



EMPLOYMENT TRIBUNALS

Claimant: Miss Joanne McIntyre

Respondent: Highfields Inclusion Partnership

Heard at: Manchester (by remote means)

On: 3 December 2021

Before: Employment Judge Wheat

Representation:

Claimant: Mr Westley Mcguire, Lay Representative

Respondent: Mr Ben Williams, Counsel

JUDGMENT

1. The claimant's claim for unfair dismissal was not presented in time. The Tribunal has no jurisdiction to hear it. The claim for unfair dismissal is dismissed.
2. The claimant's claim for breach of contract was not presented in time. The Tribunal has no jurisdiction to hear it. The claim for breach of contract is dismissed.
3. The claimant's claim that there was an unauthorised deduction from her wages was not presented in time. The Tribunal has no jurisdiction to hear it. The claim that there was an unauthorised deduction from wages is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Scale 4 Teaching Assistant from the 8 November 2017 to the 9 December 2020 when she was summarily dismissed. She presented the ET1 on the 27 April 2021 making claims for unfair

dismissal, breach of contract (notice pay) and unauthorised deductions from wages. This was a preliminary hearing.

Issues

2. The issues to be decided by the Tribunal are as follows:
 - (a) Whether the claimant's claims of unfair dismissal, and all her other claims, were presented out of time, and, if so;
 - (b) Whether the Tribunal should extend the time for presentation of the claimant's claims on the grounds that it was not reasonably practicable for the claimant to have presented the claims within time, and they were thereafter presented within a reasonable time.
3. It was agreed between the parties that the effective date of dismissal was 09 December 2020 and that 15 December 2020 was the last date of payment of wages to the claimant.

Procedure, documents and evidence heard

4. The claimant produced a witness statement and the Tribunal heard evidence from her.
5. There was a bundle prepared for the preliminary hearing consisting of 76 pages.
6. Both parties made closing submissions.
7. At the outset of the hearing, an issue arose with regard to the ACAS Early Conciliation Certificate (the 'ECC'). Mr McGuire, lay representative for the claimant, explained that there were two certificates before the Tribunal and that the dates given on those certificates as to receipt by ACAS of the EC notification were different and may have a material impact upon the issue of time limits. The two certificates were as follows:
 - R128379/21/47 – Date of receipt by ACAS of EC Notification: 08 April 2021, Date of issue by ACAS of Certificate: 27 April 2021
 - R131938/21/26 – Date of receipt by ACAS of EC Notification: 22 April 2021, Date of issue by ACAS of Certificate: 27 April 2021
8. The latter certificate was the certificate referenced on the ET1 and accepted by the Tribunal when the ET1 was presented on 27 April 2021. The existence of two ECC's appeared to have arisen because there was confusion at ACAS as to who the individual respondents were. The parties agreed that in accordance with Rule 12(2ZA) of the Employment Tribunals Rules of Procedure 2013 (as amended) and in line with the principle in the case of **HM Revenue and Customs v Garau 2017 ICR 1121**, the ET1

should be amended to state the reference of the earlier ACAS ECC, that being R128379/21/47, with the date of receipt by ACAS of EC Notification being 08 April 2021.

Fact Findings

9. The respondent is a Pupil Referral Unit based in Stockport, providing approximately 125 full time places for young people aged from 11 to 16. The claimant was employed by the respondent as a Scale 4 Teaching Assistant from 8 November 2017 to 9 December 2020 when she was summarily dismissed. The dismissal followed a disciplinary process which commenced on 7 October 2020, investigating allegations of a breach of the Covid 19 regulations in force at the time and of failures to carry out a reasonable management instruction in relation to accessing school emails whilst remote working.
10. A disciplinary hearing took place on 3 December 2020. An appeal hearing took place on 17 March 2021, having been delayed at the request of the claimant. At the appeal hearing, the claimant was accompanied by Mr McGuire, who is recorded in the minutes of the meeting as stating that the appeal was delayed due to government guidelines. I found this to be the reason that the appeal hearing was delayed.
11. The claimant's claims for unfair dismissal, breach of contract (notice pay) and unauthorised deductions from wages were presented to the Tribunal on 27 April 2021, over 4 months from both the effective date of dismissal (9 December 2020) and the last payment of wages (15 December 2020).
12. The time limit for presentation of the claim for unfair dismissal expired on 8 March 2021. Similarly, the time limit for presentation of the claim for breach of contract (notice pay) also expired on 8 March 2021. The time limit for presentation of the claim for an unauthorised deduction of wages expired on 14 March 2021.
13. The claimant was involved in what she describes as domestic violence struggle and had been since before her dismissal on 9 December 2020. She was subject to threats of violence and stalking from her ex- partner, including him turning up in her garden, sending text messages, phone calls, letters and presents through her mum's door.
14. From 4 January 2021 to 8 March 2021 schools were closed due to the Covid 19 epidemic. The claimant's children were at home with her during this period of lockdown and whilst the campaign of harassment from her ex- partner was continuing. I accepted the claimant's evidence that the police were called out on numerous occasions, although no evidence of, for example, the crime reference numbers was provided to the Tribunal. The claimant was living in fear, anxious and distressed and was not functioning normally. She did not feel safe leaving the

house and only did so occasionally. The claimant did not access medical help or advice during this period of time.

