EMPLOYMENT TRIBUNALS

Claimant: **Miss Nicola Cody**

Respondent: **Southend East Community Academy Trust**

Heard at: **East London Hearing Centre**

On: **Thursday 23 March 2023**

Before: **Employment Judge Hallen**

Representation

Claimant: Councillor A Cox- Claimant's Lay Representative

Respondent: Ms H. Leppert- Solicitor

RESERVED JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

The judgment of the Tribunal is that: -

1. **The Claimant presented her claim of unfair dismissal after the time limit imposed by Section 111 of the Employment Rights Act 1996 had expired and the Tribunal has no jurisdiction to hear this complaint.**

2. **This Claim Form is accordingly struck out.**

REASONS

Background and Issues

1. This matter came before me having been listed for a preliminary hearing on the issue of jurisdiction on 11 January 2023 by the Tribunal on written notice. This listing followed an application made by the Respondent in respect of the Claimant's claim of unfair dismissal had been presented outside the primary time limits for presentation of such claims pursuant to section 111 (2) Employment Rights Act 1996 ('ERA'). Accordingly, the Tribunal listed the claim to consider whether the claim was out of time and if so whether the Claimant could

persuade the Tribunal that time should be extended under the relevant test in the above section.

2. At the hearing before me, the Claimant was represented by Councillor Tony Cox who was her lay representative. The Claimant was in attendance and had prepared a witness statement that was called 'Grounds of Resistance'. She confirmed that this statement contained her evidence in chief and that she was well enough to be cross examined despite having suffered from depression and anxiety since the death of her father some 20 years ago. The Claimant was the only witness called and thereafter the parties made oral submissions. I had in front of me an index and bundle of documents made up of 67 pages, the Claimant's witness statement, the dismissal letter of 14 July 2021 and the appeal dismissal letter of 15 November 2021 as well as two handwritten notes made by the Claimant dated 27 November and 4 November 2021.

Facts

3. The Claimant was employed by the Respondent from May 2003 until her summary dismissal on 15 July 2021 for gross misconduct.

4. The Respondent is a Multi-Academy Trust comprised of 6 schools in Essex. The Claimant was employed as a Teaching and Learning Assistant at Richmond Avenue Primary School and Nursery ('the School").

5. The Claimant made a public post on her Facebook account about the School on 17 May 2022 that the Respondent found to amount to potential gross misconduct. Although the Claimant's Facebook page was set to 'Private' amongst the Claimant's 1000 Facebook 'friends' were members of staff and parents of pupils of the School, all of whom had access to the Claimant's posts.

6. Several members of staff reported the Claimant's posts to the Head Teacher of the School and an investigation into her conduct was carried out. The outcome of the investigation found that the Claimant had a disciplinary case to answer for gross misconduct.

7. The Claimant was suspended on full pay pending the outcome of the disciplinary process. A disciplinary hearing was scheduled to take place on 14 July 2021 chaired by the Head Teacher of the School. This was the second date agreed between the Claimant and the Respondent after an earlier postponement request from the Claimant.

8. On the morning of the disciplinary hearing, the Head Teacher was contacted by the Claimant's Trade Union representative (GMB) who confirmed that Trade Union support for the Claimant was being withdrawn and they would not be in attendance. The Respondent was then contacted by MS, an NHS Employee Retention Officer (Mental Health and Wellbeing) who said that the Claimant did not wish to reschedule the hearing but would like MS to provide support via Microsoft Teams.

9. The Respondent was unable to accommodate this request due to technical difficulties but agreed to delay the meeting start time to allow MS to attend in person with the Claimant. MS was available to give advice to the Claimant throughout the disciplinary hearing and the appeal hearing.

10. Sometime later, the Claimant informed MS that she did not wish to attend the hearing as she felt 'mentally unable to do so". The Claimant had been signed off on sickness absence from 8 June 2021 for stress and anxiety which sickness absence continued supported by sickness absence certificates until 27 December 2021. The Claimant gave evidence to the Tribunal that she has suffered from this condition for twenty years since the death of her father. Her symptoms were made worse as a consequence of the disciplinary action against her and her dismissal from the School.

