EMPLOYMENT TRIBUNALS

Claimant: **Mrs Jacqueline Cross**

Respondent: **NHS Somerset Clinical Commissioning Group**

Heard at: **Bristol (by video)** **On: 20 July 2022**

Before: Employment Judge Le Grys

Appearances
For the Claimant: Ms. L. Millin (counsel)
For the Respondent: Mrs. H. Winstone (counsel)

JUDGMENT having been sent to the parties on **25 July 2022** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant, Mrs Jacqueline Cross, was employed by the Respondent, NHS Somerset Clinical Commissioning Group, from 6 January 2014 until 23 April 2021, when her employment was terminated by reason of her resignation. In a claim form dated 10 November 2021 she brings a claim for unfair dismissal and argues that her resignation should be taken to be a constructive dismissal.

2. Section 111(2) of the Employment Rights Act 1996 (*"ERA"*) establishes time limits for the presentation of a complaint of unfair dismissal. It is not in dispute that on this occasion the complaint was not presented within three months of the effective date of termination. The Claimant argues, however, that it was not reasonably practicable for the claim to be presented in time, as she had made a genuine mistake as to the time limits. She further argues that, once she became aware of the true time limit, the claim was presented within a reasonable further period.

3. The Respondent contested the claim. They argued that it was reasonably practicable for the matter to have been presented in time and the Tribunal therefore has no jurisdiction to hear the claim.

4. The Claimant appeared before the Tribunal represented by Ms. L. Millin of counsel, and gave sworn evidence. The Respondent was represented by Mrs. H. Winstone of counsel. I considered the evidence in a 112 page bundle of documents provided by the Respondent, and a 17 page bundle (including a skeleton argument) provided by the Claimant. I additionally considered a separate 4 page skeleton argument of the Respondent.

Issues for the Tribunal to Decide

5. It is agreed that the claim was not presented within three months of the effective date of termination (allowing for early conciliation). It was also apparent that, once the Claimant states that she became aware of the correct time limit, the claim was issued promptly thereafter. The sole issue for the Tribunal, therefore, was whether it was reasonably practicable for the claim to be presented in time.

The Facts

6. The Claimant was employed by the Respondent as a nurse, initially at band 5 and later at band 6. In 2015 a vacancy arose at band 8, which the Claimant was encouraged to apply for; for a number of reasons she decided against this. Another individual was instead appointed to the role in 2016 but did not remain in post. The Claimant alleges that she was then bullied to take on this lead role. She ultimately agreed to do so on a trial basis, but in the intervening time her band 6 role disappeared from the structure and so there was no possibility of a return.

7. The Claimant found the work to be extremely difficult. She makes a number of complaints about the way in which she says she was treated during this time which formed part of her claim of unfair dismissal. It is sufficient for these purposes to note that she was absent from work for reasons related to stress between May 2019 and August 2019, and again after June 2020.

8. By January 2021 the Claimant had instructed solicitors. On 18 January 2021 the solicitors emailed one of the Claimant's managers to raise a number of concerns. This email concluded by stating that the way in which the Claimant was being treated by the Respondent *"only adds to my client's evidence in respect of any subsequent claim for constructive unfair dismissal and/or whistleblowing detriment"* (page 42 of the main bundle).

9. On 24 January 2021 the Claimant emailed the same manager, giving 3 months notice of resignation. The email set out allegations of poor treatment by the Respondent, and stated that the Claimant believed *"that there has been a fundamental breach of the trust and confidence in the employment relationship and, as such, I have been left with no other option but to resign"*. The email further stated that the Claimant anticipated submitting a formal grievance in due course, and requested details of the person to whom this should be sent (page 44). It was not, however, suggested that the Claimant was seeking re-instatement as an outcome of this grievance.

