EMPLOYMENT TRIBUNALS

Claimant: Ms G Howson

Respondent: Restore (Cumbria)

Heard at: Manchester (via CVP) **On:** 20 & 21 February 2023

Before: **Employment Judge Rhodes**

Representation
Claimant: In person
Respondent: Mr M Winthrop (solicitor)

JUDGMENT

1. It was not reasonably practicable for the claimant to have presented her complaints within the primary time limits and she presented them within a reasonable further period. The Tribunal therefore has jurisdiction to hear them.

2. The complaint of automatic unfair dismissal contrary to section 104(1)(b) Employment Rights Act 1996 is well founded and succeeds.

3. The complaint of unauthorised deductions from wages contrary to section 13 Employment Rights Act 1996 is well founded and succeeds. The respondent is ordered to pay the claimant the sum of £1,113.76 (gross).

4. The complaint of an infringement of the right to be accompanied at a disciplinary hearing pursuant to section 10 Employment Relations Act 1999 is well founded and succeeds.

5. The complaint of a failure to provide the claimant with a written statement of employment particulars contrary to section 1 Employment Rights Act 1996 is well founded and succeeds.

6. The complaint of automatic unfair dismissal contrary to section 100(1)(e) Employment Rights Act 1996 is not well founded and is dismissed.

7. The complaint of automatic unfair dismissal contrary to section 103A Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

Introduction and issues

1. The claimant complained that she had been automatically unfairly dismissed (pursuant to one of sections 100(1)(e), 103A or 104(1)(b) Employment Rights Act 1996 ("ERA 1996") and that she had suffered unauthorised deductions from wages. She also brought complaints that her rights to be accompanied (pursuant to section 10 Employment Relations Act 1999) and to receive a written statement of employment particulars (pursuant to section 1 of the Act) had been infringed.

2. During the course of the hearing, the respondent conceded that the claimant's right to be accompanied had been infringed.

3. The respondent had failed to present a response to the claim and did not apply to extend time. Pursuant to Rule 21(3), I permitted the respondent to participate in the hearing to the extent of helping to narrow the issues and make submissions.

4. The issues had been identified by Judge Allen at a preliminary hearing on 20th November 2022.

Evidence and bundle

5. I heard evidence from the claimant and was referred to an electronic bundle, of which there were, unfortunately, different versions each with slightly different pagination (which appeared to be a formatting error rather than there being any material differences between them).

The law

Extension of time limits

6. In respect of each of the complaints brought by the claimant, a tribunal may only extend time for presenting a claim where it is satisfied of the following:

- It was "not reasonably practicable" for the complaint to be presented in time.
- The claim was nevertheless presented "within such further period as the tribunal considers reasonable".

7. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. The EAT reiterated in *Cygnet Behavioural Health Ltd v Britton [2022] EAT 108* that:

> *"A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so." (Paragraph 53.)*

8. The factors that can be taken into account will vary from case to case. However, the following may be relevant:

- The manner of, and reason for, dismissal.
- Whether the employer's conciliation machinery had been used.
- The substantial cause of the claimant's failure to comply with the time limit.
- Whether there was a physical impediment, such as illness
- Whether and when the claimant knew of their rights.
- Whether the claimant had been advised by anyone and the nature of the advice given.
- Whether there was any substantial fault on the part of the claimant or their adviser which led to the failure to present the complaint in time.

9. The Court of Appeal in *Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470* also set out a number of legal principles distilled from a review of case law:

- Section 111(2) of the ERA 1996 should be given a liberal interpretation in favour of the employee.
- Regard should be had to what, if anything, the employee knew about the right to complain to a tribunal and of the time limit for doing so.
- Regard should also be had to what knowledge the employee should have had, had they acted reasonably in the circumstances. Knowledge of the right to make a claim does not, as a matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the employee to prove that their ignorance was reasonable.

10. Where the employee is prevented from presenting the complaint in time by serious illness, a tribunal would normally find it was not reasonably practicable for them to have done so. However, having an illness or medical condition during the relevant time will not in and of itself mean that an employee was reasonably prevented from presenting their claim in time or that the employee's condition meant that ignorance of the relevant time limit was reasonable.

