EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Anita Marshall**
Respondent:	**Jhoots Pharmacy Limited**
On:	**20 April 2022** **21 April 2022** **13 May 2022 (in Chambers)**
Before:	**Employment Judge McAvoy Newns**
Heard at:	**Leeds Employment Tribunal**
Appearances:	
For the Claimant:	**Mr P Morgan, Counsel**
For the Respondent:	**Mr B Hendley, Consultant**

RESERVED JUDGMENT

1. The Claimant's claim for (constructive) unfair dismissal has been presented outside of the normal time limits. As it was reasonably practicable for her complaint to be presented in time, I have not exercised my discretion to consider her claim outside of those time limits. Consequently, it is dismissed.

2. The Claimant's claim for unauthorised deductions from wages succeeds, following the Respondent's concession.

3. The Respondent is ordered to pay the Claimant the sum of £157.13 less any payments that the Claimant received during or after the final hearing. This is a gross sum and the Claimant is required to account for any income tax and/or national insurance contributions which may be due on it.

REASONS

Preliminary

1. At the outset of the hearing, I raised with the parties that there appeared to be a time limit issue with the Claimant's constructive unfair dismissal complaint. This had not been noted by the Respondent or discussed at the previous case management hearings but, as it was a matter of my jurisdiction, I was obliged to consider it. The issue arose from the fact that the Claimant was seeking to rely upon a second ACAS early conciliation certificate to extend time in order to pursue her constructive unfair dismissal complaint. The Claimant considered the claim to be in time and the submissions given in this regard are considered later.

Issues

2. The Respondent conceded the Claimant's claim for unauthorised deductions from wages. Consequently, it was agreed that the issues that I had to determine were:

    a. Was the Claimant's constructive unfair dismissal claim pursued in time?

    b. If not, was it reasonably practicable for the Claimant to present her claim in time? If not, did the Claimant present her claim within a reasonable period of time thereafter?

3. If the claim was in time, I would then consider:

    a. Whether, in accordance with section 95(1)(c) of the Employment Rights Act 1996 (the "ERA") the Claimant terminated the contract under which she was employed in circumstances in which she was entitled to do so by reason of the Respondent's conduct. In this regard the Claimant relies on the matters set out at paragraphs 9-14 of her claim as amounting to a series of acts the cumulative effect of which amounted to a fundamental breach of contract, with the act referred to at paragraph 14 as amounting to the 'final straw'; and

    b. If so, whether the Respondent:

        i. had a fair reason for her dismissal, considering those prescribed by sections 98(1) or (2) of the ERA. In this regard, the Respondent confirmed it was advancing no fair reason and instead it was defending the claim solely on the basis that there was no dismissal; and

        ii. acted reasonably in all the circumstances, pursuant to section 98(4) of the ERA.

Findings of fact

4. On 25 January 2019, the Claimant started the ACAS early conciliation process for the first time. That process concluded and the certificate was provided on 25 February 2019.

5. On 15 May 2019, the Claimant then lodged her first claim in the Tribunal. This claim was for unauthorised deductions from wages relating to deductions referred to in these proceedings as 'RX compliance deductions'. It was alleged that these deductions had been made since January 2019 on a monthly basis.

6. On 18 October 2019 the Claimant's employment with the Respondent terminated following her resignation.

7. On 13 January 2020, the Claimant started the ACAS early conciliation process for the second time. This process concluded on 13 February 2020 and the certificate was provided on that date.

8. The Claimant lodged a claim for unauthorised deductions from wages and constructive unfair dismissal on 13 March 2020.

9. In respect to the unauthorised deductions from wages claim, the Claimant complained about the above mentioned RX compliance deductions, alleging that there had been further deductions in June, August, September and October 2020.

10. In respect to the constructive unfair dismissal claim, the Claimant complained about the following which she said amounted to a series of breaches of her contract:

    a. Being advised by the Respondent's Area Manager that the branch within which she worked would be closing;

    b. The fact that her wages were frequently incorrect;

    c. The Respondent's failure to provide equipment;

    d. The Respondent's failure to ensure the stock was up to date; and

    e. The changes that the Respondent made to the work rota.