10. A number of emails were exchanged between the Claimant and Respondent in early 2021 before a grievance meeting was held on 7 May 2021. The Claimant was supported in this meeting by a union

representative. At the end the parties discussed the next steps, and the notes show that the representative made reference to *"being mindful of the ET deadline",* and that the Claimant *"has the legal option of going to ET after ACAS and to preserve the deadline, is required to submit a claim to ACAS within 3 months of the end of employment"* (pages 67-68).

11. Following the further exchange of emails about the grievance, on 8 July 2021 the Claimant emailed the Respondent and stated that given *the timelines that have been indicated, I felt I had no other option but to reach out to initiate ACAS pre-claim conciliation, in order to preserve my rights to bring a Tribunal Claim in due course, should that be necessary"* (pages 69-70).

12. The early conciliation certificate shows that ACAS was notified on 8 July 2021, with the certificate then issued on 19 August 2021.

13. The Claimant received the outcome of her grievance by way of a letter dated 5 November 2021. Following receipt of this she states that she made contact with ACAS again. In an email of 9 November 2021 (page 41) she notes that it *"has been a few months since I had a call with you/ACAS*" and requests further advice. She says that she then spoke with someone who explained that the ACAS certificate was valid for one month. She accepted when cross examined that she had had no contact with ACAS between July and November.

14. The Claimant then issued proceedings on 10 November 2021.

15. In her written statement the Claimant stated that she had originally contacted solicitors for advice, but her case was then dealt with by her professional union, the Royal College of Nursing, where it was handled by three different representatives. She believed that they were aware of the deadlines for submission of her claim. She stated that she was stressed and anxious, and disappointed because she believed that the Respondent was not acknowledging the care issues she had raised. She accepted under cross examination that she had worded her resignation letter with the benefit of legal advice. She stated that she was aware of the date *"1 day within 3 months"*, but highlighted that the legal issues were new to her. It was her belief that, once ACAS had been notified within 3 months, her case was *"safe in the system"*. The Claimant accepted that her union had specialist employment lawyers but couldn't remember whether the people she had spoken to had said that they were part of the employment team.

Relevant Law

16. Section 111(2) Employment Rights Act 1996 states:

> *(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.

17. Section 111(2A) ERA 1996 confirms that provisions relating to the extension of time limits to facilitate conciliation before institution of proceedings apply for the purposes of subsection (2)(a).

18. It is agreed that the effective date of termination in this case was 23 April 2021. Contact was made with ACAS on 8 July 2021, and an ACAS certificate was issued on 19 August 2021. It is agreed that the time limit for the presentation of the case was therefore 18 September 2021. As this was a Saturday the Respondent argued that the claim should in fact have been lodged on 17 September 2021 (referring to the case of *Miah v Axis Security Services Ltd* UKEAT/0290/17/LA), but it was agreed that this was somewhat academic in the context of the specific issues of this case.

19. The claim was dated 10 November 2021, and was therefore presented around 7 ½ weeks after the relevant time limit. It is therefore agreed that the claim could not succeed under s.111(2)(a).

20. Where a claimant argues that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

    a. s.111(2)(b) ERA should be given a *"liberal construction in favour of the employee"* (*Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA);
    b. What is reasonably practicable is a question of fact and therefore a matter for the Tribunal to decide (*Wall's Meat Co Ltd. v Khan* 1979 ICR 52, CA);
    c. The onus of proving that presentation in time was not reasonably practicable rests of the claimant (*Porter v Bandridge Ltd* 1978 ICR 943, CA).

21. In *Palmer and anor v Southend-on-Sea Borough Council* 1984 ICR 372, CA, the Court of Appeal concluded that "reasonably practicable" does not mean "reasonable", but nor does it mean "physically possible". It instead means something like "reasonably feasible". In *Asda Stores Ltd v Kauser* EAT 0165/07 Lady Smith stated *"the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done".*

22. A claimant's complete ignorance of his or her right to claim may make it not reasonably practicable to present a claim in itself, but the claimant's ignorance must itself by reasonable. In *Dedman* Lord Scarman commented that the Tribunal must ask further questions: *"what were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?"*. In *Porter,* the Court of Appeal ruled that the correct test is not whether the claimant knew of his rights but whether he ought to have known of them.

