EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107881/2020

Open Preliminary Hearing Held by Cloud Video Platform on 11 August 2021

Employment Judge Russell Bradley

Mrs Andrea Watson — **Claimant**
Represented by
Ms C Thomas
Solicitor

Dumfries & Galloway Council — **Respondent**
Represented by
Ms L Davis
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the employment Tribunal is that it does not have jurisdiction to hear the claim of unfair dismissal. The claim is therefore dismissed.

REASONS

Introduction

1. With an email sent on 20 July 2021 parties received notice of this open preliminary hearing. It was fixed to consider the question of time bar. In

particular, the issue was whether the claimant's single claim of unfair dismissal had been presented in time.

2. In advance of the hearing, parties had prepared and lodged a joint statement of agreed facts. In advance of the hearing, I had also seen a copy of a letter dated 24 April 2020 from the respondent to the claimant and a copy of the respondent's disciplinary policy. On review of the employment tribunal file, I had seen the early conciliation certificate, the ET1 and its 41 pages of claim details and the ET3 with its paper apart. No file, or hearing bundle was lodged. That said, in the course of her evidence the claimant made reference to some emails which she had to hand. This was done without objection.

The issues

3. Reflecting the purpose of the hearing, and the relevant legislation, the issues for this hearing were:-
    a. Was it reasonably practicable for the single claim of unfair dismissal to have been presented in time?
    b. If it was not reasonably practicable to present it in time was it presented within a reasonable time thereafter?

The evidence

4. I heard evidence only from the claimant. As noted above, in the course of her evidence she made reference to some emails which she had to hand. Neither solicitor took objection to her doing so. Reference was also made to various parts of the ET1 details of claim.

Findings in fact

5. I found the following facts admitted or proved.

6. The claimant is Andrea Watson. She was employed by the respondent for about 22 years. Her employment began in May 1998. She was dismissed on

22 April 2020. At that time she was employed as a procurement officer. She believed she was dismissed for numerous reasons. They included the fact that the respondent said she was fit to work while her general practitioner had signed her off as unfit.

7. On or about 20 March 2019 the claimant made contact with her trade union, Unison. By 16 September 2019 the claimant was aware of an investigation into an allegation of non-attendance at work. On 16 September 2019 she contacted her trade union representative Phil McGroggan to advise him about that investigation. The trade union supported the claimant in the period between March and September 2019.

8. The claimant attended a disciplinary hearing on 22 January 2020. She continued to receive advice and input from her trade union in the disciplinary process up to and including that hearing.

9. The disciplining officer at that hearing was Paul Garrett, the respondent's head of Finance and Procurement. He was the line manager of the claimant's line manager. The hearing was re-convened on 22 April 2020.

10. In the intervening period, on 3 March 2020 the claimant spoke to Thompsons, solicitors in Glasgow. She did so as they were the solicitors for Unison. She sought advice from Thompsons at that time.

11. At the meeting on 22 April 2020 the claimant was summarily dismissed. By letter dated 24 April 2020 Mr Garrett confirmed that decision. On receipt of that letter the claimant spoke to Mr McGroggan. On or about 29 April the claimant received an email from Thompsons. That emailed told her that in the case of unfair dismissal she required to trigger the early conciliation process within three month less one day from the date of her dismissal. It also advised her to contact her trade union representative, which she did. In April 2020, the claimant was advised by Mr McGroggan that her claim had been lodged with ACAS. She put faith in the trade union. She believed that it acted

in her best interests. She understood that all that was required had been seen to by it.

12. On three occasions prior to 29 June the claimant asked the respondent for a copy of the minutes of the disciplinary hearing. On one of those occasions, she spoke to Mr Garrett. He told the claimant that; he had spoken to HR; and the respondent did not need to provide a copy to her.

13. On 1 May 2020 Mr McGroggan submitted an appeal for the claimant. On 20 May the claimant was advised via Mr McGroggan that; the respondent could not progress her appeal due to COVID-19; and it required to await the reconvening of the respondent's Employment and Appeals Sub-committee. On 21 May the claimant submitted a subject access request. On 29 June she received a copy of the minutes from her disciplinary hearing. On 23 July the claimant was advised that the next available date for the Sub-committee was 10 September. Her appeal took place that day by "*virtual*" meeting.

14. The claimant was required to trigger early conciliation by 21 July 2020. This was not done.

15. The claimant had discussions with Mr McGroggan in August. They put together evidence for her appeal. In those discussions, she did not ask what had happened about early conciliation. It was not mentioned again until after her appeal hearing.

