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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104626/2022 (V)

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Held on 21 November 2022 by Cloud Based Video Platform

Employment Judge Neilson

Ms C Campbell

**Claimant
In person**

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The Governors of the Fettes Trust

**Respondent
Represented by:
Mr Nicholl,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Tribunal finds that it was reasonably practicable for the claimant's complaints to be presented within the statutory time limit. It is therefore the judgment of the Tribunal that the Tribunal does not have jurisdiction to hear the claims brought by the claimant in these proceedings.

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REASONS

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1. At the Hearing on 21 November 2022 by CVP the claimant appeared in person and represented herself. The respondent was represented by Mr Nicholl, Solicitor.
2. The claimant gave evidence on her own behalf. No evidence was led by the respondent.

3. The issue to be determined at the hearing was whether the claim lodged by the claimant had been lodged outside of the time limit applicable to unfair dismissal claims and whether or not the Employment Tribunal had jurisdiction to hear it. The claimant and respondent agreed that the claim should have
5 been lodged by no later than 7 August 2022 and was in fact lodged on 22 August 2022. The issue for the Tribunal was to determine in accordance with Section 111(2)(b) of the Employment Rights Act 1996 (“the ERA”) whether the claim was presented within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably
10 practicable for the complaint to be presented on or before 7 August 2022. The Tribunal explained to the claimant the legal test that had to be met to allow the claim to proceed.
4. On the morning of the hearing the claimant, by e mail, requested a postponement of the hearing to allow her time to lodge documents in support
15 of her contention that it had not been reasonably practicable to lodge the claim in time. The claimant stated that she had not realised that she was able to lodge any documents until she received copies of the authorities that the respondent was seeking to rely upon. The Tribunal explained to the claimant that it was happy to consider any relevant documents that she might wish to
20 send by e mail to the clerk, copied to the respondent’s representative. For the respondent Mr Nicholl confirmed that he was happy to proceed on that basis. The claimant submitted by e mail a number of e mails and these were received by the Tribunal and Mr Nicholl (and where appropriate are referred to in the findings in fact). The claimant withdrew her application for a
25 postponement.
5. In her ET1 the claimant has set out a claim for unfair dismissal. It is not disputed that the claimant does not have sufficient service to qualify for a claim for ordinary unfair dismissal. However, in her ET1 the claimant has set out grounds upon which there are potential claims for unfair dismissal under
30 Section 100 of the ERA and Section 103A of the ERA. Although the respondent disputes these claims Mr Nicholl accepted that for present

purposes it was appropriate to proceed on the basis that the potential claims, that did not require 2 years continuous service, were those referred to above.

Findings in Fact

- 5 6. The claimant was employed by the respondent as a teacher.
7. The claimant commenced employment with the respondent on 1 September 2020.
8. The claimant was provided with accommodation by the respondent to allow her to carry out her role.
- 10 9. The claimant's employment with the respondent terminated on 10 March 2022 without any prior notification or warning.
10. The claimant was notified of the termination of her employment by letter sent to her by the respondent by e mail on 10 March 2022. That letter stated:-

"Dear Cheryl,

15 *I very much wanted to meet you in person this morning. However, because of your absence, and the fact that we were not able to meet, I am left in the unfortunate position of writing to you to advise you of the reason why I wanted to see you and to set out in writing what I had planned to discuss with you.*

20 *It appears to the College that there has been a fundamental breakdown of the working relationship between yourself and the College. As a result, the College intends to terminate your employment with immediate effect due to this fundamental breakdown in the relationship.*

25 *Your last date of employment will be today, 10th March 2022, and you will be paid in lieu of your notice, the equivalent of your having worked until the end of this academic year, i.e., 31st August 2022. For the avoidance of doubt you are not required to teach with immediate effect.*

In addition, you may remain in the College flat until the end of the academic year, with the property to be vacated by Saturday 9th July 2022. You will not be required to continue to pay the monthly contribution towards the property nor contribute to the utilities, however, we will retain £500 which will be paid to you on return of the keys and after final inspection if no repairs or breakages are found. Your daughter may remain at the Prep school on the current fee remission until the end of the academic year.

I realise that this will be a shock to you, however, we do not believe that the relationship will ever be satisfactory. We would encourage you to make use of the Employee Assistance Programme, We Care, and the flyer is enclosed with this letter, giving details of how to access their services. If you wish to arrange to remove your personal belongings, please contact the Head of Human Resources, Wendy Davidson, to arrange a convenient time. I would be grateful if you could return the two laptops have been issued to you by the Director of IT as soon as possible.

