EMPLOYMENT TRIBUNALS

Claimant: Ms L Turner

Respondent 1: Centrica PLC
Respondent 2: British Gas Trading Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford by CVP **On:** 27 October 2020

Before: Employment Judge Loy (sitting alone)

Appearances
For the claimant: Mr M Lansman, Counsel
For the respondents: Mr H Zobidavi, Counsel

RESERVED JUDGMENT

The reserved judgment of the tribunal is that:

1. The claimant's application to amend her claim form is dismissed.

2. The claimant's claim is struck out under Rule 37(1) because her claim that she was subjected to a detriment for making a protected disclosure contrary to s.47B of the Employment Rights Act 1996 ("ERA") was not presented within the time limit required by section 48(3) of the ERA.

REASONS

Introduction

1. The claimant was a specialised and experienced Project Manager engaged between September 2018 and April 2019 on a temporary basis by Centrica - British Gas Trading Limited ("British Gas") to work on a project of importance known as the Abacus Project.

2. The respondents are well known energy companies which supply gas and electricity to business and consumers in the UK and elsewhere. The claimant says that she suffered a detriment on 19 March 2019, when her engagement was terminated. She says that this is because she "blew the whistle" to a number of senior managers in the business about what she thought might be inappropriate attempted charges. It was common ground that she was a worker and she brings her claim under s.48(1A) ERA. Acas was notified under the early conciliation procedure on 18 July 2019, which was Day A. The certificate was issued on 23 August 2019, which was Day B. The claim form was presented to the tribunal on 3 September 2019.

3. The respondents say that the claim form was presented out of time and should be struck out on that basis because the tribunal has no jurisdiction to consider it. If this claim proceeds to a final hearing the respondents deny that the claimant made a qualifying disclosure within the meaning of ERA s.43B and say that the early termination of the claimant's engagement was for operational reasons only. The respondents submit that they no longer required the design skills of the claimant and that her high pay rate could no longer be justified in the next phase of the Project.

Issues to be determined at this preliminary hearing in public.

4. This hearing was listed to determine:

   4.1 The claimant's application to amend the claim form, and

   4.2 Whether the tribunal has jurisdiction to consider the claim.

   4.3 Whether the claim needs to be clarified.

   4.4 What case management orders should be made.

5. The parties agreed to take the first and second issues together and the tribunal's decision on amendment is set out below, for the sake of convenience.

Procedure, documents and evidence heard

6. The tribunal heard evidence from the claimant. She was cross examined by the respondents' counsel. No other witnesses were called by either party.

7. A hearing bundle was prepared of 84 pages to which one additional page was added. Although the tribunal informed the parties that the bundle had been read, it directed that the parties should nevertheless bring to the tribunal's attention any document upon which they specifically wanted to rely.

Fact find

8. Much of the evidence was common ground. The following was agreed:

8.1 The claimant was a worker within the statutory framework.

8.2 The only claim made by the claimant is for a detriment, contrary to s.47B.

8.3 The claimant was not an employee of British Gas so the claimant cannot claim for automatically unfair "whistleblowing" dismissal under s.103(A) ERA.

8.4 The date of the act to which this complaint relates is the date on which British Gas told the agency (Harrington Starr) that it wanted to terminate the claimant's engagement. That was agreed to be 19 March 2019.

8.5 For the purposes of s.48(3) ERA, time began to run from that date. Primary limitation, disregarding early conciliation, ran for three months and expired on 18 June 2019.

8.6 There was no "stop the clock" period, because Acas was not notified until 18 July 2019 which fell after three months time limit had already expired.

8.7 The claim form was presented to the tribunal on 3 September 2019.

8.8 The claim form was therefore presented approximately two and a half months out of time.

9. The claimant's case was that she reasonably but mistakenly believed that the three month time period began one month later, on 19 April 2019. On the basis of that reasonable mistake she thought that time started to run from 19 April 2019. She notified Acas on what she thought was the final day. ie the last day of the period of three months from 19 April. The Acas certificate was issued on 23 August 2019. She submits that s.207B(4) ERA would then apply to extend the original three month time limit to 22 September 2019 because a further period of one month is added by s.207B in circumstances where the original period of three month elapses, during the period beginning with Day A (18 July 2019) and ending one month after Day B (23 August 2019). The claimant submits that the claim form was presented on 3 September 2019, which on thar view was therefore in time.

Was the claimant's belief that time began to run from 19 April 2019 reasonably held?

10. A reasonably held but mistaken view of when the time limit starts can in appropriate circumstances make it not reasonably practicable for a claimant to bring their claim within the initial period of three months. The claimant was cross examined by Mr Zobidavi about what she understood. The claimant told the tribunal that she thought she was being placed on garden leave for the period of one month after 19 March 2019. A period of one

month's notice is provided in the contract between the agency and British Gas. There is no contractual relationship between British Gas and the claimant. Indeed, there is no contract between the claimant in a personal capacity and either the agency or British Gas. The contract is with the claimant's company, Mara BA Limited. The agency entered into a contract with British Gas to supply British Gas with project management expertise and the claimant is named as the consultant who will provide the project management expertise to British Gas.

11. The claimant's evidence was that she thought time ran from 19 April not 19 March. The issue is whether or not the mistake was reasonable. If it is it may not have been reasonably practicable for her to have presented her claim within three months of the act of discrimination complained of. If it was not reasonably practicable to do so the tribunal will need to go on to consider whether the claim was presented within such further period as the tribunal considers reasonable after the end of the period of three months from the act complained of.

12. In her claim form the claimant says, "On 19 March I was given notice with immediate effect, with 1 month paid and me not required in the office." She also says in her claim form that she had been told to hand in her badge and laptop on 19 March 2019. She was also asked to leave the building.