16. On 10 September the claimant contacted Mr McGroggan. At that time, she asked him for confirmation that he had sent the forms to ACAS. He said he was not sure. He said he would have to check.

17. Between 10 September and 1 October, the claimant was waiting on Mr McGroggan getting back to her. On or about 1 October, she contacted ACAS herself. They could not find any record on their system of early conciliation having been started for her. On 2 October early conciliation began at her behest. On 5 October an early conciliation certificate was issued. It was sent

to her trade union representative. It was sent to him because the claimant had asked that he be noted as acting for her.

18. On 1 December the claimant met with Mr McGroggan. He told her that he was disappointed that the union's Head Office was not willing to progress her case. He advised her to get advice from an independent solicitor.

19. On 1 December the claimant exchanged emails with Ms Thomas at Beltrami & Co, solicitors.

20. On 9 December the claimant had a telephone conversation with Ms Thomas. In that call, the claimant explained that she had been advised in April 2020 by Mr McGroggan that her claim had been lodged with ACAS.

21. On or about 9 December, the claimant found out that the early conciliation certificate had been issued to Mr McGroggan. She contacted him on or about that date. She emailed him again on 12 December. In it she noted that she was aware that the certificate had been issued to him. In it, she asked him to check, and for the date that it had been sent to him. On or about 14 December he attached it with an email to her saying "*Is this the item*?"

22. On 16 December the claimant presented an ET1.

23. The extension provisions contained in section 207B of the Employment Rights Act 1996 do not apply given the claimant's failure to trigger early ACAS conciliation timeously.

Comment on the claimant's evidence

24. I found the claimant's evidence to be credible and reliable. On occasion her recollection of exact dates was not perfect. That is understandable and is no criticism. She gave her evidence in a calm, assured and open way. She was equally so in answer to questions from Ms Davis. That is to her credit.

Submissions

25. Ms Thomas made an oral submission. After an adjournment, Mr Davis lodged a written submission to which she spoke. Both made reference to an amount of caselaw. To the extent necessary, I refer to it below.

26. After referring to the provisions in section 111(2) of the Employment Rights Act 1996, Ms Thomas invited me to accept the claimant's evidence that she had relied on the advice of her trade union representative that early conciliation had been started within the three month time period and that it was then not incumbent on her to do further. The claimant relied on the actions of the trade union for her after receipt of the letter of 24 April. Ms Thomas reminded me of the evidence on the exchanges between the claimant and Mr McGroggan between 10 September and 1 October. In relation to the appeal, Ms Thomas said that the claimant had made a subject access request after her appeal hearing on 10 September. (This is borne out by what is said in the ET1 particulars at **page 32** where the claimant says she made it on 28 September). Ms Thomas said that the claimant's focus would have been on her appeal and the other information that she sought to recover after it. Under reference to the decision of the Court of Appeal in ***Marks and Spencer plc v Williams-Ryan*** [2005] IRLR 562, Ms Thomas submitted that the claimant had faith in her trade union; it was not reasonable for her to make further enquiry in light of what she understood it had done for her and it was reasonable for her to wait for the trade union to come back to her. Ms Thomas submitted that it was clear from the claimant's state of knowledge that she believed her claim had been lodged. In relation to the period after 2 October, she submitted that it was not until 9 December that she learned that the early conciliation certificate had been issued to Mr McGroggan. On 14 December she received it from him. It was reasonable for her to have submitted the claim by 16 December in those circumstances. Ms Thomas also referred to the decision of the Employment Appeal Tribunal in the case of ***John Lewis Partnership v Charman*** UKEAT/0079/11/ZT. She did not seek to add to her submission by way of reply to Ms Davis.

27. Ms Davis spoke to her written submission. She highlighted that "*the Dedman principle*" applies equally to the lodging of early conciliation forms. To summarise her submission on the first part of section 111(2), the respondent's argument is that fault and therefore remedy lies squarely with the claimant's trade union. It undertook to start the early conciliation process for her. It did not do it. She had had the benefit of trade union representation throughout. On 29 April 2020 the union's solicitors spelled out for the claimant the time-limits for starting early conciliation. Trade union representatives are skilled advisers (as per the decision in ***Charman*** at paragraph 12). The circumstances of this case are on all fours with those in the case of ***London Borough of Islington v Brown EAT 0155/08*** subject to "*reading across*" from the position on presenting an ET1 to the position of starting early conciliation. She drew to my attention the cases of ***Northamptonshire CC v Entwhistle [2010] IRLR 740*** and ***Langley v GMB and ors 2021 IRLR 309 QBD,*** her detailed submission on them being within paragraphs 21 and 22 of her written submission. On what is said at paragraph 23 of it, I took her to mean that even though the correspondence of 20 May did not schedule a date for the appeal, the two expectations set out by her remained reasonable. Separately, Ms Davis questioned what was the claimant's argument on the fact of the appeal and referred to the cases of ***Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200*** and ***Palmer v Southend-on-Sea Borough Council [1984] 1 All ER 945.***