15. The claimant did not have broadband at her property. She did have data, albeit limited, on her mobile phone. She made sure her mobile phone was not cut off, as it was an important means of communication for her. She described that she would have done 'near enough anything' to ensure she had money to keep her phone on, so as to use it in an emergency.

16. The claimant spoke with her friends and her family and with Mr Mcguire during the period of Christmas and New Year 2020/21 and the school spring term January to March 2021. Her evidence, which I accepted, was that she had discussed with people the steps she could take with regard to her dismissal. Someone told her she could complete a form with ACAS. The claimant was not able to confirm when she did speak with ACAS. She was sent a link to her phone to access forms by someone at ACAS known as Josh. She completed the ET1 with Josh's help.

17. After the appeal against her dismissal on 17 March 2021 was unsuccessful, the claimant sent an email with the subject matter 'Unfair dismissal' to Stockport council on 23 March 2021.

Legal Framework

18. The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996 (the 'ERA'):

- (2) Subject to the following provisions of this section, an Employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal –
 - (a) before the end of the period of three months beginning with the effective date of termination, or
 - (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

19. The normal time limit for bringing a breach of contract claim is within three months beginning with the effective date of termination.(The Employment Tribunals Extension of Jurisdiction (England and Wales) Oder 1994.) If the Tribunal is satisfied that it was not reasonably practicable to bring it within that time limit and it was presented within such further period as the Tribunal considered reasonable, it can consider the claim outside of the normal time limit.

20. The time limit for the presentation of a claim for unauthorised deductions from wages is found in S23(2)a of the ERA, which is three months beginning with

the date of payment of the wages from which the deduction was made, unless it was not reasonably practicable to present the claim in time and it was presented within such a further period as the Tribunal considers reasonable.

21. The time limit for presentation of the claim for unfair dismissal expired on 8 March 2021. Similarly, the time limit for presentation of the claim for breach of contract (notice pay) also expired on 8 March 2021. The time limit for presentation of the claim for an unauthorised deduction of wages expired on 14 March 2021.

22. The time limits can be extended for early conciliation started within the original time limits; however, the early conciliation process was not started until the 8 April 2021, outside of the original time limits. Therefore, starting early conciliation did not 'stop the clock' in this case.

23. Therefore, I had to consider firstly whether it was not reasonably practicable for the claimant to present the claims for unfair dismissal and notice pay on or before 8 March 2021 and the claim for unauthorised deductions from wages on or before the 14 March 2021. If it was not, then secondly, whether they were presented within such further period as was reasonable.

24. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. 'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — **Porter v Bandridge Ltd 1978 ICR 943, CA.**

25. Something is "reasonably practicable" if it is "reasonably feasible" (**Palmer v Southend-on-Sea Borough Council [1984] ICR 372**, Court of Appeal). Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyan (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

26. 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'.

27. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate.

28. If I were to be satisfied that it was not reasonably practicable for the claimant to have presented her claims within the requisite time limits set out above, I must then go on to decide whether the claim was presented 'within such further period as the Tribunal considers reasonable'. This requires the Tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired. What amounts to a 'further reasonable period' for the

purposes of S.111(2)(b) is essentially a matter of fact for the tribunal to decide on the particular circumstances of the case. In **Nolan v Balfour Beatty Engineering Services EAT 0109/11** the EAT stated that Tribunals, when considering whether to extend time under S.111(2)(b), should always bear in mind the general principle that litigation should be progressed efficiently and without delay. The EAT went on to hold that, when deciding what would have been a reasonable time within which to present a late claim, Tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred.

Submissions

29. It was agreed that Mr Williams would make his submissions first. On behalf of the respondent, he submitted that:
30. The respondent did not seek to go behind that the claimant was very distressed and that 'her head was all over the place' or that she was juggling difficulties in lockdown.
31. However, in his submission, the onus was on the claimant to prove she could not present the claim and she fell so far short of what the law would require her to show. It was accepted by the respondent that if she was actually imprisoned in her home and had no internet access, then it would not be reasonably practicable to present the claims in time, but that was not the case.
32. Furthermore, he stated that there is no medical evidence before the Tribunal of her state of mind. He stated that the claimant is heavily reliant on ACAS and the advice she says they gave but that she cannot assist the Tribunal with any dates or times as to when she contacted them.
33. He further submitted that the case of **Asda Stores Ltd v Kauser EAT 0165/07** was clear that mere stress was not enough to show that it was not reasonably practicable to present the claims.
34. The question for the Tribunal, he submitted, is whether on the facts of this case it was entirely possible to make a claim, when the claimant must have been in correspondence with ACAS by March 2021, and when she is not suggesting she was unable to make calls or send emails. It was not enough to say that she was 'in a real pickle' –he asserted that her evidence lacked detail, and taken at its highest, the claimant could still make calls. Mr Williams submitted that the claimant experiencing stress due to the domestic violence situation she found herself in was not enough.
35. On behalf of the claimant, Mr McGuire submitted that:
 - (a) Mr Williams was belittling what the claimant had gone through. He submitted that it was a massive injustice, that we all need to 'up our game' and factor in and take into account the functionality of the claimant's daily business as it was 'a hell of a lot bigger' than that.

