EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000181/2022

Held at Aberdeen on 17 May 2023

Employment Judge N M Hosie

Mr Z Dzingus	**Claimant** **In Person**
W & W Mackie Ltd	**Respondent** **Represented by** **Ms V Robson,** **HR Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the claim is time-barred and is dismissed for want of jurisdiction; and

2. the claim is struck out as having no reasonable prospect of success, in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction

1. Mr Dzingus brought a claim of automatic unfair dismissal on the ground of having made protected disclosures to the respondent, under S.103A of the Employment Rights Act 1996 ("the 1996 Act"), often referred to as whistleblowing. The respondent admitted the dismissal but claimed that the reason was gross misconduct and that it was fair.

2. This case called before me by way of a preliminary hearing to consider the following issues:-

- Time-bar
- Whether the claim should be struck out as having no reasonable prospect of success, in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure")
- Whether the claim should be struck out as it was no longer possible to have a fair hearing in respect of it, in terms of Rule 37(1)(e).

Preliminary Hearing

3. The claimant represented himself at the hearing. The respondent was represented by its HR representative, Ms Robson. I heard evidence from the claimant and Ms Robson but only in respect of the time-bar issue and, in particular the effective date of termination of the claimant's employment which was disputed. The hearing was a so-called "hybrid one". The claimant was present at the Aberdeen Tribunal office. Ms Robson gave her evidence by way of video conference, using the Cloud Video Platform ("CVP"). The claimant, who is Lithuanian, also had the benefit of an Interpreter who also appeared by way of the CVP.

4. In addition, each party submitted a bundle of documents ("C" and "R").

Time-bar

5. The position was summarised by Employment Judge Kemp in a Note which **he issued following a case management preliminary hearing on 6 February 2023 (.56-62). He said this in his Note under the heading "Jurisdiction", which I am satisfied is an accurate summary of the issue (P.58/59):-**

"The parties take different positions on the date of termination of employment. The claimant says that it was on 22 August 2022 when he received a form from HMRC referring to the termination of employment. The respondent says that it was on 6 August 2022 when a letter of dismissal was sent to the claimant by first class post, and by recorded delivery. It states that the recorded delivery letter was returned as "refused". The effective date of termination of employment is a matter which will require to be determined at a Preliminary Hearing. If it is on or after 17 August 2022 then the claimant may, subject to what follows, be in time. If not, then, again subject to what follows, it may not be, and be outside the jurisdiction of the Tribunal to hear it, which would mean that it would not be capable of being heard.

The respondent stated that it had not had any contact with ACAS and may raise an issue as to jurisdiction on that basis. There is on the file an ACAS Certificate which the respondent has not seen (R.55). I have requested the clerk to send that to Ms Robson. It states on the face of it, that Early Conciliation was commenced on 17 November 2022 and that a Certificate was issued on 25 November 2022. The Claim Form was presented on 14 December 2022. On the face of that Certificate, if the effective date of termination was 22 August 2022 then the claim was in time. If however there was an issue over that Certificate then matters may be different.

In the event that the claim form is held to be presented outwith the time limits provided by Section 111 of the Employment Rights Act 1996, and having regard to the provisions on Early Conciliation, the Tribunal will not have jurisdiction unless (i) it was not reasonably practicable to have presented the

claim form in time and (ii) the claim form was presented within a reasonable period of time thereafter.

The provisions on Early Conciliation (EC), summarised very briefly, are as follows. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 provide in effect that within the period of three months from the relevant date for a claim, here the effective date of termination of employment, EC must start, doing so then extends the period of time-bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable.

These are all matters on which the Tribunal will require to hear evidence. I have provided for that below in the Orders. Arrangements for the hearing are also set out below."

6. When he gave evidence at the preliminary hearing, the claimant confirmed his previously stated position, namely that he was not aware of his dismissal until he received correspondence from HMRC dated 15 September 2022 which stated that his benefit had ceased on 22 August 2022 (C.12); and that his "leaving date" was 22 August 2022 (C13/14).

7. He denied that he had received the dismissal letter dated 6 August 2022 from the respondent (R15/16). He claimed that the only correspondence he received from the respondent was its letter of 29 July 2022 informing him that there would be a Disciplinary Hearing on 6 August (C2). He also accepted that previously he had received from the respondent copies of the Minutes of

the investigation meeting on 8 July 2022 (C3-5), along with copies of the relevant witness statements (C6-11).