28. On the second part of the "*test*" in section 111(2) she referred to ***Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10/DA.*** In that case it was held that the length of time which it took for the Claimant to submit the claim was objectively unreasonable, and therefore the fact that the delay was caused by the Claimant's advisers made no difference. She argued that the same conclusion should be reached in this case. She noted that there had been no explanation for what had occurred between 2 October (when early conciliation started) and 9 December, nor for the period to 16 December.

The law

29. Section 111(2)(a) of the Employment Rights Act 1996 provides that 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.

30. Section 207B of the Act makes provision for the extension of time limits to facilitate conciliation before institution of proceedings. It is agreed that these provisions do not apply in this case given the claimant's failure to start (or trigger) early conciliation timeously.

Discussion and decision

31. The question of what is or is not reasonably practicable is a question of fact for the tribunal. Where the claimant has (as a matter of agreement) failed to trigger early conciliation one relevant question is; what was the reason for that failure?

32. On her evidence, the claimant knew by 29 April of; her right to claim unfair dismissal; the requirement to start early conciliation before starting a claim in the tribunal; and to start early conciliation within three month less one day from the date of her dismissal. She thus knew by 29 April that early conciliation required to begin by 21 July. On her written case she had been advised by Mr McGroggan in April 2020 that her claim had been lodged with ACAS (**page 39** of her ET1 paper apart). I was invited to accept the claimant's case that she had relied on the advice of her trade union representative that early conciliation had been started within the three month time period. I have done so.

33. In ***Williams-Ryan*** the Court of Appeal noted that although the claimant knew of the right to claim unfair dismissal, she was unaware of the time limit and

believed that she had to await the outcome of the internal appeal before making a complaint to a tribunal. In a review of authorities Lord Phillips (MR) includes reference to ***Wall's Meat Co Ltd v Khan*** [1978] IRLR 499 wherein Lord Denning said "*ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences*." In this case it is clear, as I have found, that the claimant, her trade union and their solicitors were aware of the right to claim unfair dismissal and also the time limit for starting early conciliation. Indeed, the claimant believed based on what she had been told by Mr McGroggan that it had been started timeously. Self-evidently Mr McGroggan knew of the time limit; he told the claimant he had acted for her so as to meet it. That advice has turned out to be incorrect. In ***Brown***, the evidence was that the claimant there had asked her union official to put in her claim, but the union had by oversight failed to do so. the EAT said "*where the adviser actually undertakes to present the claim and not merely to give advice, and the claimant relies upon the adviser to do so, then the failure of the adviser must be treated as the failure of the claimant.*" This appears to me to be what has occurred in this case. The reason for the failure on the part of Mrs Watson to start early conciliation in time was because she relied on her trade union representative to have done so at a time when both of them knew what the time limit was. Following the decision in ***Brown***, the failure of Mr McGroggan is to be treated as the failure of Mrs Watson. It was therefore reasonably practicable for early conciliation to have started in time. I agree with Ms Davis that I can read "*presentation of an ET1*" to "*start early conciliation*". Ms Thomas did not argue otherwise. I am not satisfied that it was not reasonably practicable for early conciliation to have started in time. Had Mr McGroggan done what he told the claimant he had done the question need not have been asked. The tribunal does not have jurisdiction to consider the claim.

34. Strictly speaking I do not need to decide whether the ET1 was presented within such further period as was reasonable. Having started early

conciliation herself, the position appears from her ET1 that by 9 December the claimant had been advised that she should have received the certificate by that date but had not. By 12 December, she emailed Mr McGroggan. From its terms it is clear that she had not by then seen it. Given that state of affairs, where she had still not seen it, and did not have its number before 12 December, my view is that the ET1 was then presented within a reasonable time, by 16 December. But that does not affect the position which is that the claim was presented out of time.

Employment Judge:	Russell Bradley
Date of Judgment:	18 August 2021
Entered in register: and copied to parties	24 August 2021