



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000123/2023

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Held in Glasgow on 31 July 2023

Employment Judge L Doherty

Mr P Hanton

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**Claimant
In Person**

Scottish Enterprise

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**Respondent
Represented by:
Ms E McMahon -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Tribunal is that:

(1) The time limit for consideration of the claim of unfair dismissal is not extended under Section 111(2) (b) of the Employment Rights Act 1996 (the ERA) and the Tribunal does not have jurisdiction to consider the claim of unfair dismissal;

25 (2) It is just and equitable to extend time under Section 123 (1) (b) of the Equality Act 2010 (the EQA) to consider a complaint of sex discrimination in respect of act(s) of discrimination occurring on the 9th of December 2022, or a continuing of acts of discrimination extending over a period as defined by Section 123 (3) of the EQA where the date of the last act of discrimination is
30 9th December 2022;

(3) A Preliminary Hearing will now be fixed to consider further case management.

REASONS

1. This was a Preliminary Hearing (PH) to consider the issue of whether the Tribunal has jurisdiction to consider the claimant's claims of Unfair Dismissal and Sex Discrimination.
- 5 2. The claimant appeared on his own behalf and the respondents were represented by Ms MacMahon, solicitor.
3. This case has benefited from earlier case management. In his Note following a PH conducted on 15 May, Employment Judge Meiklejohn set out the relevant statutory tests which the Tribunal has to apply in considering whether
10 it has jurisdiction to deal with the claims for unfair dismissal and sex discrimination.
4. It is accepted that both claims are lodged out with the relevant statutory limitation period. In relation to the claim of Unfair Dismissal the Tribunal has to determine whether it was not reasonably practicable for the claim to be
15 lodged within the statutory limitation period, and if it is satisfied on that point, whether it was lodged within a reasonable period thereafter.
5. For the Discrimination claim the issue for the Tribunal is whether time to accept the claim should be extended on the basis that it is just and equitable to do so.
- 20 6. There are outstanding issues of specification in relation to the sex discrimination claim. It is the respondent's position that the claim is not properly specified, and that matters raised in the claimant's PH Agenda constitute new claims which should only be allowed by way of amendment. Employment Judge Meiklejohn has already decided that the
25 specification/amendment point should be held over until such time as the time-barred point is dealt with.
7. For the purposes of this PH, it was agreed that the Tribunal would approach the matter on the basis that 9 December 2022, which is the agreed date of termination of employment, is the date from which time will run for the
30 purposes of both claims. The effect of that is that the Tribunal is only able to

make a determination as to whether time should be extended to consider the claim of sex discrimination in respects of act(s) of discrimination occurring on 9 December 2022 or continuing acts of discrimination extending over a period where the date of the last act of discrimination is 9 December 2022.

- 5 8. The claimant gave evidence on his own behalf and the parties lodged a joint Bundle of Documents.

Findings in fact

9. The claimant was employed by the respondents as Head of Data and Analytics.
- 10 10. In July 2021 the claimant very sadly suffered two serious bereavements when his wife and his mother died. The claimant's mental health was affected by this and he had time off work, returning to work on 6 April 2022. The claimant received medical treatment as a result of his ill health.
11. At some point between August and September 2022 the claimant and the
15 respondent had a protected conversation. The claimant did not take legal advice at that time.
12. On 3 November 2022, the claimant raised a FOI request with the respondents.
13. On 11 November 2022 the claimant tendered his resignation, following the
20 respondent's refusal of his appeal against his grievance outcome. The claimant gave 4 weeks' notice on resigning. The date of termination of his employment was agreed to be 9 December 2022. The claimant did not work during his notice period.
14. The claimant contacted ACAS on 11 November 2022 with a view to
25 investigating if they could conciliate with his employers. The claimant was aware of ACAS's role as an industrial conciliation body.
15. The claimant received an ACAS certificate on 12 December 2022 which recorded the date of receipt by ACAS of the Early Conciliation (EC) notification as 11th November and the date of issue of the Certificate as 12 December 2012.

16. The ACAS Certificate was accompanied by an email from ACAS dated 12 December which stated:

“You can now use this certificate to make a claim to an employment tribunal if you still want to.

5 *How to make a claim to an employment tribunal*

You can make a claim online or by post

(Link to how to make claim - Gov Website)

Make sure you submit your claim on time

10 *You have at least one month from the date you receive this certificate, if you notified ACAS of the dispute within your time limit.*

If you are concerned you might be out of time, make a claim as soon as possible. The employment judge will decide whether to accept it.

if you have any questions about tenements, contact the ACAS helpline (link to helpline).”