8. This conflicted with the evidence which I heard from Ms Robson. The claimant did not attend the disciplinary hearing on 6 August, but the respondent decided to proceed in his absence. In attendance at the hearing were Ms Robson and Mr William Mackie. On 6 August 2022, they prepared a dismissal letter which was signed by Mr Mackie (R15/16). Ms Robson's evidence was that her standard practice was to send letters of this nature both by "special delivery" and also first class post and that this was done by Mrs Mary Mackie that day. The special delivery letter was returned marked "not signed for" but the first class letter was not.

9. The issue for me, therefore, was whether or not, on the balance of probabilities, the dismissal letter was received, in the ordinary course of the post, by the claimant , on 7 August 2022.

10. I decided that the respondent's evidence was to be preferred. Ms Robson gave her evidence in a measured, consistent and convincing manner and presented as credible and reliable. In addition, there was produced a statement from Mrs Mackie confirming that she had posted the dismissal letter on "Saturday 6 August 2022 at 13.02" by first class post and also special delivery (R.88).

11. Further, Mr Dzingus was aware that there was to be a disciplinary hearing on 6 August and his evidence that he took no steps to ascertain the outcome of that hearing and only became aware that he had been dismissed when he received the correspondence from HMRC dated 22 September 2022 was not at all convincing and neither credible nor reliable, in my view. There was also produced the P45 which the respondent had issued which gave as his "Leaving date", 12 August 2022 (R91-93), along with a copy of the respondent's payroll details for the claimant which also gives 12 August 2022 as his "Leave Date" (R94).

12. Accordingly, I arrived at the view that, on the balance of probabilities, the dismissal letter of 6 August 2022 was sent to the claimant that day by first class post and that it probably would have been received by him, in the normal course of the post, the following day. The effective date of termination of the claimant's employment, therefore, was 7 August 2022.

13. Further, and in any event, even if the effective date of termination was 12 August 2022, as the respondent had recorded in some of its records, it was still before 17 August 2022 which means, in either event, that the notification to ACAS on 17 November 2022 (R55) was not timeous, as it was outwith the three month time limit.

14. I arrived at the view, therefore, that the claim was time-barred.

15. However, as explained by Employment Judge Kemp, the matter does not end there as I have a discretion to extend the time limit if I am satisfied (i) that it was not reasonably practicable to present the claim form in time and (ii) the claim form was presented within a reasonable period of time thereafter, in terms of s.111(2) of the Employment Rights Act 1996.

16. It is clear that the relevant statutory provisions require an examination of the particular facts and circumstances of each case. What is "reasonably practicable" is a question of fact, the onus being on the claimant to establish that it was not "reasonably practicable" for him to present the claim form timeously.

17. I also heard evidence from the claimant in this regard. He had taken advice from a solicitor in London (see R6, for example) and he accepted that she had advised him of the three month time limit and the requirement to submit the ACAS notification. He continued to maintain, however, that the effective date of termination of his employment was 22 August and that the notification to ACAS was timeous.

18. The fact that the claimant was aware of the three month time limit and had taken advice was significant. Further, although I was mindful that English is not the claimant's first language and he was not represented at the preliminary hearing, he presented as an intelligent, articulate, person and he had been able to complete and submit his claim form online, apparently without any difficulty.

19. S.111(2) imposes a strict time limit. In my view there was no just cause or excuse for the claimant not submitting his claim in time. There was no impediment to him doing so. In ***Palmer & Saunders v. Southend-On-Sea Borough Council*** [1984] IRLR 119 the Court of Appeal suggested that the best approach is to read "practicable" as "feasible" and to ask "was it reasonably feasible to present the claim to the Industrial Tribunal within the relevant three months?". In my view it was.

20. The Tribunal does not have jurisdiction, therefore, to consider the unfair dismissal claim as it is time-barred and the claim must be dismissed.

21. This decision might be considered harsh, particularly as there is no obvious prejudice to the respondent, were I to exercise my discretion and allow the claim to proceed, but the plain fact is that s.111(2) imposes a very strict time limit. The test does not depend on a finding of fairness, justice and equity, as it does in relation to discrimination complaints. The strict nature of the provision is stressed time and again in the authorities. As the EAT said in ***Norwood v. Lincolnshire County Council*** UKEAT/0462/1 1/RN at para. 68: *"The hurdle to surmount is a high one",* a hurdle which the claimant in the present case failed to clear.