11. Whether the illness is sufficient to make it not reasonably practicable to submit the claim in time will be a question of fact for the tribunal. Although it may be legitimate for the tribunal to consider what else the claimant had been able to achieve in the three months since dismissal, it should not assume that just because the claimant has managed to cope with certain difficulties that could have been (but were not) overwhelming, it would have been reasonably practicable to also cope with the burden of submitting a tribunal claim.

12. Reliance on unqualified advice from, say, ACAS to exhaust internal appeals before bringing an unfair dismissal claim (without reference to the statutory time limits) may render it not reasonably practicable for a claimant to lodge the claim in time. In *DHL Supply Chain Ltd v Fazackerley UKEAT/0019/18* , the EAT upheld a tribunal's decision that it was not reasonably practicable in the circumstances. However, it acknowledged that another employment tribunal may take a different view.

Qualifying and protected disclosures

13. A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the types of wrongdoing or failure listed in section 43B(1)(a)-(f) of the ERA 1996. This is broken down into five elements:

- Has there been a disclosure of information?

- Did the worker believe that the disclosure was made in the public interest?
- If so, was that belief reasonably held?
- Did the worker believe that the disclosure tended to show one of more of the matters listed in sub-sections 43B(1)(a) – (f)?
- If so, was that belief reasonably held?

14. A qualifying disclosure made to the worker's employer is a protected disclosure (section 43C(1)(a) ERA 1996).

Automatically unfair dismissal

15. There are certain circumstances in which the dismissal of an employee is deemed to have been automatically unfair. For the purposes of this claim, the relevant circumstance is where the reason, or principal reason, for the dismissal is that the employee:

- made a protected disclosure (section 103A ERA 1996); or
- in circumstances of danger which she reasonably believed to be serious and imminent, took (or proposed to take) appropriate steps to protect herself or other persons from the danger (section 100(1)(e) ERA 1996); or
- alleged that the employer has infringed a right of hers which is a relevant statutory right (section 104(1)(b) ERA 1996). Relevant statutory rights are defined in section 104(4) ERA 1996 and include the right not to suffer unauthorised deductions from wages (section 13 ERA 1996).

16. In the case of each of the above, the employee does not need to have completed the normal qualifying period for an ordinary unfair dismissal claim (section 108(3) ERA 1996).

17. Whilst it is implicit in the statutory wording that there can be more than one reason for a dismissal, "*in order to establish unfair dismissal, it is necessary for the Tribunal to identify only one reason or one principal reason for the dismissal*". (Court of Appeal in *Kuzel v Roche Products Limited [2008] ICR 799*).

18. Where the employee does not have the normal period of qualifying service for an ordinary unfair dismissal claim, she bears the burden of proving the reason for the dismissal (*Smith v Hayle Town Council [1978] IRLR 413*).

19. For the purposes of a claim under section 100(1)(e) ERA 1996, the Tribunal must ask itself:

- Were there circumstances of danger that the employee reasonably believed to serious and imminent?
- If so, did the employee take or propose to take appropriate steps to protect themselves or other persons from the danger?

20. For the purposes of a claim under section 104(1)(b) ERA 1996, the allegation of an infringement does not to be correct provided that it was made in good faith (*Mennell v Newell & Wright (Transport Contractors) Ltd [1998] EWCA Civ 2082*). Further, the claimant does not need to specify the statutory basis for the right which is alleged to have been infringed provided that the employee makes it reasonably clear what the right is (section 104(3) ERA 1996).

Preliminary issue – extension of time

21. Each of the claimant's complaints has a primary time of three months, which can be extended pursuant to section 207B ERA 1996 to take account of any period of Acas early conciliation. The relevant three-month period differed slightly in relation to each of the claimant's complaints.

22. The disciplinary meeting at which the claimant was not permitted to be accompanied took place on 19th October 2021. The primary time limit therefore expired on 18th January 2022.

23. The claimant's effective date of termination was 26th October 2021, at the expiry of one week's notice given on 19th October 2021. The primary time limit for unfair dismissal therefore expired on 25th January 2022.

24. The claimant complains that she was underpaid from 25th June 2021 onwards and that she suffered a series of unauthorised deductions from wages, the last of which occurred on 15th November 2021, being the date on which her final salary payment was made. The primary time limit therefore expired on 14th February 2022.

