



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103172/2022

**Held in Glasgow on 7 September 2022 and additional evidence received
by email on 9 September 2022**

Employment Judge A Strain

Mrs J Scott McCluskey

**Claimant
In Person**

10 Action for Children

**Respondent
Represented by:
Mr G McQueen –
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. the claim of constructive dismissal has been presented out of time and it would have been reasonably practicable to have presented the claim in time;
2. the claim of constructive dismissal is accordingly dismissed

REASONS

Background

1. The Claimant represented herself. She asserted a claim of constructive unfair dismissal.
2. The Respondent was represented by Mr G McQueen, Solicitor.
3. The Open Preliminary Hearing had been fixed to determine the following issues:
 - a. Whether the ET1 had been presented out of time;

- b. If it had, would it have been reasonably practicable to have presented it in time;
- c. If not, within what time would it have been reasonably practicable to have presented the claim thereafter.

5 4. The parties had lodged an Agreed Joint Bundle of Documents with the Tribunal.

5. The Claimant gave evidence on her part and made submissions. The Respondent did not lead any evidence and made submissions.

10 6. The OPH did not conclude on 7 September. It was continued for the Claimant to produce additional evidence in the form of emails and for the Respondent to respond to that. The Claimant did produce additional emails and the Respondent responded to their content by email of 9 September 2021. This concluded the evidence and submissions before the tribunal.

15 **Findings in Fact**

7. Having heard the evidence of the Claimant and considered the documentary evidence before it the Tribunal made the following findings in fact:

20 a) The Claimant commenced employment with the Respondent on 6 January 2010.

b) The Claimant resigned from her employment with the Respondent by email of 9 September 2021. The effective date of termination of her employment was 7 October 2021.

25 c) The time limit for submitting a claim for constructive dismissal expired on 6 January 2022.

d) The Claimant was a member of Unite the Union. She was obtaining advice and representation from the union during the course of her employment and, in particular, regarding a grievance she had submitted on 1 October 2021.

- 5 e) The Claimant was aware from her trade union that she had 3 months after termination of her employment within which time to commence a constructive dismissal claim. She confirmed this knowledge in an email of 23 November 2021 to the Respondent's Fiona Steel (Page 58-59).
- 10 f) The Claimant submitted an application for member related legal assistance to Unite on 14 December 2021 (Pages 78-85). The Claimant signed the form which included a declaration at page 84 *"I understand that until the Union or its solicitors tell me that they will lodge a claim in the employment tribunal on my behalf, it remains my responsibility to ensure that any legal claim that I wish to pursue is registered issued in the employment tribunal within the time limit, which for most employment tribunal claims is 3 months less one day from the date of the act I am complaining about or my dismissal by my employer"*.
- 15 g) The Claimant's Union informed her at the end of March/beginning of April 2022 that their involvement was ended and they had not commenced employment tribunal proceedings on her behalf.
- 20 h) The Claimant called around to try and obtain legal representation. In or around 20 May 2022 she was given some brief legal advice from a lawyer to contact ACAS and commence conciliation.
- i) The Claimant got in touch with ACAS, initiated early conciliation on 20 May 2022 and was issued with an early conciliation certificate from ACAS dated 23 May 2022.
- 25 j) The Claimant's ET1 was submitted on 9 June 2022.

The Relevant Law

8. The Claimant asserts a claim of constructive unfair dismissal. Such a claim must be presented before the end of the period of 3 months beginning with the effective date of termination or 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 have been presented before the end of that period of 3 months (section 111 (2) of the **Employment**
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Rights Act 1996 (ERA 1996)). The cases of *Marks & Spencer Plc v William-Ryan [2005] IRLR 562* and *Pora v Cape Industrial Services Ltd. UKEAT/0253/18* set out the approach that a tribunal should take to the effect that the question of whether it was reasonably practicable for a complaint to be presented in time is a matter of fact for the Tribunal, taking into account all the circumstances of the case. Those circumstances can be quite wide and include, for instance, whether an employee was physically prevented from complying with the limitation period; it may also be relevant to investigate whether, at the time of dismissal (and, if not, when thereafter) the employee knew that he had the right to complain of unfair dismissal. In another case, the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee, and it will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom. It may also be relevant for the Tribunal to consider the nature of any advice which is given to the employee and it may be relevant for the Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit.

Submissions

9. Both parties made oral submissions.

Discussion and Decision

Observations on the Evidence

10. The Claimant's position was that she thought the Union were pursuing the constructive dismissal claim on her behalf. She said that her Union had told her in December/January 2022 that the Union's lawyers would be in touch and obtain an extension of time for lodging an employment tribunal claim.
11. This position appeared inconsistent and contradictory when compared with the documentary evidence in the form of the email she had sent to Fiona Steel on 23 November 2021 and the declaration she had signed on 14 December 2021.

12. In any event by the end of March/beginning of April 2022 she was aware that her trade union were no longer acting on her behalf and they had not commenced employment tribunal proceedings on her behalf.

Decision

- 5 13. The Tribunal considered and applied the approach set out in ***Marks & Spencer Plc v William-Ryan [2005] IRLR 562*** and ***Pora v Cape Industrial Services Ltd. UKEAT/0253/18***. The Claimant had obtained advice and representation from her trade union. The trade union clearly indicated to the Claimant that it was her responsibility to submit an employment tribunal claim in time. The Claimant was well aware of the time limits and referred to these in her email to Fiona Steel.
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14. The Claimant knew by end March/beginning April 2022 that the union hadn't submitted an employment tribunal claim on her behalf and that any such claim was out of time.
- 15 15. The Claimant presented no credible explanation as to why the tribunal claim had not been submitted or could not have been submitted before 9 June 2022.
16. The tribunal concluded that it would have been reasonably practicable for the Claimant to have presented her claim in time. The Claimant was aware of the time limits for presenting her claim before the time limit expired. She confirmed this in her email to Fiona Steel on 23 November 2021 and the declaration she had signed on 14 December 2021. She did not do so and accordingly her claim is dismissed.
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25 **Employment Judge: A Strain**
Date of Judgment: 29 September 2022
Entered in register: 11 October 2022
and copied to parties