11. The Claimant said that both claims arose from the same facts and requested that they be consolidated. The claims were subsequently consolidated and considered together at a number of preliminary hearings before today's hearing.

12. The Claimant explained in evidence that she was not sure why there was a delay in bringing her second claim between 18 October 2019 and 13 March 2020. She was legally represented at the time and discussions were taking place with her solicitors and her trade union regarding whether it was worthwhile for the Claimant to pursue this additional claim.

13. During the hearing the Respondent conceded the Claimant's claim for unauthorised deductions from wages. In this regard, £72.96 had been claimed for the RX compliance deductions and £122.61 had been claimed in respect to a shortfall in the Claimant's wages between 15 May and 11 September 2019. This totals £195.57. It was agreed during the hearing that the Claimant had already received

£38.44 for this claim. The Respondent stated that an additional £34 was paid immediately before the hearing but the Claimant had not received it. It was agreed that my judgment would record the fact that the Respondent should pay the Claimant the sum of £157.13 less any sums which the Claimant has received from the Respondent subsequent to the hearing.

The Law

Unfair dismissal – time limits

14. Section 111(2) of the ERA states that in respect of a complaint for unfair dismissal, the 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".

15. Section 18A of the Employment Tribunals Act 1996 states that, before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

16. s18A(4) states:

"If—
(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or
(b) the prescribed period expires without a settlement having been reached,
the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant".

17. s18A(8) states:

"A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)".

18. Section 207B(2) of the ERA states:

"In this section –(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact Acas before instituting proceedings) in relation to the matter in respect of which the proceedings are brought and (b) Day B is the day on which the complainant or applicant concerned

receives or, if earlier, is treated as receiving… the certificate issued under subsection (4) of that section"

19. Section 207B(4) of the ERA states:

"If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

20. In ***HM Revenue and Customs v Garau 2017 ICR 1121***, the EAT held that the statutory early conciliation provisions do not allow for more than one early conciliation certificate per 'matter' to be issued by ACAS. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and does not impact on the limitation period.

21. In ***Romero v Nottingham City Council EAT 0303/17***, the EAT applied their decision in ***Garau***. It was held that the Employment Tribunal Act enacted only one mandatory early conciliation process and while it was open to a complainant to contact Acas on a voluntary basis in relation to the same matter after an unsuccessful first attempt at conciliation, the rules for extending time limits under section 207B of the ERA applied only to the mandatory conciliation process.

22. In ***Compass Group UK & Ireland v Morgan 2017 ICR 73***, the EAT held that it did not matter that the ACAS early conciliation certificate had preceded some of the events relied upon in the case. It held that the word 'matter' in section 18A(1) was very broad and could embrace a range of events, including events that had not yet happened when the early conciliation process was completed. It was pointed out that Parliament had not chosen to limit the scope of an early conciliation certificate, either by requiring it to relate to past events or by providing for it to be time limited. It was held that provided that there were matters between the parties whose names and addresses were notified in the prescribed manner and they were related to the proceedings issued, the requirements of s.18A(1) would be met.

23. In ***Science Warehouse Ltd v Mills 2015 10 WLUK 251***, the EAT held that the claimant did not need to go through the ACAS early conciliation process for a second time when seeking to amend his claim to include a new cause of action. The EAT noted that when drafting the Employment Tribunals Act, Parliament had used the broad word 'matter' rather than 'cause of action' or 'claim'. The EAT noted that the Early Conciliation Rules of Procedure do not require 'prospective claimants' to formally set out each cause of action or claim when initiating the early conciliation process. They also noted that the rules envisaged that the requirement to start the ACAS process was one which fell on a prospective rather than existing claimant.

