EMPLOYMENT TRIBUNALS

Claimant: Ms N Stephenson-Gill

Respondent: Virgin Atlantic Airways Ltd

Heard at: Reading (by CVP)

On: 6 and 7 March 2023

Before: Employment Judge Eeley

Representation
Claimant: In person
Respondent: Mr T Brown, counsel

JUDGMENT having been sent to the parties on 13 March 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The task for the Tribunal today is a very specific one. It relates to the claimant's application to pursue a claim of unfair dismissal in relation to her employment with the respondent. I have a very specific task which is laid down for me by the relevant legislation (section 111 Employment Rights Act 1996). I have to apply a test to determine whether a claim which has been presented to the Tribunal outside the normal three-month time limit should, nevertheless, be allowed to proceed to a final hearing to be determined on its merits. First, I have to determine whether it was 'not reasonably practicable' for the claim to be presented to the Tribunal within the relevant time limit. If I conclude that it was not reasonably practicable to comply with the time limit, I then have to consider whether the claim was presented to the Tribunal 'within such further period as the Tribunal considers reasonable' (section 111(2)(b) Employment Rights Act 1996.)

2. I remind myself that this is a relatively strict test. It is not by the same as the 'just and equitable' discretion to extend time in claims governed by the Equality Act 2010. It does not involve consideration of the same factors or the same balancing exercise as might be required where the 'just and equitable' test is applicable.

3. I remind myself that the test of reasonable practicability is often referred to as a test of reasonable feasibility. I need to discover the reason for the delay in presenting the claim and whether there was really any impediment

to the claimant in complying with the time limit. If there was an impediment I need to find out what it was. I need to apply a rest of 'reasonable *practicability*' rather than a test of reasonable *possibility.*

4. I remind myself of the contents of the judgment, the principles it summarises, and the decision in Cygnet Behavioural Health Ltd v Britton [2022] IRLR 906 to which I have already been referred. I will not traverse it in detail here given that we were taken to it in closing but, as I say, I need to look at the substantial cause of the failure to comply with the time limit, I need to look at whether the claimant knew of her rights, whether she had any advice about the claim and whether she was herself at fault in not complying with the time limit. I then have to look at whether the claimant acted reasonably quickly thereafter to present the claim outside of the primary time limit.

5. So, first, a procedural chronology. The key procedural dates in this case are:

   5.1 The effective date of termination, which was 7 January 2021. That was the date which started the clock running initially for the presentation of the claim of unfair dismissal.

   5.2 On 6 April 2021 the primary limitation period expired (the primary three months.)

   5.3 On 28 July 2021 the initial notification was made to Acas for the purposes of Early Conciliation. This was the start of the Early Conciliation period.

   5.4 The Early Conciliation certificate was issued on 8 Septemebr 2021.

   5.5 The claim was presented to the Tribunal on 7 October 2021. That is the end of the relevant period and is the material date that I have to consider in looking at the length of the delay in presenting the claim and the reasons for that delay.

6. I should make the point before I move on, that because Early Conciliation took place outside the primary three-month time limit, there is no applicable extension of time under the Early Conciliation rules. No extra time is added on to the limitation period to take account of the time required to go through Early Conciliation. That leads us to the conclusion that the claim form was presented some six months late.

7. Next, a broader chronology arising out of the facts of this case. I have heard and seen evidence that this case focusses on a set of redundancy processes undertaken by the respondent. There were two phases: Phase 1 in May 2020 and Phase 2 in September 2020. In both phases the respondent had a 'holding pool' concept, something which was designed to facilitate keeping a talent pool on standby. The respondent would thus be ready to be re-employ those who had recently been made redundant rather than going out to look for recruits in the wider employment market. There was a hope or expectation that those recently dismissed might be able to return to work for the respondent in the near future. However, that was subject to the various changing circumstances over the period of time with

which we are concerned. Those are the circumstances which arose from the Covid 19 pandemic, and the rapidly changing circumstances facing all employers. The circumstances facing those who were engaged in international travel were particularly challenging given that international flights were grounded for a considerable period of time and it was not known particularly far in advance at what point the flights would restart.