- (b) He stated that school should have taken into account the domestic violence and that when it is mentioned in the minutes of the appeal, they literally say 'moving on'.
- (c) He reiterated that the claimant was dealing with the Covid 19 pandemic, which resulted in school closures and that she had no easy access to the internet.
- (d) He explained the claimant's functionality and loss of agency; submitting that the 'haphazard way' in which she has gone about things is evidence in itself that it was not reasonably practicable for her to have presented her claims on time.
- (e) He agreed there was no medical evidence as to her state of mind or mental health but submitted that Greater Manchester Police had been round at her house and she had given evidence of them being there.
- (f) Mr McGuire stated that the claimant could not prioritise or communicate properly. He concluded his submission by stating that the claimant was only four weeks late and had lost her functionality.

Conclusions

- 36. In determining whether it was not reasonably practicable for the claimant to present her claims in time, I took account of her witness statement and the oral evidence she gave to the Tribunal. I had regard to the bundle of documents provided for this hearing and to the submissions made by Mr Williams and Mr McGuire.
- 37. I bore in mind that Employment Tribunal proceedings must, in virtually all cases, be started within time limits set out in the various statutes and statutory instruments that confer the right to bring the proceedings and that time limits go to the Tribunal's jurisdiction.
- 38. I found as a fact that the claimant was living in fear, was anxious and distressed and was not functioning normally. I had no doubt that the claimant was facing a very difficult and turbulent period in her life as a result of the domestic violence situation she was in during the relevant time period. However, I also took into account that whilst she was experiencing domestic violence in the form of threats and harassment from her ex -partner, she was still able to talk to others about her dismissal, and her intention was initially to challenge that dismissal immediately. I concluded that the claimant was not ignorant of the potential to challenge her dismissal.
- 39. On her evidence, the claimant managed to maintain payments for her mobile telephone as it was important to ensure the phone was working in case of an emergency. Although the claimant was vague and not able to provide times or dates as to when she spoke with ACAS, she was able to receive a link to their forms via her mobile phone. I concluded that she had the means via her mobile phone and its data to access a simple internet

search which would have provided the information necessary regarding time limits, to then pursue a claim in the Employment Tribunal.

40. During her evidence in cross examination, the claimant stated that the claims would have been presented in time were it not for the wrong advice she had been given by the officer at ACAS she was communicating with. As the claimant was unable to inform the Tribunal with any accuracy as to when she spoke with ACAS, it was impossible to consider or conclude that wrong advice from ACAS affected her presenting her claims within the original time limits.
41. I next considered whether, as a result of the circumstances she found herself in as described above, it was not reasonably feasible for the claimant to have accessed the information and acted upon it during the time limit period because of her impaired functioning. I took into account the claimant's evidence that she did not access medical help or advice about her mental health whilst she was subject to domestic abuse and harassment. During this time, the claimant was speaking with various people she knew about steps she could take regarding her dismissal. I was mindful that she was, during the period of the original time limits for presenting a claim, actively pursuing an appeal against her dismissal, which eventually took place on 17 March 2021, a date within 9 days of the time limit for presenting an unfair dismissal claim expiring and which was only delayed at her request, due to the government guidance on lockdown. I also considered that whilst the claimant was not able to say with any accuracy when she spoke to ACAS, she did so whilst the domestic violence situation was still ongoing. I concluded therefore that whilst the claimant was dealing with a very stressful and frightening situation involving her ex-partner, she was able to sufficiently function, as evidenced by other steps she took at the time, to have acted upon presenting her claims in time.
42. I therefore concluded that the claimant had not been able to show that it was not reasonably practicable to present her claims in time. Having so concluded, I did not need to go on to consider whether the claims were presented in a further reasonable time thereafter.
43. The claims were not presented on time and the Tribunal has no jurisdiction to hear them.

Employment Judge Wheat
Date: 14 December 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

14 December 2021

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This hearing was held by way of the HMCTS "Cloud Video Platform". Neither side requested an in person hearing and it was in accordance with the overriding objective to conduct the hearing by video conference call.