Unfair dismissal – extending time

24. Following ***Porter v Bainbridge 1978 ICR 943***, the Claimant has to satisfy the Tribunal not only that he did not know of his rights throughout the period preceding the complaint and there was no reason why he should know, but also that there was no reason why he should make enquiries. In this regard, the burden of proof is on the Claimant.

25. Following ***Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372,*** the term 'reasonably practicable' means something like 'reasonably feasible'.

26. Lady Smith in ***Asda Stores Ltd v Kauser EAT 0165/07*** explained: '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'.

Submissions

27. Both parties gave oral submissions. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

28. The Claimant submitted that the claim was in time. As the second ACAS early conciliation process related to a different 'matter', she was entitled to benefit from the extension of time provisions twice. It was different matter because her second claim raised a complaint of unfair dismissal as well as unpaid wages, whereas her first claim raised solely a complaint of unpaid wages. There were also more facts relevant to the second claim, as highlighted at paragraph 10 above.

29. The Claimant offered no submissions on the section 111(2)(b) of the ERA test on the basis that the Claimant's evidence did not support an extension of time being granted.

Conclusions

Unfair dismissal

30. As the Claimant's employment with the Respondent terminated on 18 October 2019, subject to the below, the deadline for her to lodge her unfair dismissal claim in the Tribunal was 17 January 2020. As she submitted it on 13 March 2020, she did so outside of the normal time limits.

31. The Claimant has sought to benefit from the extension of time provisions arising from the ACAS early conciliation process in respect to her second claim as well as her first.

32. In this regard, a few days before the normal deadline of 17 January 2020, on 13 January 2020, she started the ACAS early conciliation process for the second time. This process concluded on 13 February 2020 and the certificate was provided on this date. She lodged her claim within one month of the certificate being provided.

33. If she is entitled to benefit from these extension of time provisions, her claim would be in time. If she is not, her claim would be out of time and I would need to consider whether to exercise my discretion to extend time.

34. After careful consideration and reflection, and for the reasons given below, I consider myself bound by the earlier mentioned EAT decisions to consider the Claimant's claim to be out of time.

35. The question for me to determine is, 'what was the relevant matter?" Were there, as the Claimant has submitted, two separate matters? Or does the Claimant's first notification to ACAS comprise the entirety of the matter?

36. The starting position is the definition of a 'matter'. This is not defined in the legislation and therefore I used the appellate cases referred to above as guidance. These state that the term should be given a broad interpretation, embracing a range of events (some of which might not have even happened) and attention should be given to the fact that Parliament have intentionally used the word 'matter' rather than 'claim' or 'cause of action'.

37. Section 18A(1) requires the prospective claimant to provide ACAS with prescribed information about the matter in order to start the ACAS early conciliation process. This information is limited to administrative information regarding the prospective claimant and the prospective respondent (such as names and addresses). It does not involve the provision of information regarding the nature of the legal complaints being pursued. This information is not included on the certificate.

38. Based on the evidence presented to me, it appears that the prescribed information that the Claimant gave to ACAS before lodging her first claim is the same as that which she gave to ACAS before lodging her second claim, save that, when the Claimant started the ACAS process for the first time, she was part of a group of Claimants.

39. Both claims arise from the same facts, which the Claimant acknowledged when asking for them to be consolidated and determined together. Within the second claim, the Claimant brought a claim which was identical to that pursued in the first claim. Although the Claimant had other reasons for resigning, the unauthorised deductions from her wages that formed her first claim was one of such reasons. The fact that the Claimant's resignation proceeded the date of the first certificate is irrelevant bearing in mind the cases cited earlier. When lodging the second claim and asking for the same to be consolidated with the existing claim, the Claimant was not a 'prospective claimant' but instead an 'existing claimant'.

40. ***Mills*** shows that, even though the legal complaints are different, they can still form part of the same 'matter'. There are similarities between ***Mills*** and this case as, in both, the resignation underlying the constructive unfair dismissal complaint occurred after the (for this case, first) early conciliation certificate was issued and the constructive unfair dismissal complaint related to a sequence of events that were in issue between the parties at the time of the (for this case, first) early conciliation process. The only difference is that, in ***Mills***, the Claimant sought leave to amend her claim rather than lodge a new claim (which I have considered later).