- 15 17. The claimant spoke to a conciliation officer at some point and had a discussion about time limits.

18. On receipt of the email from ACAS on 12 December 2022 the claimant formed the belief that he had to wait one month from the date of the ACAS certificate before he could lodge his claim. He subsequently formed the belief
20 that that he had three months from the date of the ACAS certificate to lodge his claim with the Tribunal.

19. The claimant had carried out research on the internet and by looking at the ACAS website. The claimant considered that some of the information on the Internet ‘muddied the waters’, but he was aware that there was a three month
25 deadline for lodging Tribunal claims. At some point the claimant also contacted two sets of solicitors for advice but did not instruct them due to the cost involved.

20. The claimant lodged his claim with the Tribunal on 17 March 2023. He was not legal represented when he lodged the claim.
21. The claimant found his work situation difficult. In the period from the termination of his employment to 17 March 2023 the claimant continued to experienced mental health issues and receive medical treatment.
22. During this period the claimant also looked for other work and submitted job applications.

Note on Evidence

23. There was an issue of credibility for the Tribunal, in that the claimant's evidence was that he mistakenly believed on the basis of the email from ACAS of 12 December 2022 that he had to wait one month from the date of issue of the ACAS certificate before lodging his claim. He said that he spoken to ACAS officer and was advised by that ACAS officer that he had three months from the date of the certificate within which to lodge his Tribunal claim. He was not clear as to when he spoke to ACAS but though it was after the email of 12 December.
24. While the Tribunal did not form the impression that the claimant sought to deliberately misled, and notwithstanding that it heard evidence only from the claimant, it was not persuaded that the claimant had received this advice from an ACAS officer. The advice which the claimant claimed was given to him by the ACAS officer was so patently wrong, and inconsistent with the information contained in ACAS's email of 12 December, that it was not plausible in the Tribunal's view that the Claimant had been told by ACAS that he had three months from the date of issue of his certificate to lodge his claim.
25. The Tribunal's conclusion on the credibility of the claimant's position in this regard is fortified in that the claimant's evidence from time to time lacked reliability. For example, the claimant could not recall that he had given notice upon resigning, and that a period of four weeks had elapsed between the date of his resignation and the termination of his employment. The claimant could not recall with any degree of accuracy when he spoke to ACAS, or when he

is contacted the two sets of solicitors he referred in his evidence. Again, the Tribunal did not from the impression the claimant was attempting to mislead it, but his lack of reliability rendered it likely on balance, in the Tribunal's view, that he did not accurately recall his discussion with ACAS.

5 26. While the Tribunal therefore accepted that the claimant misunderstood the position, it was not persuaded that he was given incorrect advice about the position from ACAS or that he could reasonably have formed the view on the basis of information given to him by ACAS that he had three months from the date of the ACAS certificate within which to lodge his claim.

10 27. ACAS's email of 12 December clearly does not state that the claimant had to wait one month from the date of issue of the Certificate before he could lodge a claim and the Tribunal did not conclude that it was reasonable for the claimant to reach the conclusion that that was the case on the basis of the contents of that email.

15 28. The Tribunal did however conclude that regardless of how mistaken the claimant's belief was to the applicable time limit after receipt of the ACAS certificate, it genuinely held by him. In reaching this conclusion the Tribunal take into account that although unreliable, and in some material respects incredible, the claimant gave his evidence with a good deal of candour. For
20 example, he readily accepted that he was aware of the function of ACAS, that he had conducted internet research, that he was aware of a three month time limit for bringing claims and that he had on two occasions sought to obtain legal advice. All of these concessions were not helpful to his position, and the fact that that the claimant was readily prepared to make them tended to
25 suggest that his evidence about his understanding of the position was genuine.

Submissions

29. The claimant submitted he had found the situation with the loss of his job to be very upsetting and he was still suffering mental health issues; while he
30 appreciated that there was a time limit he was under the impression that he was lodging his claim on time.

30. The claimant also referred to the complexity of the rules about time bar and submitted that in light of that it was reasonable for him not to understand them, and that he acted at all times in good faith.

31. Ms MacMahon provided written submissions which she supplemented orally.
5 These are not rehearsed here in detail but are referred to below where relevant.

