



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122290/2018

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Held in Glasgow on 28 February 2019

Employment Judge Shona MacLean

10 **Ms F Campbell**

**Claimant
In Person**

15 **Lloyds Pharmacy Limited**

**Respondent
Represented by:
Mr M Love
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal is that the Tribunal does not have jurisdiction under section 111 of the Employment Rights Act 1996 to hear the complaint of unfair dismissal.

REASONS

Background

25 1. On 1 November 2018 the claimant sent a claim form to the Tribunal complaining of unfair dismissal. In the response the respondent raised a preliminary issue that the Tribunal had no jurisdiction to hear the claim as it was presented out of time in terms of section 111 of the Employment Rights Act 1996 (the ERA).

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2. The case was listed for a preliminary hearing to determine the issue of time bar.

E.T. Z4 (WR)

3. The parties produced documents. The claimant gave evidence on her own account. It was agreed that the claimant's effective date of termination was 18 May 2018 and the claim was presented out of time.

5 4. The issue I had to determined was whether or not to extend the period of time to present the claim form: was it not reasonably practicable for the claim to be presented before the end of the three month period from the effective date of termination; and if not was the claim presented within such further period as I considered reasonable

10 **Findings in Fact**

5. The claimant was absent from work through ill health from 20 February 2018.

6. Around April 2018 she became aware that her employment might be terminated. She ascertained the opening hours of her local citizen advice
15 bureau (CAB) from the CAB website. The claimant visited the CAB on 9 and 18 April 2018 to discuss the potential termination of her employment.

7. On 18 May 2018 the claimant's employment was employment was terminated and she was advised of her right of appeal.

20 8. The claimant attended the CAB on 29 May 2018 and 4 June 2018 to discuss the termination of her employment. The claimant understood that she had to follow the respondent's appeal procedure. The claimant appealed against her dismissal on 4 June 2018.

25 9. The claimant received no reply from the respondent to her appeal. She attended the CAB on 26 June 2018. The adviser contacted the respondent following which the claimant received a letter dated 2 July 2018 acknowledging her appeal.

30 10. The claimant attended the appeal hearing on 11 July 2018. Tony O'Reilly the manager conducting the appeal advised that he needed to make enquiries. The outcome would take longer than a week, but he would keep the claimant updated. He did not do so.

11. On 21 August 2018 the claimant sent an email to Mr O'Reilly asking for an update and a copy of the minutes of the appeal hearing. She received no reply.
- 5 12. The claimant attended the CAB on 4 September 2018. The adviser contacted Mr O'Reilly. The adviser also arranged a legal appointment for advice on employment/redundancy on 17 October 2018 which was the earliest available appointment.
- 10 13. Mr O'Reilly emailed the claimant on 5 September 2018 asking her to contact him. The claimant replied explaining that she was on leave until 22 September 2018 said asking him to reply by email.
14. On the claimant's return she read an email from Mr O'Reilly sent on 7
15 September 2018 stating that he had returned the paperwork to HR on 25 July 2018 and "*they will have an outcome letter sent out to you today or early next week.*"
15. The claimant sent an email to Mr Reilly on 24 September 2018 advising that
20 she had not received the outcome letter from HR.
16. The claimant attended the CAB on 17 October 2018 and met with a lawyer
25 who said that employment law was not his specialism. The claimant was told that she was "*outside the 12-week window*" and there was nothing he could do. It was suggested that she get specialist advice.
17. The claimant telephoned Tait MacLeod, Solicitors for an appointment. The
30 claimant met with a solicitor on 26 October 2018 following which she notified ACAS. ACAS issued the early conciliation certificate on 31 October 2018.
18. The claimant presented the claim form to the Tribunal's office on 1 November 2018.

The Law

19. Section 111 of the ERA provides that a complaint of unfair dismissal may be presented to a Tribunal against an employer. However, a Tribunal shall not consider a complaint unless it is presented to the Tribunal
- 5 a. before the end of the period of three months beginning with the effective date of termination; or
- b. be within such 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.
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20. Subject to the provisions of Section 207B of the ERA the time limits can be extended to facilitate conciliation before the institution of proceedings.

