



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000304/2024

10

**Preliminary hearing
Held on the Cloud Video Platform
on 3 July 2024**

15

Employment Judge A Jones

Ms L Gardiner

20

**Claimant
Represented by :
Mr Bryce, solicitor**

IOTL Ltd

25

**Represented by
Mrs Craig,
General Manager**

JUDGMENT

30

The Tribunal does not have jurisdiction to determine the claimant's claims of unfair dismissal or disability discrimination.

Background

35

1. The claimant lodged a claim of unfair dismissal and disability discrimination on 15 March 2024. She had not obtained the necessary certificate from ACAS in advance of lodging the claim. That certificate was then obtained and provided to the Tribunal on 25 March. At that time the claimant's claim was accepted by the Tribunal, but she was informed that it appeared that it had been lodged out of time. The respondent resists the claimant's claims.

A hearing was listed in order to determine whether the Tribunal had jurisdiction to consider the claimant's claim of unfair dismissal on the basis it had not been reasonably practicable for the claimant to have lodged her claim within the statutory period and whether it was just and equitable for the Tribunal to consider the claim of disability discrimination. A joint bundle of documents was produced and evidence was led from the claimant.

Findings in fact

2. The Tribunal found the following relevant facts to have been established.
3. There was some dispute over the date of termination of the claimant's employment. The claimant had indicated that her employment terminated on 13 September 2023, but the respondent's position was that it terminated on 24 August 2023.
4. The events which form the basis of the claimant's claim relate to the respondent's decision that the claimant be moved from her duties as a waitress to a different part of the respondent's operations which took place around June 2023.
5. The claimant has been prescribed an anti-depressant medication Fluoxetine for a number of years. In June 2023 the claimant's dose of Fluoxetine was increased from 20mg to 40mg.
6. The claimant was signed off sick suffering stress at work on 27 June 2023 for a period of 21 days.
7. The claimant raised a grievance in relation to an allegation that she had been bullied out of her role and had been discriminated against. That grievance was not upheld and this was confirmed to the claimant in a letter of 24 July 2023.
8. The respondent informed the claimant that it had taken advice from ACAS in dealing with her grievance.
9. The claimant is a single parent with two children, one of whom has additional support needs.
10. The claimant started work in a new job around 14 September 2023 as a taxi driver.

Relevant law

11. Where a claim of unfair dismissal has not been lodged within the statutory period of 3 months from the termination of employment the Tribunal can still have jurisdiction to determine a claim where it finds that it was not reasonably practicable for the claim to have been lodged within that period. These provisions are set out in section 111 of the Employment Rights Act. Whether it was reasonably practicable for a claim to have been lodged within three months of the termination of the claimant's employment is a matter of fact for the Tribunal to determine. The Tribunal is required to consider the facts which have been established and form a view as to whether in the particular circumstances it was reasonably practicable to have lodged a claim in time. Although what is reasonably practicable will depend on the particular facts of a case, it does not mean what was reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser EAT 0165/07** explained it in the following words: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.
12. In terms of section 123(1)(a) Equality Act 2010 a Tribunal will only have jurisdiction to consider a claim of discrimination if it has been lodged within three months of the act complained of. However, section 123(1)(b) provides that a Tribunal may consider a claim not lodged within that period if it is lodged within a period where it considers it just and equitable still to determine the claim.
13. Therefore the Tribunal must consider whether it is just and equitable to exercise its discretion to allow the claimant's claim to proceed. The exercise of such discretion should be the exception and not the rule. The Tribunal should consider the prejudice against the claimant should the claim not be allowed to proceed and the prejudice against the respondent if the claim does proceed. It should take into account factors which are relevant in the

exercise of its discretion. In *Concentrix GVC v Intelligent Contact Ltd v Obi* 2023 IRLR 35, the Employment Appeal Tribunal reviewed authorities on the appropriate approach to be taken by Tribunals when considering whether to exercise its discretion in this regard. The EAT considered the relevance of the provision of a reason for the delay in lodging a claim and the prejudice to the employer should a claim be accepted out of time.

Discussion and decision

- 10 14. In terms of the issue of whether it was reasonably practicable for the claimant to have lodged a claim of unfair dismissal, my starting point was that the relevant date for calculating the date on which the claimant should have lodged a claim was the last possible date, being 13 September 2023. In those circumstances, a claim should have been lodged by 12 December 15 2023 and therefore her claim was almost three months late. Had the claimant's employment terminated on the date proposed by the respondent it would be a further 3 weeks late being lodged.
15. I took into account that the claimant was on an increased dose of medication from around June 2023 and that she had onerous family 20 responsibilities. However, I was also mindful that the claimant had continued to work other than a period of sickness absence prior to her resignation and had almost immediately commenced a new job. It did not appear that the claimant had taken any steps to investigate the possibility of bringing a claim before the Employment Tribunal until some months later. 25 While I appreciate that the claimant no doubt had a lot on her mind at this time, that did not in my view prevent her from investigating what steps she would have to take to bring a claim of unfair dismissal. While the claimant said that she had assumed that the respondent had treated her lawfully because they said that they had taken advice from ACAS, it was not clear 30 what had changed her view some months later.
16. I also took into account the risk of prejudice to the respondent in defending the claim as the events which formed the basis of the claimant's claim had taken place over a year ago (apparently coming to a head in June 2023).

While the claimant's solicitor highlighted that the issues had been documented and suggested that there would be no prejudice to the respondent in that regard, I did not entirely accept that submission.

Memories necessarily fade the farther from the events which form the subject matter of a claim and the more likely prejudice will arise in seeking to defend a claim. There was certainly a risk of prejudice to the respondent in that regard.

5
10
15
17. For these reasons I was of the view that it was reasonably practicable for the claimant to have lodged her claim of unfair constructive dismissal within the statutory period. Given the amount of information available online, little effort is now required by prospective claimants to explore relevant time limits and while there was no evidence about the extent to which the claimant knew her rights, she was aware of the existence of ACAS and could have contacted them should she wish to explore the raising of a claim.

18. The Tribunal is afforded a wider discretion in determining whether it has jurisdiction to consider a claim of discrimination. The test of whether or not it is just and equitable affords a Tribunal a wider discretion than determining whether it was reasonably practicable to have lodged a claim in time.
20
However, as set out in ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434***, the exercise of discretion in this regard should be the exception and not the rule.

25
30
19. In exercising its discretion, a Tribunal is required to consider factors such as the length and reason for delay and prejudice on the respondent. Even if the claimant was not aware of the relevant time limit in lodging a claim prior to February 2024, and the Tribunal had no evidence on that point, that does not explain why the claimant did not take steps to establish what time limit might have been applicable prior to that time. The claimant had raised a grievance and alleged discriminatory treatment in June 2023. It would have been open to her to further investigate what steps should be taken should she wish to bring a claim to the Tribunal.

20. While the claimant had health issues during the period between June 2023 and March 2024, those health issues did not prevent her working. While the

Tribunal noted that the claimant's position was that she had to work because of her responsibilities as a single parent, nonetheless this was a relevant factor to be considered.

5 21. Taking all these factors into account I concluded that the claim had not been brought within a period as was just and equitable to displace the time limit terms of section 123 of the Equality Act 2010 and therefore the Tribunal does not have jurisdiction to determine the claimant's claims.

Employment Judge: A Jones
Date of Judgment: 4 July 2024
Entered in register: 8 July 2024
and copied to parties