



EMPLOYMENT TRIBUNALS

Claimant: Ms T Hein
Respondent: M.J.S. Hotels Limited t/as the Quorn Lodge Hotel

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On: 2 July 2024
Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: Mr S McManus, lay representative
For the respondent: Col (retd) HS Mann, director

JUDGMENT

UPON hearing from the lay representative for the claimant and from director of the respondent

AND for the reasons set down below

IT IS THE TRIBUNAL'S JUDGMENT THAT

1. The claimant's claim for constructive unfair dismissal was presented out of time. It was reasonably practicable to have presented them in time. The Tribunal therefore lacks jurisdiction to decide them. Therefore they are dismissed,
2. The claimant's claims for breach of contract in respect of
 - 2.1. Contractual holiday pay
 - 2.2. Unpaid wageswere presented out of time. It was reasonably practicable to have presented them in time. The Tribunal therefore lacks jurisdiction to decide them. Therefore they are dismissed.

REASONS

1. Ms Hein brings claims of constructive unfair dismissal, breach of contract relating to contractual holiday pay and breach of contract relating to non-payment of three-months pay. Although the claim form suggested there might be a claim for redundancy payment, Ms Hein confirmed at the hearing

she was not suggesting she had been made redundant and agreed therefore there was no such claim. The alleged breaches of contract were outstanding when Ms Hein's employment ended. M.J.S Hotels Ltd denies these claims.

2. In preparation for the hearing it became apparent that the claims appeared to be out of time. Because time limits affect whether the Tribunal even has jurisdiction to consider the claims, the Tribunal dealt with this as a preliminary issue.

Hearing

3. Mr S McManus (Ms Hein's friend) represented Ms Hein. Col (ret'd) HS Mann, a director of M.J.S Hotels Ltd, represented it. I am grateful to both for their help.
4. On considering the file the day before, I noted that the claim appeared to be out of time. The Tribunal therefore sent a note highlighting this to the parties on 1 July 2024 at 10:29 saying the issue would be dealt with as a preliminary issue. It was the first time the issue had been raised. No party requested an adjournment in reply or at the hearing.
5. I heard oral evidence from Ms Hein, but only on the issue of time limits. Because the Tribunal had only just raised the issue and so witness statements did not deal with the issue of time limits, and with the parties' agreement, I asked questions of Ms Hein to enable her to give evidence about the relevant issues. Mr McManus then asked a few questions as evidence-in-chief, and I assisted him to formulate them as needed. I allowed Ms Hein a chance to present as evidence anything not covered by the questions but which she felt relevant. Col Mann then asked a couple of questions in cross-examination and likewise I assisted him to formulate them as needed. The respondent called no evidence on this issue. The parties had brought other witnesses but did not hear from them because they could not assist on that issue. I have taken into account Ms Hein's evidence.
6. The respondent had prepared a bundle of documents. I have taken into account the documents to which the parties have referred me. I have also considered the Tribunal's file. The only documents of relevance were the notices of rejection of the claim, to which I refer below. The documents to which Ms Hein referred me were all in the bundle prepared by the respondent.
7. Each party made closing submissions. I have taken them into account.
8. No adjustments were required, though we took a short break to enable Ms Hein and Mr McManus to speak before she gave evidence. No other breaks were requested.
9. I announced my decision at the hearing but said I would put my reasons in writing. These are those reasons.
10. No party suggested the hearing was unfair. I am satisfied it was a fair hearing.

Issues

11. The preliminary issues I must decide are:
 - 11.1. When did Ms Hein's employment end?
 - 11.2. In respect of each claim, when does the time start to run for presenting the claim?
 - 11.3. Was the claim presented in time?
 - 11.4. If not, was it not reasonably practicable to present it in time?
 - 11.5. If not, was it presented in such time thereafter as was reasonable?

Facts

12. I begin with the following observation: I have no doubt Ms Hein is an honest witness and has done her best to assist the Tribunal to understand the facts.
13. I make the following findings of fact necessary for me to decide the preliminary issue on the balance of probabilities.
14. Ms Hein's employment began on 1 August 2005. It is agreed that M.J.S Hotels Ltd was her employer at all relevant times.
15. It seems that in May 2023, issues began to arise between Ms Hein and M.J.S Hotels Ltd's directors. For present purposes the details and accuracy of the allegations and counter allegations do not matter.
16. It is clear that Ms Hein became mentally unwell. A letter from Dr M Reason dated 12 June 2024 which I infer from its tenor is based on Dr Reason's perusal of Ms Hein's medical notes confirms that Ms Hein reported "anxiety centred about her workplace" from about mid-July 2023. The doctors issued her with a MED3 (certifying for social security purposes that she was not fit for work) because of anxiety for the period 24 July 2023 to 7 October 2023. The mental health practitioner advised her on 24 July 2023 to "access mental health support via Acas".
The doctors also prescribed her anti-depressants.
17. An email dated 30 October 2023 from Ms E Cusey, an active monitoring practitioner from the charity Mind (a mental health charity), confirms that she assessed Ms Hein on 17 August 2023. She noted Ms Hein reported to her that she had "difficulty moving on from her situation due to potential upcoming Tribunal as a result."
18. Ms Hein confirmed this was a reference to these proceedings and that at this time she was already considering resigning and presenting a claim for constructive unfair dismissal. Ms Hein had already done some research online about claims for constructive unfair dismissal. She was aware at this time that the claim would be against her employer.