41. It appears to me, therefore, that in order to be a different matter, based on the authorities referred to earlier, some of the prescribed information may need to differ, for example, a claimant may have brought one claim against their employing entity and then wish to pursue a second claim against a named respondent. As this would involve the provision of different prescribed information, this may qualify as a new 'matter'. This is not what happened in this case.

42. Consequently, I have concluded that all of the Claimant's claims formed part of the same 'matter'. When she lodged her second claim, she was presenting an application to institute relevant proceedings in respect of the same 'matter'.

43. The cases state that there can only be one mandatory early conciliation process per matter. They say that any subsequent process is voluntary and any certificate issued was not a certificate as defined in section 18A(4). Consequently, the ACAS process which the Claimant commenced on 25 January 2019 was the mandatory process relevant to this claim. The Claimant cannot benefit from the second ACAS process in order to extend the time limits. Consequently, her claim is out of time.

44. As to the extension of time limits, the Claimant has not satisfied me that it was not reasonably practicable for her to present her claim in time. She had the benefit of legal representation as well as trade union support. She had been engaged in the Tribunal process for several months before her resignation. The reasons that she gave for lodging her claim late do not support an extension of time being granted which her Counsel appeared to acknowledge when giving submissions.

45. In carefully considering this case, I have reflected on the following counter arguments, some of which were raised by the Claimant's Counsel and some of which I have considered on my own initiative:

    a. The facts of this case can be distinguished from the appellate authorities quoted earlier. In ***Garau***, the claimant went through the ACAS early conciliation process twice before lodging his claim for unfair dismissal and disability discrimination. He relied upon the second certificate when bringing his claim which was the error. In ***Romero***, similarly, the claimant engaged in the ACAS early conciliation process twice before lodging his claim for unfair dismissal and sought to rely upon his second certificate when lodging his unfair dismissal claim. In ***Mills***, the claimant did not lodge a claim in the Tribunal in order to bring his constructive unfair dismissal complaint. Instead, he sought leave to amend his existing claim which the Tribunal considered using their case management powers;

    b. in ***Mills***, Judge Eady QC stated at paragraph 29: *"If such an application to amend were not permitted, it may be that the Claimant becomes a prospective Claimant in respect of that matter, and there may then be an obligation to invoke the EC procedure unless one of the section 18A(7) exceptions apply".* This suggests that Judge Eady QC was contemplating a situation involving the claimant being required to lodge a second claim in the Tribunal, if the application for leave to amend was refused, in which case the claimant would then become a prospective claimant in respect to that

second claim and may benefit from the extension of time provisions that are the subject of these proceedings;

c. The purpose of early conciliation is to encourage resolution and therefore reduce the number of claims being submitted to the Tribunal. By not benefiting from the extension of time provisions in circumstances like this, such attempts at conciliation appear to be being discouraged; and

d. An unrepresented claimant who has benefited from the extension of time for the first claim may have a reasonable expectation that they will benefit from it the second time around. If they applied their mind to the word 'matter', they may reasonably conclude, as the Claimant submitted in this case, that a claim for unpaid wages and a claim for unfair dismissal would amount to two different and distinct matters. They would not have thought that its interpretation would be as broad as the appellate cases cited above suggest.

46. Notwithstanding these points, bearing in mind the authorities cited above, and in particular the wide interpretation of the word 'matter' that the EAT has been adopting, it would appear to me to be an error of law to conclude that the second claim in this case comprised a separate 'matter' and therefore the Claimant ought to benefit from the extension of time provisions again.

Unauthorised deductions from wages

47. Following the Respondent's concession, this claim is upheld. The Respondent should pay the Claimant the sum of £157.13 less any sums which the Claimant has received from the Respondent subsequent to the hearing.

Employment Judge McAvoy Newns

19 May 2022