Please do not hesitate to contact me to discuss this matter further.

yours sincerely

Jonathan Marchant
Deputy Head (Academic)"

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11. The respondent's staff were notified on or shortly after 10 March 2022 that the claimant would not be returning to school.
12. The pupils who the claimant taught were notified on or shortly after 10 March 2022 that the claimant would not be returning to school.
- 25 13. The claimant removed her belongings from the school shortly after 10 March 2022.
14. The claimant contacted her union, the Educational Institute of Scotland (E.I.S.) to seek their support following the termination of her employment. The

claimant spoke to an EIS lawyer. The claimant had been in contact with the EIS prior to 10 March, following a meeting she had with the respondent in February 2022.

- 5 15. In the period between 10 March 2022 and 27 March 2022 the EIS wrote a letter to the respondent on behalf of the claimant seeking the re-instatement of the claimant. The respondent declined to re-instate the claimant.
- 10 16. Following the respondent declining to re-instate the claimant the EIS told the claimant that she should contact ACAS. The EIS notified the claimant in or about March/April 2022 that she had three months within which to submit her claim to ACAS. The claimant was aware, at this time, that she needed to submit her claim to ACAS by 10 June 2022.
17. The claimant was paid in lieu of her notice period of one term. Payment was made to the claimant towards the end of March 2022.
- 15 18. In April 2022 the claimant went on holiday to Spain with her daughter and her parents. Her father became ill in Spain and was hospitalised. The claimant stayed in Spain with her father and was there for 6 or 7 weeks.
19. The claimants father died in May 2022. The claimant then had to arrange a care package for her mother.
- 20 20. The claimant contacted ACAS on 6 June 2022 with details of her claim against the Respondent.
21. ACAS reported back to the claimant that the respondent was not prepared to enter into pre-claim conciliation.
- 25 22. By e mail of 7 July 2022 ACAS issued to the claimant an Early Conciliation Certificate. The e mail stated in bold type *"It is your responsibility to ensure that any tribunal claim is submitted on time."* The e mail also stated *"Acas cannot advise you about when a tribunal claim should be submitted."*

23. The claimant made contact with a lawyer to discuss her potential claim against the respondent. The claimant contacted Ms Mohammed of MM Legal, Kirkhill House, 81 Broom Road East, Newton Mearns, Glasgow G77 5LL on or about 14 July 2022.
- 5 24. On 15 July 2022 the claimant had a call, over zoom, with Ms Mohammed. The purpose of the call was to discuss the claimants potential claim against the respondent. During that call Ms Mohammed notified the claimant that there was a deadline for bringing a claim before the employment tribunal and that the claimant would need to be careful of that time limit.
- 10 25. The claimant sent an e mail on 4 August 2022 to Ms Mohammed as follows:-
“Dear Ramiza, Please find attached my ID. I'm shall forward on correspondence shortly. I'm slightly concerned as I feel there may be a deadline of contacting the tribunal although perhaps I misunderstood. The e-mail says a minimum of one month after their certificate. Kind regards Cheryl”
- 15 26. The claimant sent an e-mail to Ms Mohammed on 5th August 2022 as follows:- *“Dear Ramiza, I've forwarded everything I have - I think. Most of my documents were in my emails and on my laptop which was blocked immediately when the dismissal e-mail was sent out. I'll forward some also from Wendy the HR lady. Do we have to register with the tribunal straight away? Is the deadline one month from the 7th of July when the certificate was issued? Kind regards Cheryl.”*
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27. The claimant sent an e-mail to Ms Mohammed on 16th August 2022 as follows:- *“Dear Ramiza I'm just slightly concerned about timing. maybe I got it wrong and there isn't a deadline so would be grateful if you could confirm kind regards Cheryl”*
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28. Ms Mohammed contacted the claimant by e mail on 16 August 2022 and stated :- *“I emailed you last week with detailed questions and urgency to provide more information as your deadline was imminent. You have now missed this and your claim is time barred.”*

29. The claimant did not receive an e mail from Ms Mohammed in the week prior to 16 August 2022.
30. The claimant submitted a claim to the Employment Tribunal on 16 August 2022. The claim form was rejected by the Employment Tribunal as there was an incorrect address.
31. The claimant submitted a fresh claim form to the Employment Tribunal on 22 August 2022. That claim form was accepted by the Employment Tribunal.
32. The claimant remained in the accommodation provided by the respondent until 9 July 2022 when she and her daughter moved out.
33. Between 9 July 2022 and 16 August 2022 the claimant and her daughter stayed with the claimants mother; with some of the claimants friends and camped. The claimant and her daughter moved into their current accommodation in Perthshire on 16 August 2022.
34. During the period from May through July 2022 the claimant was on medication. She was diagnosed by her doctor as suffering from stress and grief and was taking sleeping pills, anti-depressants and blood pressure tablets.
35. The claimant applied for a new teaching role at the beginning of July 2022 and had a successful interview for that role at the beginning of July 2022. The claimant began her new teaching role on 1 September 2022.