19. On 21 September 2023, Ms Hein's employment ended through her resignation. This is the effective date of termination.
20. On 22 September 2023, Ms Hein commenced early conciliation. She identified M.J.S Hotels Ltd as her employer and potential respondent. In fact the certificate did not include "Ltd" in the putative respondent's name but I cannot see that creates any particular issue since it is clearly an oversight and it is obvious to whom she was referring. She told me that Acas has explicitly asked her who her employer was. They had advised her that her employer's name would be on her payslips. She looked at those payslips and from them identified the respondent as her employer. I find as a fact that Ms Hein at this point believed that M.J.S. Hotels Ltd was her employer. She confirmed that there was nothing to suggest it was Col Mann.
21. Early conciliation ended on 29 September 2023. Ms Hein confirmed that Acas sent to her a link for completing an ET1 (claim form) online and she told me that Acas had advised her about time limits. They also sent to her an early conciliation certificate (EC certificate) to confirm she had completed early conciliation with M.J.S. Hotels Ltd and to provide the number. Ms Hein does not remember receiving it. I am satisfied that she did because she entered the correct EC certificate number in her claim, and therefore that implies she must have received it to be able to do so.
22. On 7 October 2023, she presented her ET1. However for the respondent on the ET1 she named Col Mann, rather than M.J.S Hotels Ltd. Because I am satisfied she had by this point received the EC certificate, I am satisfied that I can conclude she was (or at least could reasonably have made herself) aware of its contents and in particular that it identified M.J.S. Hotels Ltd as putative respondent. Because this is whom she had identified to Acas as her employer, I am satisfied that at the time she presented her claim she believed that M.J.S Hotels Ltd was her employer.
23. Ms Hein said she named Col Mann because most of the factual disputes were about him. However she confirmed no-one has ever sought to suggest to her that her real employer was Col. Mann or to persuade her to name him as respondent rather than M.J.S. Hotels Ltd. I am satisfied that it was her decision alone to name Col Mann. I am satisfied from her answers also that she did not actually believe that Col Mann was actually her employer either. I conclude the circumstances show that she still believed it was M.J.S. Hotels Ltd because there was nothing that happened to suggest that she ought to change her mind about that issue.
24. Ms Hein told me that at the time she was mentally unwell. She was on anti-depressants. She told me she was confused, could not make big decisions (though there is no suggestion she lacked capacity) and was forgetful. This is supported in my view to some extent by Dr Reason's letter and the email of Ms Cusey.
25. However I note that on 25 September 2023, Ms Hein began a new job working in a local café 5 days per week for 4½ hours each day. This job did not involve decision making as such. I note however she was able to return

to work and work effectively it seems, even though at this time the doctor's note said she was unfit to work.

26. Weighing up all the circumstances I find as a fact that, while Ms Hein may have been mentally unwell, it did not lead her to name Col Mann as respondent rather than M.J.S Hotels Ltd. This is because
 - 26.1. She was able to complete the rest of the ET1 more or less satisfactorily and in significant detail;
 - 26.2. She was able to transpose the Acas early conciliation certificate number accurately;
 - 26.3. She had already discussed the identity of her employer with Acas shortly before presenting the claim as part of early conciliation, and with them identified it as M.J.S Hotels Ltd;
 - 26.4. She still believed M.J.S. Hotels Ltd was her employer even though she named Col Mann;
 - 26.5. The Acas certificate identifies the putative respondent for her potential employment claim, and she had this certificate in her possession;
 - 26.6. She had been considering a claim against her employer for at least one month. Whatever the effect of her mental health the circumstances lead me to find that she was able to be aware of a potential claim and that she would need to resign, to decide to resign and to pursue early conciliation and then decide to and actually fill out a detailed claim and present it. In my view this points against any suggestion that her mental health was so bad that meant could not correctly name M.J.S Hotels Ltd in the ET1;
 - 26.7. The medical evidence does not provide a basis to conclude her condition itself was a cause of the decision to name Col Mann rather than M.J.S. Hotels Ltd as respondent.
 - 26.8. She was able to do and maintain some employment and to hold down a job, which suggests while unwell, she was not so unwell that it led her to make the mistake she made.
27. I conclude therefore as a fact that Ms Hein knew her employer was M.J.S Hotels Ltd and could have named it as respondent. Further there was nothing in the circumstances that led her to name Col Mann as respondent.
28. On 29 January 2024, Legal Officer Parmar rejected the claim because the respondent on the ET1 was not the respondent named on the EC certificate. Until this point, Ms Hein believed her claim was valid and proceeding normally. Ms Hein did not realise she had made the error until the claim was rejected.
29. On 31 January 2024, Ms Hein corrected the error and asked for reconsideration. Employment Judge Welch considered the matter. She concluded the original rejection was correct, but the error was now rectified. Therefore she accepted the claim and deemed the date of presentation as 31 January 2024.