13. Also on 19 March 2019 an email was forwarded to her of the same date in which Paul Abbot of Centrica told the agency, "Centrica would like to give Lesley notice effective immediately ... Centrica will pay one months' notice as we appreciate this will come as a surprise." That email was forwarded to the claimant at 15:02 the same day, with the covering note, "I'm still in shock."

14. The claimant said that she understood from the email forwarded to her on 19 March that she was being put on garden leave and would remain so during the one month notice period while the engagement with British Gas was still remaining in place. Although no instruction was given to her that she was on garden leave she says that she was contacted on a few occasions. The claimant accepted during cross examination that she felt that something was "not right" about the way the engagement had ended, which she attributed to the fact that she had raised concerns about inappropriate charges to third parties. On the time limit she accepted she was aware of the three month time limit but was mistaken about from when it would start to run. On 18 July 2019 she contacted Acas and her insurers under her home contents policy.

The law

15. The time limits applicable to a claim under s47B of the ERA are set out in s48 ERA in the following terms:

> "Section 48

> An **[**F1employment tribunal**]** shall not consider a complaint under this section unless it is presented—
>
> (a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.
>
> (4)For the purposes of subsection (3)—
>
> (a)where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b)a deliberate failure to act shall be treated as done when it was decided on;
>
> and, in the absence of evidence establishing the contrary, an employer**[**F14, a temporary work agency or a hirer**]** shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

Conclusion

16. The tribunal finds that it was reasonably practicable for the claimant to bring her claim within the initial three month period.

17. Although the claimant may have genuinely believed that time began to run from 19 April 2019, the tribunal does not find that that belief was reasonably held. The claimant was told unequivocally that notice was given, "with immediate effect". That cannot reasonably be understood as anything other than exactly what it says.

18. The tribunal does not consider that the claimant's belief was reasonably held. There is no evidence to support the claimant's contention that she was being placed on garden leave by Mr Abbot for a month until 19 April. The language used by Mr Abbot in his email of 19 March is only consistent with the immediate termination of the contract and British Gas made payment in lieu, in accordance with the notice provisions in the agency agreement. In the circumstances, the claimant's belief that the contract was continuing until 19 April is unsustainable.

19. The tribunal also takes into account that the claimant is a skilled professional with access to financial resources and who is aware in general terms of the time limit of three months. She must have been aware of that period because she contacted Acas on 18 July, the final day of the three

month period counted from 19 April. Having been aware of the time limits all along it would have been reasonable of her to make inquiries or take advice on her understanding of how those time limits operated in her case. She had the knowledge, skill and professional experience to do so, and had she done so she would have been in an informed position to have presented her case before the three month time limit expired on 18 June 2020.

20. On 20 March 2019, the claimant sent an email to her now former colleagues, from her private email address, saying that she was "Given notice with immediate effect." There is nothing equivocal or ambiguous about that language and there is nothing said or implied that she was being placed on garden leave for a month until 19 April. Garden leave operates by keeping the contract alive so that the contract remains in place in the notice period. Garden leave is not consistent with immediate termination of a contract. Furthermore, the claimant's own words used closely after her engagement was terminated are likely to be more reliable evidence of her understanding at the time. (The tribunal came back to this point when considering the claimant's application to amend her claim form).

The claimant's application to amend.

21. The claimant says that she seeks an amendment to the wording of her claim form to clarify what is said to be an ambiguity in that form. The claimant submits that she understood the words in Mr Abbot's email of 19 March to be a notice period, to start with immediate effect and not the termination of the contract. She says that is what she understood at the time and it is what she set out in her witness statement. Her case is that she was dismissed on one month's notice, placed on garden leave with immediate effect but the contract between British Gas and the agency and by implication her did not terminate until the notice period expired on 19 April 2020.

22. Accordingly, the claimant applied to amend box 8.2 of her claim form (eighth paragraph) by removing the words, "with immediate effect with" and replace those words with the single word "of". If allowed, her pleaded case claim form would read as follows, "On 19 March I was given notice of one month paid … "

23. There are a number of problems with the application. First, this is not really an application to amend the pleading at all. It is an application to change the claimant's case in relation to the key issue in this claim, and to align it with the evidence in her witness statement, especially as termination by Mr Abbott was the only detriment in the case. The word immediate is the most important word of all. It is the word that indicates the time at which Mr Abbot intended to terminate the engagement. It means that he is terminating the contract forthwith. The tribunal is not prepared to grant an amendment the purpose of which is to change the claim form so that it reflects Mr Abbot's intention. It would be very unusual for the tribunal to exercise its power to permit amendments in order for the parties case to fit together better than it does. The amendment is not granted. The tribunal

does not accept that the proposed amendment is the minor amendment of a pleaded case.

24. The tribunal also notes that this application, even if granted, would have no bearing whatsoever on the limitation issues that are being determined at this preliminary hearing. The only purpose of the amendment would be to fortify the reasonableness the claimant's mistaken belief about when time began to run. The interests of justice and the overriding objective are better served by leaving the claim form intact, for the claimant to explain any ambiguity or inconsistency in oral evidence.

25. The claimant's application to amend is refused.

Conclusion

26. The tribunal finds that it was reasonably practicable for the claimant to bring her claim within time. Having failed to do so the claim is not within the tribunal's jurisdiction and no extension of time for further period that is reasonable arises for the tribunal's consideration.

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Regional Employment Judge Foxwell

Signed on behalf of Employment Judge Loy pursuant to Rule 63

Date: 3 March 2021

Sent to the parties on:
……03 March 2021……

.....T Henry-Yeo.....
For the Tribunal Office