25. Other relevant dates are:

The claimant's appeal against dismissal:	17th January 2022
Commencement of Acas early conciliation:	21st March 2022
Acas early conciliation certificate:	29th March 2022
Presentation of the Tribunal claim:	14th April 2022

26. The claimant's evidence as to her circumstances between 19th October 2021 and 14th April 2022 was unchallenged and the relevant findings are set out below.

27. The claimant is a vulnerable person with a history of trauma. She was so traumatised by the meeting on 19th October 2021 at which she was dismissed that, having left work, she lay down in a busy road and had to be helped home.

28. The bundle contained a letter from a trauma practitioner who treated the claimant during this period which said that the claimant "*feels unable to leave her home at times without support. Simple tasks, running errands, managing finances as well as social interactions with strangers are anxiety-provoking situations that have had a physical and psychological impact on her.*"

29. The claimant was struggling to manage her own affairs and got into rent arrears. She was heavily reliant on her therapist and was not fit enough to conduct her own research into her employment rights. In the circumstances, it was reasonable for her to have relied on the (unqualified) advice of her therapist that, to preserve her rights, she must submit an appeal against her dismissal to the respondent within three months of the end of her employment.

30. Despite still not being well enough to cope with her own affairs, the claimant (relying on her therapist's advice) appealed to the respondent on 17th January 2022. The respondent rejected her appeal in a letter dated 9th February 2022 but I accept the claimant's evidence that she did not receive that outcome letter on the basis that, if she had received it, she would not have chased the respondent for an outcome in March 2022.

31. In chasing for a response, the claimant set a deadline for an outcome of the end of March 2022. Having then been informed that the appeal had been rejected, she promptly contacted Acas on 21st March 2022 and thereafter acted promptly in presenting this claim on 14th April 2022, having received the Acas early conciliation certificate on 29th March 2022. By this time, the claimant had recovered sufficiently to feel well enough to pursue a claim.

32. I am satisfied that it was not reasonably practicable for the claimant to have presented any of her complaints within their respective primary time limits by reason of her ill health. In view of her circumstances at the time, it was also reasonable for her to have relied heavily on advice from her therapist. The fact that that unqualified legal advice was incorrect resulted in reasonable and excusable ignorance on the claimant's part. She acted on that advice in good faith.

33. The steps she took after the expiry of the primary time limits was prompt and led to her presenting her complaint within a reasonable period thereafter. As the claimant's health improved, she was going through the proper channels, in appealing the decision, chasing for an outcome, contacting Acas and presenting her claim. All those steps were reasonable and they were taken within a reasonable time frame.

34. For these reasons, the claimant was granted an extension of time until 14th April 2022 in respect of all her complaints.

Substantive issues – findings of fact

35. The claimant's evidence was unchallenged and the relevant findings are set out below.

36. The respondent is a registered charity which sells recycled pre-owned items in its shops in the Carlisle and Penrith areas. The claimant's started her employment with the respondent on 21st June 2021. The expectation was that the claimant would at the respondent's furniture shop which was open five days per week. On this basis, she was contracted to work 30 hours per week at £8.91 per hour. However, as things turned out, the claimant managed the respondent's Morton shop which was open six days a week. The job description for that role specified a 35-hour week and the claimant worked at least 35 hours per week from 25th June 2021 onwards but was paid for only 30 hours throughout her employment.

37. On 2nd July 2021, the respondent's Human Resources Adviser asked the claimant to complete a payroll form. The claimant did so and stated that her hourly rate was £9 which was what she thought was the rate she had been offered at interview. When the claimant told Rachel Nutley that she had completed and returned the form, Rachel Nutley was unhappy at her for doing so and told her that her hourly rate was £8.91. She expressed irritation that the claimant had created more work for her and told the claimant that she had "*gone above [her] station*".

38. On 7th July 2021, the claimant informed her manager (Rachel Nutley), orally and by text message, that volunteers were stealing from the shop and they had verbally threatened the claimant when she challenged them ("Disclosure 1"). There followed a series of texts between the claimant and Rachel Nutley in which Rachel Nutley responded in a way which appeared sympathetic and supportive.

39. The risk of theft and the possibility of the claimant's being threatened were exacerbated by the lack of a functioning lock on the back door of the shop, through which an intruder had gained entry. There was also no lock on the shop toilet which left the claimant feeling vulnerable. To address this, the claimant got the respondent's permission for her father to fit locks to both rear and toilet doors.