30. Ms Hein was not a member of trade union. She did not seek advice from a law centre or similar or from a solicitor. She did some research online in August 2023, but also relied on Acas's advice.
31. I find as a fact that Ms Hein corrected the error promptly. That is apparent from the time line.

Law

32. For a claim of unfair dismissal or for breach of contract, the claim must be presented within 3 months of the effective date of termination: **Employment Rights Act 1996 section 111** and **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 Article 7**.
33. In both types of claim, the Tribunal can extend the time limit with the effect that a claim is deemed presented in time if:
- 33.1. it is satisfied that it was not reasonably practicable to present the claim in time, and
- 33.2. it is satisfied that the further period before it was eventually presented is reasonable.
34. The case law on this test was recently reviewed by the Employment Appeal Tribunal (EAT) in **Cygnnet Behavioural Health Ltd v Britton [2022] IRLR 906 EAT** and summarised. I note from this case that:
- 34.1. The test is a strict one (at [19] and [27]),
- 34.2. The test is focused on practicality of what could be done, not whether it was reasonable not to do something: (at [20] and [27]),
- 34.3. It is for the claimant to prove it was not reasonably practicable to present the claim in time: (at [21] and [25]),
- 34.4. Any ignorance of rights and time limits must be a reasonable one (at [23] and [25]),
- 34.5. If it was not reasonably practicable to present the claim in time, whether it was presented in a reasonable time thereafter is "an objective consideration having regard to all of the circumstances of the case, including what the claimant did, what he knew or reasonably ought to have known about time limits, and why it was that the further delay occurred." (at [24] and [25]), and
- 34.6. 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 (at [53]). I see no reason why it should be different with other claims whose time limits are subject to the same formulation.
35. I also note it is a factual question for me to decide: **Wall's Meat Co Ltd v Khan [1979] ICR 52 CA**.
36. I have also considered **Adams v British Telecommunications plc [2017] ICR 382 EAT**. In **Adams**, A made a genuine mistake and failed to include the EC certificate number on her claim. A thought the claim had been lodged in time. Eventually, the Tribunal rejected the claim. A corrected the

error and presented a second claim. This second claim was out of time. Applying **Software Box v Gannon [2016] ICR 148 EAT**, Simler P explained that the fact that a complaint was made within time and then rejected did not, as a matter of principle, preclude the consideration of whether a second claim traversing the same ground was one in which the Tribunal should have jurisdiction. The question of what was reasonably practicable was a question of fact for the Tribunal and would often depend on the claimant's state of mind, viewed objectively. In A's case A's false belief that the first claim was in time was reasonable and an impediment to presenting the second claim in time. I see no reason why this should not apply where a claim is rejected and then accepted later after correction since the 2 situations are, it seems to me, practically the same.

Were the claims presented in time?

37. No. Taking into account EC, the claims should have been presented by 27 December 2023. Employment Judge Welch's confirms the presentation date is 31 January 2024.

Was it not reasonably practicable to present the claims in time?

38. The error that led to rejection and explanation is the same for all 3 complaints.
39. I have concluded that it was reasonably practicable for Ms Hein to have presented the claim in time. My reasons are as follows:
- 39.1. Ms Hein was at least one month before presenting her claim considering presenting a claim for constructive unfair dismissal against her employer. She had already started to do some research.
- 39.2. She was able to identify M.J.S Hotels Ltd as employer when commencing early conciliation. Acas had provided her help to identify them. Therefore she had received help to name the respondent to her potential claims. Nothing happened to lead her reasonably to conclude this was wrong.
- 39.3. When she completed her ET1, she had the EC certificate and M.J.S Hotels Ltd's name on it. If she could transpose the EC certificate number, then she could have reasonably identified the correct respondent from it – someone whom she believed after taking advice was her employer.
- 39.4. She did not ever believe Col Mann was her employer. Indeed she had no reason to.
- 39.5. I do not consider that Ms Hein's belief that her claim was valid and proceeding normally until the notice of rejection on 29 January 2024 was a reasonable belief. She was not mistaken when she identified Col Mann as respondent. She chose deliberately to name him rather than the entity she knew was her real employer. She had not been misled.
- 39.6. It follows that her belief that her claim was valid and proceeding normally until 29 January 2024 was not a reasonable one.

Therefore it cannot have led to it not being reasonably practicable to correct the error and for Ms Hein therefore to have presented a valid claim in time.

- 39.7. I conclude that her ill-health does not provide a basis to conclude that at any stage it was not reasonably practicable to have presented the claim in time. It did not have that degree of impact.

If not, was it presented in such time thereafter as was reasonable?

40. This issue does not arise, in light of the above.

Conclusion

41. The result is that the claim could reasonably have been presented in time. It was not. Therefore the Tribunal has no jurisdiction to consider the complaints. I therefore dismiss them.

Employment Judge Adkinson

Date:2 July 2024

JUDGMENT SENT TO THE PARTIES ON

...16 July 2024.....

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FOR THE TRIBUNAL OFFICE

Notes

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