8. It is clear from the documentation before the Tribunal, that people in the holding pool were no longer the respondent's employees. They were effectively on a list for potential re-engagement. The idea was to keep those who were experienced working within the respondent on the books only to the extent of being in the holding pool ready for re-engagement. The holding pool concept also meant that it might be possible to bypass the lengthier and more arduous recruitment process which would be required for a completely fresh, 'new-starter' employee. It might also have an impact on the amount of training that was required to 'on-board' an employee. Those coming back to employment from the holding pool would retain the level of seniority that they had accrued prior to redundancy. However, they would not continue to accrue seniority or length of service during their time within the holding pool. So, effectively, the level of seniority froze at termination and restarted at re-engagement rather than being 'reset' to zero at re-engagement.

9. On 5 May Phase 1 of the redundancies were announced. All Cabin Crew were placed at risk of redundancy. It was initially announced that the holding pool would only apply once employment had been terminated, that those in the pool would be free to accept employment elsewhere, and there was no obligation to return to work for the respondent. There was also no guaranteed offer of re-employment. The idea at that stage was that the holding pool would be in place for two years and would then lapse.

10. The claimant was put at risk of redundancy in Phase 1. Various documents were sent out to her in and around May 2020 which included the document at page 80. This referred to the introduction of the holding pool for the 1,250 crew who had been made redundant. It indicated that the pool was for people whose employment had already ended rather than current employees.

11. Page 95 in the bundle makes it clear that the holding pool was to apply after redundancy pay had been paid and that individuals could leave the pool at any time. It states in terms that everyone in the holding pool would have ceased employment within the company.

12. On 30 May (page 118), the trade union made it clear that redundancy pay would be paid to any individuals before they entered the holding pool. At page 139 there was an indication that those in the pool would hand back company property before entering the pool, although that may have changed by the time the respondent got to Phase 2 of the redundancy programme. Page 140 confirmed that length of service and seniority would not continue to accrue whilst in the pool.

13. On 11 June 2020 the respondent confirmed that the claimant had not been selected for redundancy in Phase 1 and would continue in employment.

14. In August 2020 the claimant received a document from the trade union indicating, amongst other things, what the relevant time limits were for unfair dismissal claims in the Tribunal and also signposting the need to engage in Acas Early Conciliation.

15. On 4 September 2020 the second phase of the redundancies was announced. Again, all employees made redundant in that phase were offered the opportunity to be placed in the holding pool. A video announcement made it clear that anyone in the holding pool would no longer be an employee and could go elsewhere for employment. I have seen reference in the documentation (at page 157) to an internal furlough scheme. The idea was that those who did not get retained on furlough/CCRS, would be made redundant but they would be placed at the top of the existing holding pool (in performance order.) However, the available evidence did still make it clear that those in the holding pool were ex-employees and could find and take alternative employment. The feature of the documentation was that it was trying to be encouraging and to be hopeful that when flying 'ramps up' everyone will come back to work but there was no express guarantee of this given in the documents that I have seen. Again, I have got the video transcript from 4 September which reiterates those points (page 162.)

16. On 15 September the respondent confirmed that the claimant had been provisionally selected for redundancy. The claimant filled in a risk preference form indicating, at page 200, that she wanted to enter into the furlough scheme, the CCRS scheme.

17. On 22 September 2020 the claimant was sent a letter that confirmed that she was at risk of redundancy and offered her a place in the holding pool and confirmed that she had not been successful in getting into the CCRS, the furlough scheme. I note that when she went into the holding pool, perhaps after some delay, she did receive her accrued pay and redundancy pay (calculated as at the date of termination.) She was not receiving continued wages in any form for the period she spent in the holding pool. Again, the terms of reference in September 2020 for the holding pool reiterate that the incumbents are not employees. There are updates to say that the individuals can look for other jobs but with a modification to indicate that if they do come back to the respondent from a different airline there may be training complications and a longer training requirement. The next sentence says in terms that the respondent does not have a direct contractual obligation to a former crew member to offer them re-employment. The respondent was therefore being upfront to that extent. How the claimant herself interpreted what she was receiving by way of communications may have differed from the content of the documentation when viewed holistically. She may have interpreted it in her own way (for understandable reasons.)

18. Page 216 of the bundle was the Phase 2 selection matrix. Again, there are comments within that that the claimant relies upon about strong performers etc. My observation is that the respondent was making it clear (in line with the evidence given to the Tribunal) that the mere fact that someone was in Phase 2 of a redundancy selection process did not automatically mean that they were a poor performer. In fact, such an individual would have survived

the first tranche of redundancies, probably as a result of stronger scores. However, that is not the same as guaranteeing a return to work for the people in Phase 2.

19. On 30 September 2020, an email was sent to those in the holding pool to notify them that, whilst they were no longer employees, there would be quarterly newsletters to update them. The claimant was put on the holding pool email distribution list.