Submissions

36. The claimant explained that in hindsight she could see that there was a time limit of 7 August 2022 that should have been complied with but her position was that she had not appreciated this at the time. She had thought that the one month period after 7 July 2022 was possibly some form of cooling off period. She had placed her trust in her solicitor. The period from March through to August 2022 was one of the most difficult periods of her life. She described herself as being like a “zombie” for most of that summer. She was

suffering from stress and was on medication, her father had died and she needed to find a home. As soon as she was aware of the time bar issue she lodged her claim on 16 August 2022 and again as soon as she was aware of the error in that claim form she lodged again on 22 August 2022.

5 37. For the respondent Mr Nicholl placed reliance upon the cases of *Cygnets Behavioural Health Limited -v- Britton* 2022 IRLR 906; *The Governors of the Sheredes School -v- Davies* UKEAT/0196/16 and *Capital Foods Limited -v- Corrigan* 1993 IRLR 430. He submitted that it was not in dispute that the ET1 was lodged outside of the time limit. The test is whether it had been
10 reasonably practicable to lodge in time. The claimant was aware of the three month time limit and there was a responsibility on the claimant to find out the appropriate time limit that applied. In any event the claimant had legal advice here. She instructed Ms Mohammed. If there was a failure in the legal advice that is a matter between the claimant and her lawyer. In looking at the whole
15 period the claimant was able to instruct the EIS and spoke to one of their lawyers; she applied for and got a new job in Perthshire; started ACAS conciliation and instructed a lawyer. In all the circumstances it was reasonably practicable for the claimant to lodge her claim in time. As a fall back the respondents position is that in any event it would not be reasonable
20 to extend time to 22 August 2022.

The Law

38. Section 111(2) of the Employment Rights Act 1996 (“ERA”) provides that:-
25 “...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 is not reasonably practicable for the complaint to be presented before the end of the period of three months.”

39. These time periods may be modified by the ACAS conciliation process in accordance with Section 207A of the ERA.

5 40. The test as to whether or not an unfair dismissal claim should be received although late is a two stage test under section 111(2)(b). Firstly the issue is whether or not it was not reasonably practicable to lodge within the original time period. If it was not then the Employment Tribunal must go on to consider whether the time that has elapsed since then is itself a reasonable period.

10 41. In accordance with *Dedman v British Building and Engineering Appliances 1973 IRLR 379* and *Marks and Spencer v Williams-Ryan 2005 IRLR 562* the relevant principles to be applied from these authorities are:-

41.1 section 111(2)(b) ERA should be given a liberal construction in favour of the employee;

15 41.2 it is not reasonably practicable for an employee to present a claim within the primary time limit if she was, reasonably, in ignorance of that time limit;

20 41.3 however, a claimant will not be able to successfully argue that it was not reasonably practicable to make a timely complaint to an employment tribunal, if she has consulted a skilled adviser, even if that adviser was negligent and failed to advise her correctly;

41.4 the question of reasonable practicability is one of fact for the tribunal, and should be decided by close attention to the particular circumstances of the particular case;

25 41.5 it is not reasonably practicable to bring a claim if a claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a tribunal will expect them to present the

claim as soon as reasonably practicable, rather than allowing three months to run from the date of discovery;

5 41.6 if a claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a tribunal is likely not to extend time. If the claimant has some idea that they could bring a claim but does not take legal advice, a tribunal is even less likely to extend time.

10 42. The onus is on the claimant to establish that it was not reasonably practicable to bring the claim in time

Discussion & Decision

15 43. The test that needs to be applied by the Tribunal is whether it was reasonably practicable for the claimant to lodge her claim in time. It is common ground that the claim should have been lodged by 7 August 2022 and was not in fact lodged until 22 August 2022. Although it was not raised by either party the Tribunal did consider whether there could be any argument that the date of dismissal was not 10 March 2022 but some later date. However, on the
20 evidence the Tribunal was satisfied that there was a clear dismissal that took effect on 10 March 2022. That was the position that was accepted by both the claimant and the respondent and was consistent with the evidence. In assessing whether it was reasonably practicable it is important to consider the particular circumstances of the case. The Tribunal was concerned to
25 understand what the substantive reason for the failure to lodge in time was; whether the claimant knew of her rights or could have taken reasonable steps to know of her rights; whether the claimant received any advice and whether there was any other impediment to the claimant lodging her claim in time.