11. The Head Teacher went ahead with the disciplinary hearing in the Claimant's absence as she was concerned that to prolong the process any further would be detrimental to the Claimant's mental wellbeing. The School was due to commence the six-week summer break which would have meant considerable delay to the Claimant in having her disciplinary hearing rescheduled.

12. At the disciplinary hearing, the outcome of the investigation was presented to the Head Teacher. The Head Teacher considered a pre-prepared statement provided by the Claimant in response to the allegations made against her.

13. Following the hearing, the Head Teacher considered all the evidence presented to her. She decided that the Claimant had committed serious acts of gross misconduct in breach of the Respondent's Employee Code of Conduct and as such should be dismissed summarily without notice.

14. The Respondent confirmed the outcome of the hearing to the Claimant in a letter dated 14 July 2021 and informed the Claimant of her right to appeal the decision. The effective date of dismissal was 15 July 2021 when the Claimant received the letter of dismissal. The three-month time limit for lodging a Claim Form for unfair dismissal would expire on 14 October 2021. Due to the conclusion of the ACAS pre claims conciliation process between 24 September and 30 September, this time limit was extended to 30 October 2021.

15. The Claimant confirmed her intention to appeal the decision via email on 20 July 021. The Respondent agreed to convene an appeal hearing when the autumn term commenced. A letter was sent to the Claimant inviting her to an appeal hearing on 15 October 2021.

16. At the Tribunal hearing before me, the Claimant asserted that the Respondent was deliberately delaying the appeal hearing to frustrate her making a claim to the Tribunal. However, I find that this was not the case as the appeal hearing was fixed for 15 October 2021 and this was within the primary time limit for the Claimant to lodge her claim to the Tribunal. It was the Claimant who declined to attend the appeal hearing on 15 October 2021 as her representative, Councillor Tony Cox was unavailable. The Respondent offered two alternative dates (2 November 2021 and 10 November 2021) to the Claimant via email. The appeal hearing was rescheduled for 2 November 2021.

17. The appeal hearing was rescheduled on a further occasion at the Claimant's request because the Claimant's representative was unavailable on 2 November 2021. It was agreed that the appeal hearing would take place on 9 November 2021 and at the Claimant's request, her representative, Mr Cox would be permitted to attend via video link.

18. A link was set up for Mr Cox to attend via 'Microsoft Teams' as agreed. However, he did not access the link and as such did not attend the appeal hearing despite the Claimant's

expectation that he would be in attendance. The Respondent left the 'Microsoft Teams' link open for Mr Cox throughout the appeal hearing.

19. After consideration, the appeal panel decided unanimously to uphold the decision of the Head Teacher and the Claimant's appeal against dismissal was dismissed. The Respondent wrote to the Claimant confirming the outcome of the appeal via a letter dated 15 November 2021 confirming that the appeal was dismissed.

20. The Claimant did not lodge her Claim Form with the Employment Tribunal until 6 December 2021 exactly three weeks after receiving the notification that her appeal against dismissal had been dismissed. She gave evidence at the Tribunal that she posted it on 20 November 2021 by first class post but could not explain why it had not been received by the Tribunal until 6 December 2021. She did not produce any evidence of postage of the Claim Form.

21. At the Tribunal hearing, the Claimant said that she took advice from ACAS both prior to and after her dismissal on process and procedure. Specifically, she took advice from the ACAS officer on 27 September 2021 who told her that she should wait for the appeal process to conclude before commencing her claim for unfair dismissal in the Employment Tribunal. She did not adduce any evidence of this advice from ACAS. I did not accept her evidence in this regard. She did not produce any corroboration of this advice and I find that it was unlikely that the ACAS officer would have given this advice to her. Her evidence to me was that she thought she had three months to complete the ACAS pre claims conciliation process. However, I did not accept this evidence. It was more likely than not that she was advised that she had three months to commence her Tribunal claim for unfair dismissal.

22. The Claimant also confirmed in evidence that she was a member of the GMB Trade Union and that she joined another Trade Union after the GMB would not represent her at the disciplinary hearing that led to her dismissal. She took advice from this new union as to her appeal against dismissal. She also confirmed that she took advice on her claim from her local Citizens Advice Bureau, from an organisation called Southend Advocacy. Indeed, she produced handwritten notes of discussions with that organisation dated 4 November 2021. In addition, she confirmed that she was obtaining advice from MS as well during this period.