20. On 14 October the claimant had her individual consultation meeting. She was then emailed the notice of termination and told that the effective date of termination would be 7 January. She was offered a place in the holding pool subject to the terms of reference. The claimant then appealed against the dismissal with 29 grounds of appeal. At that point it is evident that, irrespective of the alleged quality of any such support, she is still interacting with (and being supported by) her trade union.

21. On 9 November the appeal outcome was issued. The appeal was partially upheld but not to the extent that the decision to dismiss was overturned.

22. On 11 April the claimant issued further appeal points. Mr Borsberry dealt with those in the coming days and weeks.

23. On 24 November the claimant received an email confirming that the outcome of the appeal did not affect the redundancy dismissal.

24. On 8 December the claimant contacted Mr Hodges. There was further correspondence with both Mr Borsberry and Mr Hodges in January. The documents suggest that the claimant received her redundancy pay and the P45 on 20 January 2021. She received further information about scoring and engaged in correspondence about that on 21 January and 27 January. There are further emails from the claimant suggesting a focus on a return to work from the holding pool around about 11 February.

25. In any event, on 17 March, the claimant got a legal advice summary letter from her trade union (page 403.) It does seem to give some negative advice regarding prospects of success but crucially, for the purposes of this preliminary issue, it reiterates the time limit information and makes it apparent that it is the claimant's job to lodge a claim if she decides to do so.

26. 6 April, as I have already indicated, was the end of the three-month limitation period. The claimant's evidence to me was that she had made her mind up at that point *not* to bring the claim, albeit she says that that decision was based, at least in part, on what she characterised as misleading information by the respondent and (to some extent) by the trade union. However, she had made a calculation as to what was in her best interests at that point.

27. On 6 May 2021 there was further communication from the respondent that it hoped that international travel would 'ramp up' and that contracts would be offered to those in the holding pool in perhaps August 2021. Those in the holding pool were asked to register their intention to return to employment with the respondent given that they might in fact have got jobs elsewhere in the meantime. At this point the respondent indicated that there would be a

short online interview rather than an automatic selection for re-engagement based on previous scores.

28. In May 2021 the claimant was interviewed by video. Unfortunately, she failed to secure a post and was removed from the holding pool. She exited that holding pool on 1 July 2021.

29. It is worth setting out that chronology in detail so that we can follow through what was facing the claimant at every stage of this process and what her related thought processes were.

Conclusions

30. So, I draw the following conclusions. The claimant knew what the effective date of termination was; she knew about the time limits applicable in the Tribunal before they actually expired; she knew that 6 April was an important date; she knew the basis on which she thought her selection for dismissal was unfair (hence the detailed grounds of appeal and subsequent correspondence which she engaged in.) So, she was armed with the knowledge that she needed in order to make a claim before 6 April. If she was going to claim unfair dismissal it would be based on what had happened up to the effective date of termination and her selection to go into the holding pool. It would not be based on an argument about reselection for employment and a return to work out of the holding pool. The events surrounding termination of employment would be the core of the unfair dismissal claim. So, the claimant possessed all the relevant and necessary knowledge and information to be able to make the claim within the three-month period. She made a conscious decision *not* to make a claim at that point to avoid, in her words, "Rocking the boat", in case it jeopardized her return to work from the holding pool. That was a strategic decision for the claimant. She was free to make it, to assess her best interests and to try and work out what was likely to happened going forwards. There is nothing about that strategic decision or the information that she had that meant that it was not reasonably feasible, not reasonably practicable, to present the claim in time. She made the decision (a decision she might have dealt with differently with the benefit of hindsight) but she did make a conscious and informed decision.

31. The claimant says that she made that litigation strategy decision on the basis of false assurances from the respondent that there was a guaranteed return to work. A layman might well say, "if I'm going to be coming back to work anyway, why should I rock the boat?" As I say, the reality is that even if the assurances she says that she had from the respondent led her reasonably to conclude that there was a guaranteed option to return to work (and I make no such finding) that does not mean that it was not reasonably practicable to present the claim anyway and within the time limit. There was no impediment to presenting the claim form. These sorts of consideration might carry more weight in applying the 'just and equitable' extension test in an Equality Act context. I am not going to venture into that territory as it is a different test for a different day.