22. Notwithstanding my decision that the claim was time-barred and falls to be dismissed, for the sake of completeness I also address the respondent's strike out application.

Strike-out

The law

23. The term "qualifying disclosure" is defined by s.43B of the Employment Rights Act 1996 ("the 1996 Act"), which provides, so far as relevant:

"43B Disclosures qualifying for protection

(1) In this Part 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 following -

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of an individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that the information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

A "protected disclosure" is one that is made in accordance with S.43A of the 1996:

"43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43A."

24. For the purposes of addressing this issue I took the claimant's averments in his claim form and further particulars at their highest value. In other words, I accepted that he would be able to prove the facts he alleges.

25. In his Note following the case management preliminary hearing on 6 February 2022, Employment Judge Kemp ordered the claimant to provide further particulars of his claim (R59/60).

26. The claimant submitted these particulars by e-mail on 23 February 2023 (R70/71).

27. However, these averments along with the averments in the claim form, do not, in my view, reveal that he made a qualifying disclosure, in terms of S.43B.

28. Further, and in any event, what the claimant has detailed appears to be a personal workplace issue which he had with Mr Grubb and was not, therefore, "in the public interest".

29. At the preliminary hearing, the respondent's representative submitted that the claimant had not presented an "effective claim" and not made a protected disclosure.

30. I am satisfied that that submission is well-founded.

31. Accordingly, I arrived at the view that the claim has "no reasonable prospect of success" and that it should be struck out in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure which is in the following terms:

> "37 *Striking Out*
>
> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response in any of the following grounds -*
>
> (a) *that it is scandalous or vexatious or has no reasonable prospect of success."*

32. In arriving at this view, I was mindful that the claimant was unrepresented and that English is not his first language. I was also mindful that a similar approach

to that taken to strike out in discrimination claims in taken in protected disclosure claims and that strike out is a draconian step.

33. I was also particularly mindful of the guidance of the EAT on dealing with litigants in person in strike out applications in Cox v. *Adecco & Others* UKEAT/0339/19/AT.

34. However, the terms of Employment Judge Kemp's Note were perfectly clear and the claimant was afforded ample opportunity to provide the necessary specification of his claim.

Claimant's amendment application

35. During the preliminary hearing, without any prior warning, the claimant produced further particulars of his claim (C1). I took this to be that an application to amend. His application was opposed by the respondent (R.95-97).

36. Having regard to the guidance on amendment applications in *Selkent Bus Co. Ltd v. Moore* [1996] ICR 836, I decided that the application should be refused. While the claimant's amendment was in relation to the existing claim the facts were entirely new. Further, I was mindful of the clear direction given by Employment Judge Kemp to provide further particulars and while the claimant is a litigant in person I was also mindful of the views expressed by the Honourable Mr Justice Langstaff at para. 16 of his Judgment in *Chandhok v. Tirkey* UKEAT/0190/14/KN that:-

"The claim as set out in the ET1, is not something just to set the ball rolling, as the initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subject merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. The respondent is not required to answer a witness statement, nor a document but the claim is made - meaning, under the Rules of Procedure 2013, the claim as set out in the ET1)."

37. The application to amend was also well outwith the three months' time limit. The claimant was dismissed on or about 7 August 2022 and his application to amend was not submitted until 17 May 2023. Although this is not determinative of the amendment application, it is a significant factor as I have already decided that the claim which was presented on 14 December 2022 is time-barred and that my discretion to allow the claim to proceed although out of time should not be exercised.

38. I was also of the view that the balance of prejudice/hardship favoured the respondent in that were I to allow the amendment this would involve further delay and expense as the respondent would require to answer the amendment and further procedures would be required.

39. It struck me that the claimant's application to amend was something of an afterthought.

40. For all these reasons, therefore, the application to amend is refused.

41. Further, and in any event, the proposed amendment does not disclose a qualifying disclosure, in terms of s.43B. Also, there is insufficient detail of what was disclosed, to whom, when and how.

42. I am also satisfied that this decision is in accordance with the "overriding objective" in the Rules of Procedure.

Fair hearing

43. A further issue for the hearing was whether the claim should be struck out in terms of Rule 37(1)(e) of the Rules of Procedure namely: *"that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."*

44. For the sake of completeness, I record that there was no basis for a strike-out on that ground. None was advanced by the respondent's representative at the preliminary hearing.

Employment Judge: **James Hendry**
Date of Judgment: **1 June 2023**
Entered in register and copied to parties: **1 June 2023**