

Preliminary Hearing

- (3) By letter of 20 March 2022 the ET directed today's Preliminary Hearing to consider whether the claim has been presented within the statutory time limit, and whether the claimant had sufficient length of service to claim unfair dismissal.
- (4) I was provided with a bundle of documents consisting of 190 pages, a witness statement for the Claimant set out in an email dated 11 January 2023 and a witness statement from Fahd Rehman, Temporary Staffing Manager, on behalf of the Respondent. I read such documents as I was taken to by the parties.

Facts.

- (5) The claimant was offered, and accepted the position of Team Leader in Clinical Records and commenced employment on 3 December 2018. Her contract of employment set out that she had no previous service with an NHS employer; her employment was subject to a six month probationary period.
- (6) On the evening of 20 September 2019 the Claimant had a telephone conversation with her manager, Nadine King, the Clinical Records Manager. The claimant says that Ms King told her during this conversation that she had passed her probationary period and describes her joy over that weekend.
- (7) On 23 September 2019 the Claimant was given a letter inviting her to a probationary review meeting, she says she was told that it "did not look good". The probationary review meeting eventually took place on 14 October 2019, and the claimant was accompanied by a union official. Ms King, in a three page letter of the same date explained her decision to terminate the Claimant's contract of employment because she determined that the claimant had failed her probationary period. The Claimant was given one month's notice of termination and told that her employment would end on 8 November 2019.
- (8) After 8 November 2019 the claimant continued to be on the Respondent's "bank" and worked various shifts; her final one being in March 2020. The claimant agreed that her bank engagement was separate to her employment.
- (9) In January 2020 the Claimant raised complaint about matters during her employment and about having been told that she had passed her probation orally, then subsequently being told that she had failed the probationary period. The claimant said that she had raised issues about treatment (and in particular the letter of 23 September) during her employment with the CEO and HR director prior to 14 October 2019. The claimant did not receive a formal outcome letter relating to her complaints until 16 July 2021. That outcome letter includes an apology to the Claimant that the matter had taken so very long which was in part because the initial investigator had left the Respondent, and the pandemic had caused significant delays.

- (10) The Claimant was a member of UNITE the UNION. She took advice from them, she said that she was told that she had to wait for the outcome for her complaint to be dealt with by the respondent “in house” She wanted to resolve the matter internally. She lost her father on 4 December 2019, which impacted on her profoundly, and also caught COVID twice and then suffered a tragedy in losing her brother on 16 July 2020. She did not bring a claim in 2020 at the advice of her union. Once she received the letter of 16 July 2021, she went to ACAS on 27 August 2021 and received her ACAS certificate on 13 September 2021, then presented her ET1 (which she prepared in person) on 13 October 2021.
- (11) The claimant said that her union rep told her that the time limits for tribunals were three months minus one day when the two of them were waiting to meet an HR officer of the Respondent on the day before her father died, ie. 3 December 2019.

Submissions

- (12) The Respondent said that the Claimant’s case was the she relied on her union’s advice to wait until receiving notification of the outcome of the investigation into her complaint before bringing a claim to the ET. However, she had been informed of the three month ET time limit, but if she was misadvised, any claim rests against the union. He relied on *Friend v Institution of Professional Managers and Specialists* [1999] IRLR 173 in support of the proposition that a trade union has a duty of care in tort to use ordinary skill and care in advising a member in an employment dispute, and *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 All ER 520 at 526, that any remedy rests against a negligent union.
- (13) Even if the reason for not presenting a claim was waiting for the outcome of internal proceedings, this is not a sufficient reason to show it was not reasonably practicable; *Bodha v Hampshire Area Health Authority* [1982] ICR 200.
- (14) In any event, the claimant does not have requisite service for a claim of unfair dismissal. Her breach of contract claim seems to be that her investigation took an excessive period of time; firstly there is no contractual right to have a complaint determined within a particular period and secondly the complaint was raised after termination so there was no breach of contract by the date of the EDT, so there was no extant claim on termination so there is no jurisdiction.
- (15) The claimant explained that her union told her to wait for the outcome of her internal complaint. She thought that the time limit ran from receiving the outcome of the investigation which was 16 July 2021; she commenced early conciliation about five weeks after that and presented her ET1 one month after the conclusion of ACAS EC.

Law

- (16) A claim of unfair dismissal must be presented within 3 months of the effective date of termination unless that is not reasonably practicable, in which case it may be considered if it has been presented within such further period as is reasonable. This is provided for in section 111 of the Employment Rights Act 1996 (“ERA”). The three month period will be extended in accordance with section 207B ERA when compulsory early conciliation has been entered into; section 207B(4) provides that if a time limit would expire during the conciliation period, it will instead expire one month after the end of the conciliation period.
- (17) The time limit for breach of contract claims under the 1994 Extension of Jurisdiction Order is similarly three months unless it was not reasonably practicable, in which case it is within such further period as is reasonable. Such claims must be “arising out of or be outstanding on the termination of the employee’s employment” (para 3(c)).
- (18) What it is “reasonably practicable” for a claimant to do is a question of fact (*Wall’s Meat v Khan* [1979] ICR 52), and there is a duty on the claimant to show why she could not present her claim within time (*Porter v Bandridge* (1978) ICR 943). In *Schultz v Esso Petroleum* [1999] IRLR 488, the Court of Appeal confirmed that “reasonably practicable” means more than reasonably capable physically of being done, and the best approach is to ask whether it was reasonably feasible to present the complaint within the relevant three months. The injection of the qualification of “reasonableness” also requires a tribunal to consider the surrounding circumstances of a case.
- (19) As outlined by Mr Lawrence, *Bodha* makes it clear that waiting for the conclusion of an internal process does not render it impracticable to bring a claim, and if negligent advice is given by a union, *Dedman* makes it clear any remedy is against them not the employer.

Conclusions on issues.

- (20) The claimant was dismissed on 8 November 2019, and the statutory time limit therefore expired on 7 February 2020. ACAS EC does not serve to extend the limit, having been entered into in 2021. The claim is 20 months out of time.
- (21) The claimant essentially relies on two reasons for it being out of time, firstly that she was waiting for an internal process to conclude, and secondly that her union, which had mentioned a three month time limit, advised her to wait. However, it is well established that an internal process does not extend the time limit and that it does not render it impracticable to present a claim. If (and I make no findings in this regard) the claimant was incorrectly advised by a union official, she may have a remedy against them for negligent advice.
- (22) I take into account that in late 2019 the claimant suffered a bereavement, and then caught covid. This may have rendered it not reasonably practicable to

have brought her claim (or commenced ACAS EC) by 7 February 2020, but even if that was the case, she has not presented the matter within a reasonable period. She was able to contact ACAS and present a case promptly once she decided to do so in summer 2021, and could have done that during 2020.

- (23) The claims are accordingly dismissed.
- (24) Further, the claimant in any event agrees that her service with the Respondent was less than one year; in these circumstances the ET does not have jurisdiction to hear an unfair dismissal complaint in any event. Nor is it clear that she has any claim for breach of contract, as she seems to seek to rely on a term that complaints should be dealt with in a reasonable period, and would have to establish the basis of any such term in her contract.

Employment Judge Tuck KC

13 January 2023

Sent to the parties on:

3rd February 2023

For the Tribunal:

GDJ