40. On 8th July 2021, the claimant sent Rachel Nutley photographic evidence of rats in the shop's toilet ("Disclosure 2"). The following day, Rachel Nutley passed on praise for the claimant's handling of the rat problem from one of the respondent's trustees.

41. On 13th July 2021, the claimant showed Rachel Nutley mould in the shop and evidence of water getting into the electrics ("Disclosure 3").

42. The same day, Rachel Nutley sent the claimant a text to say that she was increasing the claimant's hours to 37½ per week. In spite of this, the claimant continued to be paid for only 30 hours per week.

43. On 9th August 2021 informed Rachel Nutley orally and by text message that she had been threatened while working in the store ("Disclosure 4"). Following this incident, Rachel Nutley emailed the claimant to ask "*I hope you're ok after today? Been thinking of you and just wanted to say we still want you at Restore*".

44. On 11th October 2021, the claimant showed Rachel Nutley water running into the electrics ("Disclosure 5").

45. On 12th October 2021, the claimant emailed Rachel Nutley to inform her that the shop's lights were faulty ("Disclosure 6").

46. By the morning of 15th October 2021, the claimant had been made aware that the respondent was going to investigate allegations against her concerning the closing of the shop and alleged inappropriate behaviour towards a trustee and a volunteer. The claimant was disheartened by the allegations and enquired about how much notice she would need to give to resign.

47. Later the same day (15th October 2021), the claimant sent an email to Karen Parr to say "*I am not sure I have being [sic] paid for 37.5 hours per week would you be able to look into this for me*." The following day, the claimant emailed HR in similar terms.

48. Meanwhile, on 16th October 2021, one of the respondent's trustees, Eleanor Hancock, emailed the claimant to invite her to attend "*an informal meeting to investigate*" the above allegations. The meeting was scheduled for 19th October 2021.

49. The claimant replied by email the same day to confirm her attendance and to ask if she could bring a companion and call any witnesses. Eleanor Hancock replied the same day to say "*this isn't a disciplinary so no witness needed or allowed…it's an investigative conversation about what's been going on… if it seems there's stuff to talk about formally you will receive a letter and a copy of the appropriate policy then, plus guidance on who can accompany you*."

50. At the meeting, contrary to the assurance about its nature that had previously been given to the claimant, she was dismissed on one week's notice for the stated reason of "*unsatisfactory time on probation*". Eleanor Hancock told the claimant that she was *"not cutting it as a manager*" and that she had gone above her station in querying her pay with HR, which was the same formulation of words used by Rachel Nutley after the claimant had incorrectly completed the payroll form on 2nd July 2021.

51. As already dealt with above, the claimant was traumatised by the outcome of the meeting.

Conclusions

Automatically unfair dismissal – section 103A

52. Each of the Disclosures 1 to 6 amounted to protected disclosures. In each case, there was a disclosure of information which the claimant reasonably believed was in the public interest.

53. Disclosure 1 amounted to a disclosure that a criminal offence had been, was being or was likely to be committed.

54. Disclosures 2 to 6 amounted to disclosures of information that the health and safety of any individual had been, was being or was likely to be endangered. In addition, they were disclosures of information that the respondent had failed, was failing or was likely to fail to comply with the legal obligation to provide a safe working environment for the claimant and others.

55. The claimant had a reasonable belief in all of the above and that they were made in the public interest.

56. They were therefore all qualifying disclosures and, as they were made to the claimant's employer, they were protected disclosures.

57. However, the claimant has not established that there was any causal link between the making of her disclosures and her dismissal. Rachel Nutley's responses to the disclosures tended to be supportive and there is no evidence to suggest that the claimant was dismissed for having made them. On the contrary, Rachel Nutley's response Disclosure 4, for example, was "*we still want you at Restore*". The claimant also received praise for her handling of the rat problem.

58. On this basis, the complaint under s103A fails.

Automatically unfair dismissal – section 100(1)(e)

59. The lack of a functioning lock on the rear and toilet doors of the shop represented circumstances of danger which the claimant reasonably believed to be serious and imminent in view of the fact that there had been an intruder, thefts from the shop and threats to the claimant. Obtaining permission for her father to fit locks to those doors was an appropriate step to protect herself from that danger.