23. Where the claimant is generally aware of his rights, ignorance of the time limit will rarely be acceptable as a reason for delay. In *Trevelyans (Birmingham) Ltd. v Norton* 1991 ICR 488, EAT Mr Justice Wood said that, when a claimant knows of his rights, they are under an obligation to seek information and advice about how to enforce that right.

24. In *Marks and Spencer plc v Williams-Ryan* 2005 ICR 1293, CA the Court of Appeal set out a number of principles:

    a. s.111(2) should be given a liberal interpretation in favour of the employee;
    b. Regard should be had to what, if anything, the employee knew about the right to complain to a Tribunal and the time limit for doing so;
    c. Regard should be had to what knowledge the employee should have had, had they acted reasonably in the circumstances. Knowledge of the right to make a claim does not, as a matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the employee to prove that their ignorance was reasonable;
    d. If the Claimant's solicitor fairs to meet the deadline, the Claimant will not be able to argue that the claim was not submitted in time.

Discussion and Conclusions

25. Having heard from the Claimant I accept that she held a genuine belief that notifying ACAS of her claim was sufficient. She gave credible evidence as to her mistake and her actions at the conclusion of the grievance process, which included contacting ACAS at that point and the prompt submission of the ET1, support the suggestion that she had been waiting for this process to conclude.

26. The Claimant stated that she was under considerable stress at the time and genuinely did not realise that she had to do anything further. Under cross examination, however, she accepted that there was no medical evidence to suggest that this made her unable to present the claim, and further accept that she has had the assistance of her Union throughout.

27. I therefore turn to whether the mistake was reasonable. While mindful of the need to give s.111(2) a liberal interpretation in favour of the employee, I am not satisfied that it was. The Claimant had the benefit of legal advice at an early stage and drafted her resignation letter in contemplation of proceedings. She had the assistance of her Union throughout. Both legal and Union representatives can reasonably be expected to know about the time limits and advise the Claimant accordingly. While the fact of the misunderstanding is clear, the Claimant does not provide any reasons as to why the error was made, which appears to have been entirely her own; she does not suggest, for example, that it was a result of being misled by either her representatives or the Respondent. Furthermore, references to time limits can be seen in the emails and notes from the time, and so there is no question that the Claimant knew that these were an issue. She sought ACAS conciliation within these time limits, demonstrating an awareness that the process needed to be followed notwithstanding the fact that the internal grievance procedure had yet to conclude.

28. The case can therefore be distinguished from circumstances where a Claimant is completely ignorant of their rights to bring a claim in the Employment Tribunal. Furthermore, I note that the Claimant was not seeking re-instatement as an outcome of her internal grievance process; this case can therefore also be distinguished from one where an individual is perhaps trying to see first if they can resolve matters internally and without needing to go to the lengths of a legal process. Proceedings were in mind from the time of the resignation and so it was reasonable to expect that these matters would be confirmed.

29. Given this early contemplation of a claim, as well as the fact that the Claimant has been assisted by representatives, was aware that certain procedural steps needed to be taken, and was aware that these steps applied regardless of whether the internal grievance process had concluded, it would have been possible for the Claimant to ascertain the correct facts within the relevant time limit and reasonable to expect this to be done. While I accept that these matters can be confusing, those intending to bring a claim can be expected to undertake due diligence in checking matters such as deadlines, particularly when they are already aware that these form a crucial part of the process. I accept the submission of the Respondent in this regard that the information was available, had it been checked.

30. Taking all of this into account I am satisfied that it was reasonably practicable for the Claimant to bring her Claim within the specified period. As such, the claim is out of time and cannot proceed.

Employment Judge Le Grys
Date: 15 August 2022

Reasons sent to the parties: 26 August 2022

For the Tribunal Office