The Law

The Statute

23. The material parts of the Section 111 of the Employment Rights Act 1996 are as follows: 111 Complaints to employment tribunal.

> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (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…

A two-stage test

24. Where a claim is presented outside the period of 3 months it is necessary to ask firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. There is no general discretion to extend time and the burden of proof rests squarely on the Claimant to establish that both limbs of the test are satisfied.

The meaning of "reasonably practicable"

25. The expression "reasonably practicable" does not mean that the employee can simply say that his/her actions were reasonable and escape the time limit. On the other hand, an employee does not have to do everything possible to bring the claim. In Palmer and Saunders v Southend-On-Sea Borough Council [1984] IRLR 119 it was said that reasonably practicable should be treated as meaning "reasonably feasible".

26. **<u>Schultz v Esso Petroleum Ltd [1999] IRLR 488</u>** is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

<u>"Reasonable ignorance".</u>

27. The question of whether it is open to an employee ignorant of her rights to rely upon that ignorance as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. **<u>In Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379</u>** Scarman LJ said the following: *"Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events. Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse." The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of time."*

28. In **<u>Wall's Meat Co Ltd v Khan [1978] IRLR 499</u>** Brandon LJ dealt with the issue of ignorance of rights as follows: *"The impediment may be physical, for instance the illness of*

the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."

29. In those and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practicable turns, not on what was known to the employee, but upon what the employee ought to have known **Porter v Bandridge Ltd [1978] ICR 943, Avon County Council v Haywood-Hicks [1978] IRLR 118**. A further proposition can also be gleaned from those authorities. Where an employee is aware that a right to bring a claim exists it will be considerably harder to show that they ought not have taken steps to ascertain the time limit within which such claims should be presented.

A reasonable period thereafter

30. The question of whether an employee has presented their claim within a reasonable time of the original time limit is a question to be determined objectively by the employment tribunal taking into account all material matters see **Westward Circuits Ltd v Read [1973] ICR 301, NIRC**.

31. In **Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10** the then president of the EAT said: *"Ms Hart pointed out that the question which arises under the second stage in s 139(1)(b) is couched simply in terms of what further period the tribunal would regard as "reasonable", and not, like the question under the first stage, in terms of reasonable practicability. She submitted that it followed that the "Dedman principle" – namely that for the purpose of the test of reasonable practicability an employee is affixed with the conduct of his advisers (see, for the most recent review of the case law, Entwhistle v Northamptonshire County Council (2010) UKEAT/0540/09/ZT, [2010] IRLR 740) – does not fall to be applied. She pointed out that that principle is a consequence of the ultimate test being one of practicability (not even, be it noted, when the test was first formulated, reasonable practicability), and that the consideration of what further period was "reasonable" did not require so strict an approach. She made it clear that she was not saying that the fact that a Claimant had been let down by his advisers was decisive of the question of reasonableness at the second stage, but she submitted that it must be a relevant consideration. [16] I accept the validity of the formal distinction advanced by Ms Hart, but I do not believe that it makes any real difference in practice as regards the question of the relevance of the culpability of the Claimant's legal advisers. The question at "stage 2" is what period – that is, between the expiry of the primary time limit and the eventual presentation of the claim – is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is. If a period is, on that basis, objectively unreasonable, I do not see how the fact that the delay was caused by the Claimant's advisers rather than by himself can make any difference to that conclusion."*

32. What I take from these authorities is that, in assessing whether proceedings have been brought within a reasonable period after the expiry of the original time limit, it is necessary to have regard to all relevant matters including, where appropriate, the factors that made it not reasonably practicable to present the claim in time. Whether they remained operative may be an important matter.

33. The pausing of time for ACAS EC under s.207B(3)(a) and (b) ERA will apply in all cases where the primary time limit has not already expired. In this case, Day A was 24 September 2021 which was the commencement of the ACAS pre claims conciliation process by the Claimant. Day B was the receipt of the ACAS Certificate on 30 September 2021 and the one-month extension extended the primary time limit to 30 October 2021.