The Respondent's Submissions

21. Mr Love prepared detailed submissions which I have summarised.
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22. The burden of proof in establishing that it is not reasonable practicability is on the claimant.
23. When looking at this question, I was referred to the case of *Marks and Spencers plc v Williams-Ryan* [2005] EWCA Civ 470 for the key principles that I should contemplate when considering the question of reasonable practicability. Section 111(2) of the ERA should be a liberal interpretation in favour of the employee. Regard should be had to: what if anything the employee knew about the right to complain to a Tribunal; of the time limit for doing so; and what knowledge the employee should have had, had they acted
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- 25 reasonably in the circumstances. Where the claimant retains a skilled adviser and fails to meet the time limit because of the skilled adviser's negligence, the claimant cannot argue that it was not reasonably practicable to submit the claim in time.
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24. The claimant acknowledges in her claim form that at the meeting with the CAB solicitor on 17 October 2018, she knew that she had missed the time limit and that was confirmed in subsequent correspondence.

25. The claimant's position is that she was informed that she had to exhaust the respondent's internal appeal process before she could raise a claim. Her inference was that she was misadvised by the CAB.

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26. Where skilled advisers are at fault, a Tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time (*Dedman v British Building and Engineering Appliances Limited* [1973] IRLR 379). In *Remploy Ltd v Brain Limited* UKEAT/046/10, the EAT held that the question of reasonable practicability should not hinge on the nature of the relationship between the adviser and the claimant. If the absence of a duty of care is to be weighed in the balance, it should be considered as part of the factual matrix rather than be elevated into a principle.

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15 27. In a case where a claimant has consulted skilled advisers, the question of reasonable practicability is to be judged by what he could have done if he had been given "such advice as they should reasonably in all the circumstances have given him" (*Northamptonshire County Council v Entwistle* UKEAT/0540/09).

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28. The fact that an employee is pursuing an internal appeal does not in itself mean that it is not reasonably practicable for the employee to submit a claim within the applicable time limit even if this means submitting the claim before an appeal has been concluded (*Bodhu v Hampshire Area Health Authorities* [1982] ICR 200 and *Palmer & another v Southend on Sea Borough Council* [1984] IRLR 119).

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29. The claimant confirmed that she went to the CAB and obtained advice on seven (possibly eight) separate occasions. Two or three of those were before the termination of her employment. Three were after termination but before the limitation day. The last was after the limitation date and then on 17 October 2018 when she alleges was the first time that she knew about the three-month deadline. The claimant confirmed that at the various meetings

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with CAB, the matter of termination of employment was discussed. She also confirmed that she had dealt with four different advisers.

5 30. The claimant also confirmed that she looked at the guidance on CAB's website in relation to making claims; the effect of appeal; the importance of strict time limits for raising a Tribunal claim and the importance of raising a claim timeously even though an internal appeal process may be continuing.

10 31. The claimant admitted to accessing CAB's website and had she been minded to do so, she could have accessed guidance about raising Tribunal claims. The respondent's submission was that it would have been reasonable for the claimant to have availed herself of this information.

15 32. There is no evidence from any of those advisers whom the claimant accuses of misadvising her. The claimant has no documentary evidence showing that she was misadvised by the CAB. I only have the claimant's word for this.

20 33. The respondent's position is that it is not credible to believe that four different CAB advisers dealt with the claimant's claim and misadvised her as to the deadlines for raising a claim particularly when those meetings took place in the context of discussions about her employment being (or potentially being) terminated. Also, this assumes that the CAB advisers provided advice in stark contrast to that outlined on its website. It has to be assumed that the CAB advisers are trained in line with the guidance on their website.

25 34. Even if the claimant was misadvised, the claimant's right of recourse is against the CAB directly. The claimant has not contacted the CAB to take issue with the fact that she has been misadvised. There has been ample opportunity to ascertain the existence of the relevant time period for her claim.
30 The claimant has taken advice on matters such as internal appeal and she should take advice on the limitation period for raising the claim. The respondent's position was that it was reasonably practicable (in the sense that it was reasonably feasible) for the claimant to present her claim in time. Accordingly, I should therefore reject the claimant's argument that it was not

reasonably practicable for her to present her claim before the limitation date of 17 August 2018.

5 35. Even if I accept that it was not reasonably practicable for the claimant to present her claims in time, I would still need to consider whether the claim was presented within such further period as I considered reasonable.

10 36. I was referred to the cases of *the University Hospitals Bristol NHS Foundation Trust v Williams* UKEAT/0291/12 and *Westwood Circuits Limited v Reed* [1973] ICR301 NIRC.