60. However, the claimant has not established that there was any causal link between her father's fitting of the locks and her dismissal. The respondent gave permission for the locks to be fitted and having them fitted made the shop more secure. It is inconceivable that the respondent would have dismissed her for this.

61. On this basis, the complaint under section 100(1)(e) fails.

Automatically unfair dismissal – section 104(1)(b)

62. The emails which the claimant sent to Karen Parr and HR on 15th and 16th October 2021 respectively amounted to assertions that the respondent had made unauthorised deductions from the claimant's wages. Although the claimant's emails were expressed politely, they clearly evidence the claimant's belief that she may have been underpaid. The nature of the complaint would have been obvious to the respondent. Even though it is not necessary for the relevant right actually to have been infringed, the claimant (for the reasons set out below) was correct in her assertion that she had been underpaid.

63. For the following reasons, I find that the sending of these emails was the reason, or principal reason, for her dismissal.

64. The stated reason for the claimant's dismissal ("unsatisfactory time on probation" and "not cutting it as a manager") is not a plausible one. All the indications are that the claimant had been performing well. She had not been told that she was in a probation period and had not been given any metrics by which her performance would be assessed. She had not been told at any point that her performance was unsatisfactory or that she was in danger of failing her probation. On the contrary, she had received positive feedback and praise and, as noted above, Rachel Nutley reassured her after she had been threatened on 9th August 2021, "*we want you to stay at Restore*".

65. As of the morning of 16th October 2021, the respondent was not contemplating the termination of the claimant's employment. The claimant was told, in express terms, that the meeting on 19th October 2021 was an informal one and had been arranged for the purpose of investigating allegations against the claimant.

66. Something therefore changed between the morning of 16th October 2021 and the meeting on 19th October 2021 to cause the respondent to decide to dismiss the claimant. The only material interceding event was the email the claimant sent to HR on 16th October 2021 (which was after she received the email assuring her that the meeting was an informal one).

67. To add weight to this is the comment Eleanor Hancock made to the claimant at the meeting on 19th October 2021 to the effect that she had gone above her station in contacting HR about her pay. This was strikingly similar to Rachel Nutley's response to the claimant's filling in the payroll form.

68. Following her dismissal, the claimant sought evidence in support of her alleged poor performance as a manager, via a data subject access request and an appeal, but no such evidence was provided, further detracting from the plausibility of the stated reason for dismissal.

69. For these reasons, I find that the reason (or principal reason) for the claimant's dismissal was the assertion of her statutory right not to suffer unauthorised deductions from wages. Her complaint under section 104(1)(b) therefore succeeds.

Unauthorised deductions from wages

70. The respondent accepts that the claimant was paid throughout her employment at national minimum wage rates on the basis of a 30-hour week. These are the hours it was assumed she would work if she had gone to work at R's furniture store. However, the JD for the job she actually undertook (Charity Shop Manager) was for 35 hours per week.

71. The claimant worked Monday to Saturday from 9am to 4.30pm. Even allowing for a one hour lunch break every day, that amounted to 39 hours per week. The claimant, however, limits her claim to 35 hours per week for 25th June to 13th July 2021 (2½ weeks) and 37½ hours thereafter based on text from Rachel Nutley dated 13th July 2021 in which Rachel Nutley said that her hours would increase to 37½ (a period of 15 weeks until the end of her employment).

72. I find in the claimant's favour in respect of these two aspects of her claim. She was clearly working well in excess of 35 hours per week and both the job description and Rachel Nutley's text support the claimant's claim in this respect. The gross total payable to the claimant is:

Shortfall in respect of 2½ weeks @ (35-30 hours) x £8.91 = £111.38

Shortfall in respect of 15 weeks @ (37½-30 hours) x £8.91 = £1,002.38
Total = £1,113.76

73. I do not find for the claimant in respect of her overtime claim. The claimant has not discharged the burden of proof in respect of overtime hours and she herself accepted that her figures were only 'guestimates'.

Failure to provide a written statement of employment particulars

74. The claimant was not provided with a written statement of particulars contrary to s1 ERA.

Employment Judge Rhodes
Date: 15th May 2023

JUDGMENT SENT TO THE PARTIES ON
23 May 2023

OR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
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