34. The existence of a contractual appeal procedure does not alter the Effective Date of Termination. If an employee is summarily dismissed and his or her appeal succeeds, he or she will be reinstated with retrospective effect. If, however, the appeal fails, the dismissal takes effect from the original date of dismissal: **West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL**. The only exception to this will be where there is an express or implied contractual provision to the contrary.

Conclusion and Findings

35. In relation to the test in section 111 ERA as cited above, the question for me to determine at stage one was where a claim was presented outside the period of 3 months, I had to ask whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated.

36. Although I have every sympathy for the Claimant and her stress and anxiety that she has suffered from for the past twenty years since the death of her father, I do not find that her illness had any material impact on her delay in lodging her Claim Form at the Tribunal. It should be noted that the Claimant was signed off work from 8 June 2021 which was before the disciplinary action commenced until 27 December 2021 which was after she lodged her Claim Form at the Tribunal. Her illness did not prevent her from taking an active part in the disciplinary process. Her stress and anxiety has been a condition that has existed for 20 years and she has managed to deal with it during this period. I accept that having to face a disciplinary process is a stressful experience for the Claimant as it if for most employees. However, in my finding, it did not have a material impact on this Claimant in understanding and dealing with what was happening to her. Indeed, even whilst she was signed off work on sick leave, she actively engaged in the disciplinary process from the outset, taking advice as she said from ACAS as well as from MS, her Trade Union (GMB) and another Trade Union when GMB would not represent her at the disciplinary hearing on 14 July 2021. Her illness did not prevent her from taking an active part in the disciplinary process or indeed at the appeal hearing on 12 November 2021 which she attended. At the hearing before me she did not argue that she was incapacitated at all in respect of her illness from being involved in the disciplinary process. Nor did she argue that her illness presented any difficulty in her understanding that a time limit applied to her lodging her claim at the Tribunal. She was aware that a three-month time limit was applicable, but she sought to persuade me that this time limit applied to the ACAS pre claims conciliation process. I find that this was not plausible as the Claimant had extensive sources of advice as to her rights. These sources on her own evidence included ACAS, MS, her Trade Union, (GMB), her new Union after she left the GMB, the Citizens Advice Bureau, Southend Advocacy and

Councillor Tony Cox. Given this, I find that it was reasonably practicable for the Claimant to have lodged her claim on or before 30 October 2021 which was the end of the primary time limit with the extension of one month granted under Section 207B(2)(a) and (b).

37. In the Claimant's response to the Respondent's application, the reason cited for the late submission of the Claim Form was the fact that the Claimant's appeal against dismissal was ongoing until 15 November 2021 and that was the reason why the Employment Tribunal process could not start until thereafter. She argued to me that the Respondent had deliberately extended the appeal process to prevent her from making a claim to the Tribunal. However, I am satisfied that the Respondent did not do this. I found as a matter of fact that the Respondent arranged her first appeal meeting on 15 October 2021 and that this was within the primary time limit for lodging a claim in the Tribunal. It was the Claimant who asked for an adjournment of that hearing because her representative Mr Cox could not attend. Indeed, at the appeal hearing on 9 November 2021, she clearly knew about the right to make a claim to an Employment Tribunal which was confirmed by her statement to the panel that she would *'take [the matter] to the Tribunal'.*

38. Given my above findings, I conclude that it was reasonably practicable for the Claimant to have filed her Claim Form within the primary time limit by no later than 30 October 2021.

39. Although strictly speaking I do not need to deal with Step 2 of the process as set out above, I will briefly do so. There was a delay between the date of the conclusion of the Claimant's appeal on 15 November and 6 December 2021 of three weeks before she submitted her claim to the Tribunal. She did not give an adequate explanation for this additional three-week delay. She said that she posted the Claim Form to the Tribunal on 20 November 2021 by first class post but produced no proof of postage. I find it unlikely that there would have been a delay from 20 November 2021 when she posted the form until 6 December 2021 when the Tribunal received the form as evidenced on the Claim Form in the bundle. Therefore, I am also not satisfied that the Claim Form was presented within a reasonable time of the original time limit expiring.

40. In conclusion, the Claimant's claims for unfair dismissal was presented out of time and the Tribunal has no jurisdiction to hear them. Accordingly, the claim must be struck out.

Employment Judge Hallen
Dated: 29 March 2023