Consideration

32. The Tribunal has to apply two different statutory tests in order to determine whether it has jurisdiction to consider the claims of unfair dismissal and sex
10 discrimination

33. The Tribunal firstly considered the unfair dismissal claim.

Unfair Dismissal Claim

34. The relevant statutory provision are as follows:

Section 111 of the ERA

15 (1) *A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*

(2) *Subject to subsection (3), an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*

20 (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*
25 *that period of three months.*

Section 207B of the ERA

Extension of time limits to facilitate conciliation before institution of proceedings

(1) *This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).*

5 (2) *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*

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(b) *Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

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(3) *In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

(4) *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.*

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(5) *Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.*

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35. The Tribunal first considered whether the claim was brought within the statutory time limit. The date of termination of employment is 9 December 2022.

36. The primary time limit expires three months less one day from the date of termination (9 December 2022) and therefore expires on 8 March 2023. That time limit is extended automatically by the 'stop the clock' provisions in Section 207B.
- 5 37. The 11 November is the date of Notification of the EC certificate and the date of issue of the certificate and is 12 December 2022.
38. The claimant however remained in the respondent's employment up until 9 December, and therefore as is made clear in *Revenue and Customs Commissioners v Garau 2017 ICR*, referred to by Ms MacMahon, the clock can only be stopped when the limitation period is running. The limitation period did not start to run until after the claimant's employment had terminated on 9 December. Under Section 207, A day is therefore 10 December and B day is 12 December (the date of issue of the EC Certificate). The effect of this is that three days is added to the primary limitation period, with the effect that the limitation period for the unfair dismissal claim (and the sex discrimination claim in respect of acts of discrimination on 9 December or a continuing or series of acts of discrimination, the last act of which is on 9 December) expires on 11 March 2023.
- 10 15
39. Section 207B (4) which provides effectively a safety net of one month from the date of issue of the certificate within which to lodge a claim, did not operate to extend the time limit by one month in the claimant's case as the claimant still had around two months from the date of issue of the certificate within which to lodge his claim.
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40. The claim was presented on 17 March and is therefore 6 days late.
41. The Tribunal then went on to consider the two strand test set out in Section 111 (2) of the ERA.
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42. The first limb of the test which the Tribunal has to apply is to consider whether it was not reasonably practicable for the claim to be lodged in time. If it is satisfied on that point, the Tribunal would then go on to consider if the claim was lodged within a reasonable period thereafter.
- 30

43. The Tribunal reminded itself that the burden rests with the claimant to show that it was not reasonably practicable to lodge the claim on time.
44. The Tribunal also reminded itself of the guidance in the case of the case of *Palmer and Saunders v Southend on Sea Borough Council (1084) ICR 372* referred to by Mr McMahon. What was said in that case was that correct test is to ask if it was reasonably feasible for the claim to be presented by the correct date.
45. The Tribunal considered the claimant's argument that his misunderstanding of the rules was reasonable given their complexity.
- 10 46. The claimant was aware of the three month time limit for lodging claims and had carried out research on the internet about lodging Tribunal claims, including looking at the ACAS website.
47. The claimant was therefore not ignorant of the fact that a three month time limits applied to the presentation of claims. The reason he advanced for the claim being lodged late were that he initially understood from the email he received from ACAS that he has to wait one moth from the date of the certificate before he could lodge a claim. Having spoken to ACAs he then thought he had three months from the date of the certificate to lodge the claim.
- 15
48. For the reasons given above the Tribunal was not persuaded that although the claimant may have thought that was the case, that he had any reasonable basis for reaching his conclusions. The fact that the claimant unreasonably held misconceptions about the applicable time limits, was not a factor which rendered it not reasonably practicable for the claim to be lodged within the statutory limitation period.
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49. The Tribunal accepted that the claimant was upset by his work situation and that was suffering from mental health difficulties and was receiving medical treatment. He was however able to have able to carry out internet research, have a conversation with ACAS, and contact two sets of solicitors, albeit for reason of cost he did not instruct them. He was also able to look for jobs and complete job applications in the period between termination of employment
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and the claim being lodged. There was nothing to suggest that the claimant's circumstance with regard to his health had changed by 17 March 20123 when the claim was lodged. The fact that the claimant was able to engage in these activities did not support the conclusion that the claimant's ill health was such that it rendered it not feasible or not reasonably practicable for him to have lodged his Tribunal claim within the limitation period.

50. The Tribunal was not persuaded that the claimant had discharged the burden which rests with him in order to establish that it was not reasonably practicable for the claim to be lodged within the applicable time limit.

