case is also unusual in that the mistake made was not the common one of getting an address wrong or the correct 'legal' name of a respondent. Regard has to be had to the Employment Tribunal Rules which apply in relation to the acceptance and rejection of claims particularly Rule 10:

> "***Rejection: form not used or failure to supply minimum information 10.—(1) The Tribunal shall reject a claim if— (a) it is not made on a prescribed form; (b) it does not contain all of the following information— (i) each claimant's name; (ii) each claimant's address; (iii) each respondent's name; (iv) each respondent's address [;or (c) it does not contain one of the following— (i) an early conciliation number; (ii) confirmation that the claim does not institute any relevant proceedings; or (iii) confirmation that one of the early conciliation exemptions applies.](b) (2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.***"

34. It was not argued that the claim form was not defective or that there was some error in the rejection and subsequent reconsideration of that rejection.

35. The relatively recent case of ***Adams*** which I raised with Ms Paige has to be considered. This was a case where a defective Employment Tribunal application was made. In that case it was the failure of a solicitor to use the correct ACAS Early Conciliation number on the application that led to it's rejection. The error was pointed out and the form resubmitted but now out of time. The Tribunal found that the claim was out of time finding that it had been reasonably practicable to lodge the claim in time. The then President Mrs Justice Simler allowed the appeal holding that the focus should have been not just on the first application but on the second and the second leg of the test. The Judge recorded:

> ‘‘*The focus is accordingly on the Claimant's state of mind viewed objectively. The Employment Judge did not focus on the second claim and did not simply use the first claim as a guiding light in determining the factual questions she had to determine in relation to the second claim. Had she done so, a number of matters could and would have been considered. First, having lodged the first claim on 16 February 2015 believing it to be complete and correct, the Claimant would have had no reason to lodge the second claim on that date. Secondly, the Claimant cannot have been aware of the mistake she made in transposing the certificate number until after the limitation period expired because had she become aware of it, for example on 16 February when she was in the process of presenting the complaint, she would have corrected it. Moreover, in the period between 16 and 19 February she laboured under the mistaken belief that the first claim had been correctly presented without any defect. Those are the reasons why the second claim was not presented until 19 February, but none of those points appear in the Employment Judge's consideration”.*

36. The present case does not involve solicitors. The claimant in ***Adams*** was relying on her solicitors to lodge the form correctly and had no idea that a minor error, although at that time one with serious consequences, had been made. She was entitled to rely on her solicitors to submit it properly.

37. The Judgement continued:

> ‘‘*The question for the Tribunal, in those circumstances, was not whether the mistake she originally made on 16 February was a reasonable one but whether her mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances. In that regard, it seems to me, it must be assumed that the Claimant's error was genuine and unintentional. Further, as I have already indicated, it must be assumed that she was altogether unaware of the error since had she been aware of it no doubt she would not have made it or it would have been corrected.”*

38. The crucial matter is to consider the error that was made. In ***Adams*** it was accepted that the error was a very minor one: a slip. The mistake the claimant made here would have been obvious had she reread the form. The form is in clear terms. The omission of her address is clearly a substantial error. How else can the Tribunal make contact with her. In passing I would comment that the failure of the respondent to pass on the correspondence from the Tribunal

or to alert her brings no credit whatsoever to them or their managers and has prevented the claimant raising what appears to be a stateable claim. Ms Paige had no instructions as to why they had acted in this manner.

39. I reject Ms Paige's submission that the claimant was at fault in not chasing up her application. She made a reasonable assumption that the effects of the Pandemic could have affected the Tribunal administration and was confident that her application was made and ''in the system''. Although she misunderstood the Guidance around cases being listed within 26 weeks that was again a reasonable error for someone to make who was not familiar with the Employment Tribunal system.

40. In conclusion the form that the claimant had to complete was clear and not one that should have posed her any difficulty. The claimant's own address was clearly vital as without that address and contact details the Tribunal Service could not contact her directly. It was an important document and even if the claimant felt unable to re-read it and check the information given she could have asked her husband to do this for her. Her ignorance that the form was defective was not in my view reasonable.

41. Unfortunately for the claimant I am drawn to the conclusion that she was at fault in not appreciating that a significant error had been made and that the first leg of the test has not been made out namely she has not demonstrated that it was not reasonably practicable for the claim to have been made on time and that this has the unfortunate result that the Tribunal has no jurisdiction to hear her claim.

Employment Judge Hendry

Date of Judgement 12th May 2022

Date Sent to Parties 12th May 2022