



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S El-Shoubashi

**Respondent:** Network Rail Infrastructure Limited

**Heard at:** Bury St Edmunds

**On:** 17 October 2022

**Before:** Employment Judge Laidler (sitting alone)

## Representation

**Claimant:** Ms A Chute, Counsel

**Respondent:** Ms I Baylis, Counsel

# JUDGMENT

- 1. The claim of failure to pay holiday pay is dismissed on withdrawal.**
- 2. The remaining claims of automatically unfair constructive dismissal contrary to sections 100 and 103A of the Employment Rights Act, detriments contrary to sections 44 & 47 and unauthorised deductions from wages were received out of time.**
- 3. It was reasonably practicable to have presented the claims in time, the tribunal has no jurisdiction and the claims are dismissed.**

# REASONS

- 1. This hearing was listed by notice sent to the parties on 3 April 2022 for a case management discussion. As it appeared however that the claim had been submitted out of time and both parties were represented by counsel it was agreed that it would be proportionate and in accordance with the overriding objective that this hearing to be converted to an open preliminary hearing to determine whether the tribunal had jurisdiction to hear the claims. E J Tynan had stated in a letter to the parties of the 29 June 2022 that the**

issue of time limitation would be discussed at this hearing. Both counsel had been instructed on the basis that the issue would be determined and had filed and served written submissions on the point. The hearing proceeded on that basis with the consent of the parties.

2. It was clarified at the outset that the claims are of constructive unfair dismissal contrary to sections 100 and 103A of the Employment Rights Act 1996 (ERA) the claimant asserting that she had raised health and safety issues and made protected disclosures and detriments contrary to sections 44 & 47 ERA. There is also a claim for one days wages unpaid. The claim of a failure to pay annual leave has been dismissed on withdrawal. The claimant accepts that she does not have 2 years service to pursue a claim of ordinary unfair dismissal and no such claim is pursued.

### **The procedural background**

3. The claimant commenced ACAS Early Conciliation on 16 August 2021 and the certificate was issued by ACAS on 26 August 2021. The effective date of termination was the 28 May 2021 and there is no dispute that the last day on which the claimant could lodge her claim in time was the 26 September 2021.
4. The ET1 was received at the Watford Employment Tribunal on 26 September 2021 having been submitted by the claimant by email to that office.
5. By email of 7 October 2021 the claimant was sent an email by the Watford Employment Tribunal in which it stated that new claims cannot be submitted by email. The claimant was told to follow the instructions online and to resubmit her claim. The claimant replied enquiring whether she could also submit a separate particulars of claim document and was told that she could submit that by email in Word or PDF format and it would then be added to the ET1 form.
6. The claimant submitted the claim online on 8 October 2021.
7. In the particulars at section 15 of the ET1 claim form the claimant confirmed she had originally emailed her claim form on 26 September 2021 having been advised by counsel to do that. She stated that that original submission would have been received on time.
8. The respondent filed its response on 10 January 2022. It took the point that the claim had been submitted out of time and that the tribunal did not therefore have jurisdiction to determine the complaints.
9. In filing her claim by email the claimant had acted on the advice of Counsel Ms Shahin Ismail of Fenners Chambers. In an email to the claimant of 18 November 2021 Ms Ismail acknowledged that she had provided the wrong advice to the claimant. She confirmed she had informed her insurers the Bar Mutual about this and strongly suggested the claimant take independent legal advice on the impact of her mistake on the claim and her avenues for redress. She went onto state that as the Tribunal accepts ET3 responses

by email she had made the assumption that they would accept and ET1 also in that way.

### **Relevant law**

10. There is no dispute that in relation to the various claims brought the claims should be submitted within 3 months and that it is a 'reasonably practicable' test (sections 23, 48 and 111 ERA).
11. In considering the position when an adviser is at fault the tribunal must have regard to the guidance given in Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379. If a professional adviser engaged by the claimant is at fault then the claimants redress is against that adviser. The tribunal will need to consider:
  - a. Whether the adviser was a professional or skilled adviser
  - b. Whether the adviser was at fault in the advice they gave, and
  - c. Whether the wrong advice was the substantial cause of the missed deadline.
12. In Marks and Spencer plc v Williams – Ryan [2005] ICR 1293 the 'Dedman principle' was reaffirmed and it made clear that where the reason for the missed limitation date is the fault of a skilled adviser, that fault is to be visited on the claimant and it must be held that it was reasonably practicable to submit the claim in time.

### **Submissions**

13. Both representatives provided written submissions which it is not proposed to set out again here but there was no dispute between them as to the legal principles to be applied.

### **Conclusions**

14. The claim was submitted out of time when it was lodged in accordance with the Rules on the 8 October 2021. The last date it would have been in time being the 26 September 2021.
15. It had been reasonably practicable to present the claim in time and indeed the claimant did so but by an unacceptable method, namely by email which was rejected by the tribunal. The only reason and the sole cause why the claimant lodged the claim that way was the advise of Ms Ismail, of counsel. It cannot be said that the mistake made was reasonable. Ms Ismail even states in her letter to the claimant that it was made on the 'assumption' that as an ET3 could be lodged by email so could the ET1. A simple search on line would have confirmed that was incorrect.
16. It having been reasonably practicable to have presented the claim in time and it having been received out of time the tribunal has no jurisdiction to determine the complaints which are dismissed.

## CASE MANAGEMENT ORDERS

1. By the **24 October 2022** the claimant to send to the respondent a draft list of the legal issues to be determined by the tribunal for agreement.
2. By the **31 October 2022** the parties to file the agreed list of issues to be incorporated into the judge's summary

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Employment Judge Laidler

25 October 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

29 October 2022

GDJ  
FOR THE TRIBUNAL OFFICE