10 51. The Tribunal having reached this conclusion did not require to go on to consider the second limb of the test in Section 111(2) (b) of the ERA.

52. The effect of the Tribunal' conclusion is that time is not extended under Section 111(2) of the ERA and the Tribunal does not have jurisdiction to consider the claim of unfair dismissal.

15 **Sex Discrimination Claim**

53. The relevant statutory provision is contained in Section 123 (1) of the Equality act 2010 (the EQA) which provides:

1) *Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*

20 (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

(2) *Proceedings may not be brought in reliance on section 121(1) after the end of—*

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(a) *the period of 6 months starting with the date of the act to which the proceedings relate, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

(3) *For the purposes of this section—*

(a) *conduct extending over a period is to be treated as done at the end of the period;*

(b) *failure to do something is to be treated as occurring when the person in question decided on it.*

(4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

(a) *when P does an act inconsistent with doing it, or*

(b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

54. As indicated above the agreed approach was that for the purpose of assessing the expiry of the limitation period the Tribunal would take time as beginning to run from the date of termination of employment. On that basis the Tribunal's conclusions as to the expiry of the limitation period are as noted above. The ACAS extended limitation period expired on 8 March and the claim was lodged on 11 March, rendering it 6 days late.

55. The escape clause in Section 123 (1) of the EQA is broader than that in Section 111(2) of the ERA for unfair dismissal complaints, however there is no presumption that the Tribunal should extend time, and the exercise of discretion to extend time is the exception rather than the rule. The onus rests with the claimant to satisfy the Tribunal that time should be extended (*Robertson v Bexley Community Centre (2003) IRLR 434 CA* referred to by Ms McMahon).

56. While the Tribunal need not adhere to it lavishly, and not all of the factor identified are relevant in this case, useful guidance is found in *British Coal Corporation v Kibble and others 1997 IRLR 336*, referred to by Ms McMahon. Relevant factors for consideration include:

- (1) The length of the delay and the reasons for it;
- (2) The extent to which the cogency of the evidence is likely to be affected by the delay;
- (3) The extent to which the parties sued as cooperated with any requests for information;
- (4) The promptness with which the claimant acted once they knew of the possibility of taking action; and
- (5) The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

57. The length of the delay here is not substantial. The Tribunal was satisfied that the reason for the delay was the claimant's belief as to when the limitation period expired. For the reasons given above however the Tribunal was not satisfied that his belief was reasonably held and therefore would not of itself be a factor which could be relied upon to extend time on the grounds of justice and equity.

58. The Tribunal considered however that it was entitled to take into account that in the period from the termination of his employment up until the lodging of his claim, the claimant was suffering from mental health issues for which he was in receipt of medical treatment. This is not a factor which automatically justifies an extension of time and was not sufficient for the reasons given above to render it not reasonably practicable for the unfair dismissal claim to be lodged in time. However, the fact that the claimant was suffering from ill mental health and receiving medical treatment during the limitation period was a factor which the Tribunal considered it was entitled to have some degree of regard in considering whether to extend time on the grounds of justice and equity.

59. It was not suggested by Ms McMahon that the cogency of the evidence was likely to be affected by the delay. The prejudice to the respondents in extending time is significantly mitigated by virtue of the fact that the claim while late, is not substantial late and it is not suggested that the delay will impact on the respondent's ability to defend the claim.

60. The Tribunal takes into account that time limits are strictly applied and that the interests of the respondent need to be taken into account as well as those of the claimant, however balancing the relevant factors the Tribunal was satisfied that it was just and equitable to extend time to consider the discrimination complaint.
61. It should be noted however that the effect of agreed approach which the Tribunal took to the determination on time bar means that the Tribunal's conclusion only operates to extend time so that the Tribunal has jurisdiction to consider claims of discrimination which occurred on 9 December or claims in respect of a series of acts of discrimination which are found to amount to conduct extending over a period as defined in Section 123 (3) (a) of the EQA, where the last act of discrimination occurred on 9 December 2022. Time bar remains a live issue for any claim of sex discrimination which does not fall into this category.
62. There is an outstanding issue for the Tribunal in respect both of specification of the claim and of potential amendment of the claim(which amendment may be opposed), both of which still require to be determined. A further PH of one hours duration to take place by telephone to consider case management and further procedure in connection with the sex discrimination claim will now be fixed.

Employment Judge: L Doherty
Date of Judgment: 02 August 2023
Entered in register: 07 August 2023
and copied to parties