30 44. The claimant gave evidence and the Tribunal largely accepted her evidence as set out in the findings in fact. The Tribunal found the claimant to be an honest and truthful witness.

45. It was clear from the evidence that the claimant knew of her right to bring a claim before the Employment Tribunal shortly after she was dismissed. She was aware of the facts and circumstances that gave rise to the claim. The EIS had notified the claimant that she had to lodge her claim with ACAS within
5 three months. The claimant did in fact lodge her claim with ACAS within the three month period. The Tribunal accepts that there may have been some confusion or misunderstanding on the part of the claimant as to the process that required to be followed after her claim was lodged with ACAS and the Early Conciliation Certificate was issued. The Tribunal considers that the root
10 cause of the failure by the claimant to lodge her ET1 in time was this misunderstanding of the process to be followed after the Early Conciliation Certificate was issued. It is clear from the e mails that the claimant sent to her lawyer on the 4th and 5th August 2022 that the claimant was not certain of the process to be followed.

15 46. Having identified the root cause of the failure to lodge in time the Tribunal has considered whether or not the claimant knew of her rights or could have taken reasonable steps to understand her rights. The Tribunal also considered what advice the claimant obtained. Whilst the Tribunal accepts that it is possible that the claimant did not know that she had to lodge her ET1 with the
20 Employment Tribunal by 7 August 2022 the Tribunal also accepts the there were steps the claimant could have taken to make herself aware of the position. The claimant accepted under cross examination from Mr Nicholl that she did not carry out any research by searching for information on time limits on the internet. The claimant was also, by mid July 2022, obtaining advice
25 from a lawyer. At this point in time the claimant was fully aware that there was a potentially serious issue regarding a time limit. She had been told as much by her lawyer. That much is also clear from the e mails sent to her lawyer on 4th and 5th August 2022. The claimant was very candid when she said in giving
30 evidence that she knew there was a deadline but did not know when it was and she placed her trust in her lawyer. The Tribunal is satisfied that there were reasonable steps the claimant could have taken to find out the position

on time limits prior to 7th August 2022, by either obtaining that information from her lawyer or by carrying out further research herself.

5 47. The Tribunal does not know the full detail of what was discussed between the claimant and her lawyer and it may be that there has been some failure on the part of her lawyer to fully advise the claimant in all the circumstances. However even if that were so that is a matter between the claimant and her lawyer and it is well established that the fault of professional advisers is not something that a claimant can rely upon as an impediment making it not reasonably practicable to lodge the claim in time – *Capital Foods Limited -v-*
10 *Corrigan*.

15 48. The Tribunal has considered whether there was some other impediment which made it not reasonably practicable to lodge the claim in time. The claimant specifically relied upon her ill health and the other difficulties she faced in the period from May through to August 2022. However whilst the Tribunal has sympathy for the difficult circumstances the claimant found herself in during this period it is not satisfied that these circumstances made it not reasonably practicable to lodge the claim in time. With regard to the health issues the Tribunal accepts the evidence the claimant gave about being diagnosed with stress and grief but the Tribunal also has to consider
20 what the claimant did during this period in terms of her ability to function. During this period the claimant was able to move house to Perthshire; apply for a new job; attend an interview for that job; put in place a care package for her mother; lodge the claim with ACAS and instruct a lawyer. The Tribunal has also had regard to the case of *Cygnets Behavioural Health Limited -v-*
25 *Britton* where Mr Justice Cavanagh in the Employment Appeal Tribunal determined that the fact a claimant is ill (in that case depression and dyslexia) does not mean automatically that it is not reasonably practicable to be able to claim within the primary limitation period. The test must always be to apply a common sense approach to what is reasonably practicable in all the
30 circumstances of the case.

49. In conclusion the decision of the Tribunal is that it was reasonably practicable to present the claim within the original time limit. The claimant could have taken steps by herself or through her lawyer to ascertain the correct date for lodging the claim. Insofar as there was any breakdown in communication or
5 fault with her lawyer then that is not an impediment that is relevant for the purposes of the test under Section 111(2)(b). The Tribunal is not satisfied that any health or life events were such as to make it not reasonably practicable to lodge in time. The Tribunal accordingly does not have jurisdiction to hear the claim. The issue of whether the claim was then submitted within a
10 reasonable period of time accordingly does not arise.

Employment Judge: Stuart Neilson
Date of Judgment: 23 November 2022
Entered in register: 29 November 2022
15 and copied to parties