15 37. While it is clear that the length of time following the original limitation period is not of itself determinative and will not make an application inherently unreasonable, I nonetheless need to give proper consideration to all the circumstances of the case including throughout the period of the further delay the claimant's actual knowledge as to her rights as to what knowledge she should have had she acted reasonably in all the circumstances. Both before and after the limitation date, the claimant knew or ought reasonably to have known after making reasonable enquiries the correct limitation date and
20 awaiting a further period of ten weeks between 17 August 2018 and 26 October 2018 before contacting ACAS to progress early conciliation was not reasonable.

25 38. The claimant confirmed that she first heard about the limitation date from the CAB solicitor on 17 October 2018. The alleged obstacle which is the claimant's lack of awareness as to the correct limitation period was removed on that date. Despite this, it still took the claimant until 26 October to contact ACAS. The claimant did not act as quickly as possible once the obstacle had been removed.

30 39. Even if I accepted that it was not reasonably practicable for the claimant to present her claims in time, the further period which it took her to present her claims was unreasonable in all the circumstances.

The Claimant's Submissions

40. The claimant said that throughout 2018, she had been under significant stress caring for her mother and then her sister, both of whom she lost in that year.

5 41. The claimant candidly accepted that during one of the initial meetings at CAB, there was discussion about possibly raising a claim with the Tribunal only if matters were not resolved during the internal process. She accepted that she may have been told about the Tribunal time limits, but she could not specifically recall this. Her understanding had been that she had to exhaust
10 the internal process first. Her subsequent meetings with the CAB focused on progressing the appeal hearing and it was only in the meeting on 17 October 2018 that she became aware that the time limit had expired.

Deliberations

15 42. I considered that the claimant gave her evidence in a straightforward manner and did not seek to embellish her evidence. I had no doubt that 2018 had been a traumatic year for the claimant. Discovering that her job was at risk of redundancy and then being dismissed would have added further pressure on what were already difficult personal circumstances.

20 43. The claimant very fairly conceded in cross examination that had she been aware of the time limit of 17 August 2018, she would have been capable of initiating the ACAS early conciliation procedure before then and presenting her claim form within the time limit. From the evidence, I considered that she knew from her various meetings with the CAB advisers that she had a right
25 to make a claim to the Tribunal. She understood that she required to exhaust the appeal procedure. She did not appear to have any clear understanding that the time limits for making an application to the Tribunal started on 18 May 2018 and the time limits were unaffected by the appeal hearing.

44. While I had no doubts that was the claimant's understanding, it was not clear from the evidence before me that the claimant had in fact been given the wrong advice rather than misunderstanding the advice. Given the information contained on the CAB's website, I considered that it was highly unlikely that all four advisers failed to inform her of the time limits for presenting a claim.
45. The claimant attended numerous meetings with the CAB to discuss the termination of her employment. The claimant produced various emails and referred to the fact that she had checked the opening hours of the CAB online. She was able to access the internet via her smart phone. I therefore considered that she was able to make enquiries via the internet. While I could understand the preference to have face to face meetings with the CAB advisers, she was able to access information from which she could readily have ascertained details about how to go about making an application to a Tribunal and the time limits involved.
46. Given the number of meetings that the claimant attended at the CAB notwithstanding the respondent's delay in fixing the appeal hearing and advising her of the outcome, I considered that before 17 August 2018, it was reasonably practicable for the claimant to have presented her claim.
47. Even if it was not reasonably practicable then it did not appear to me the claimant acted within such further period as was reasonable. The claimant knew on 17 October 2017 that her claim form was out of time. The claimant did not go online to ascertain what steps she should take. She did not contact ACAS but rather contacted a firm of solicitors and did not indicate any degree of urgency in relation to the advice that she was seeking. The claimant delayed a further ten days. I accepted that on receiving advice from solicitors, she acted promptly, but this did not in my view demonstrate that she acted as quickly as she could possibly could when she knew that her claims were late and that she had to act if she wished to pursue the matter further.

48. In all the circumstances, I concluded that the Tribunal did not have jurisdiction to deal with the claimant's claim and it was not appropriate to grant the claimant's application to extend the time limit for accepting her claim as it was not reasonably practicable for her to have presented her claim in time.

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Employment Judge

Shona MacLean

10 **Date of Judgment**

11 March 2019

**Entered in register
and copied to parties**

12 March 2019

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