32. The reality is that there was no guarantee of a return to work in the documents she received. The claimant relied on some portions of the documentation and ignored others. She knew that she was in the holding

pool and she knew she had been dismissed. She thought she would be one of the first to come back to work from the pool. The respondent had expressed that hope and expectation but not guaranteed it. The claimant understandably wanted to see such a guarantee but, objectively, that was not present in the documents and the evidence that I have seen. The respondent had not said to the claimant: 'you remain an employee.' It had not said to her she could not get a job elsewhere. It had not told her that the time limit had not started to run for the unfair dismissal claim. She knew the time limits. She knew what the trade union had said to her even if she did not think it was good advice. She had to make a decision for herself as to what to prioritise at that point and whether she wanted to preserve her claim of unfair dismissal by presenting it within the time limit or not.

33. The claimant has characterised her situation as a 'temporary displacement' but that is not what it was. In law it was a termination and nobody had used the language of 'temporary displacement' to her. She took a gamble on that, for perhaps understandable reasons. She actually accepted in evidence that she had made a conscious decision not to bring a claim. It was not the case that she could not bring the claim. Rather, she chose not to.

34. I must just respond to a couple of points made by the claimant in submissions. She raised the issue of the retention of uniform. I understand what the claimant reads into that and that there was a change between Phase 1 and Phase 2 in her mind but, realistically and reasonably, it does not override the clear communications made to her that her employment had come to an end.

35. The claimant referred to the training issues if she were to return to work for the respondent from another airline. When read in context the respondent was not saying that she could not return to the respondent from another job elsewhere. Rather the respondent was giving her information about the impact that it would have on training and the relevant procedures.

36. The claimant talked about the reassurance that she was at the top of the holding pool and would be one of the first to return to work. I see what she thought and what was said to her but that does not mean that it was not reasonably practicable to bring the claim. It is a separate issue. It relates to post-termination issues rather than to the dismissal itself. Likewise, the fact that she did not realise at the expiry of the time limit that she would have to go through an interview (she was first told about that in May) does not mean that she could not have complained about unfair dismissal before 6 April. Again, this is an issue surrounding a potential return-to-work, a re-recruitment issue, and not a fairness of dismissal issue. The claimant might well have made a different strategic decision but that is not the legal question before me which is and remains the test of reasonable practicability. In any event, I note that although she did not know about the interview until May, she did know about it well in advance of the date she actually presented her Tribunal claim form in October. If this factor was genuinely a 'game changer' from the claimant's perspective, one might expect the claim to have been presented as soon as possible after she became aware of the interview or, at the very least, once she exited the holding pool.

37. So, drawing that all together, she knew the dismissal date, she knew the time limits, she knew the basis of any claim that she would make for unfair dismissal, there was nothing preventing her from deciding to claim within the limitation period. She made an active choice and, therefore, it was reasonably practicable for her to bring the claim within time.

38. In any event, if I had found that the claimant had passed that first limb of the test and concluded that it was not reasonably practicable to present the claim in time, I would still have found that she delayed too long thereafter in bringing her claim. She knew in July that she had left the holding pool. At that point, at the very latest, she should have been looking to make the Tribunal claim because she knew that she was not going to be brought back to work through the holding pool. At that stage she had nothing to lose even based on her own characterisation of events. So, the issue of being misled by the respondent (even if I had accepted it), ceases to be effective at that point. We know from the evidence that the claimant spoke to solicitors in July but did not put the claim to early conciliation until the end of July. She did not get the certificate as soon as the rules allowed for. Instead, it was produced in September. We can speculate as to why that delay took place, whether there were other things going on at the time, whether her solicitors were engaged in dealing with other claimants in the multiple but that is not in itself a good reason for delaying further. Even once the certificate was issued, her solicitors waited a further month on her behalf before putting the claim in. I note that the unfair dismissal part of the claim form is not particularly lengthy or complex. A claim to that extent could have been put in as soon as possible, as a protective measure, and could then have been consolidated with the group of claims in the multiple. Instead, the tribunal claim was presented three months after she was told she had exited the holding pool and six months after expiry of the three-month time limit.

39. All of the above leads me to conclude that it was reasonably practicable for the claimant to have brought the claim to the Tribunal within the relevant time limit. In any event, the claimant would fail on the second limb of the statutory test. She did not present the claim within such further period as is considered reasonable. The claim does not pass the test in the legislation and I therefore decline jurisdiction for the unfair dismissal. The unfair dismissal claim will, accordingly, be dismissed.

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Employment Judge Eeley

Date: 29 May 2023

Judgment sent to the parties on

30 May 2023

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For the Tribunal office