EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Taylor	**v**	The Perfume Shop

Heard at: Cambridge **On:** 13 July 2018

Before: Employment Judge Mr RP Tynan

Appearances
For the Claimant: In person.
For the Respondent: Mr O Hollaway, Counsel.

JUDGMENT having been sent to the parties on 9 August 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. My decision in this matter is that the tribunal has no jurisdiction to consider the claim or part of it and accordingly the claim should be dismissed. This is a claim by Serena Taylor. The claim is of unfair dismissal. Form ET1 was filed with Watford Employment Tribunal on the 26 January 2018. The respondent responded to that claim on 16 March 2018. The respondent contends that the employment tribunal has no jurisdiction to consider the claim as it has been brought out of time.

2. The claimant represented herself before me and indeed has represented herself throughout these proceedings. The respondent was represented by Counsel, Mr Hollaway. The claimant gave evidence on her own behalf, she was accompanied by her mother and also by a former work colleague, Mr Weatherall. Initially there was some suggestion that Mr Weatherall might give evidence on the claimant's behalf but in the event, it was identified that his evidence would relate only to the issue of whether or not the claimant was fairly or unfairly dismissed and accordingly he did not give evidence in relation to the issue of whether or not the tribunal has

jurisdiction to consider the claim. For the respondent, evidence was given by Margaret (Maggie) Thomas, area manager for the respondent.

3. For the purposes of the preliminary hearing I have before me a hearing bundle comprising five documents running to 51 pages. However, I requested and was provided with additional copy documents, namely the claimant's letter appealing against her dismissal dated 25 September 2017, the respondent's letter to the claimant dated 24 October 2017 inviting her to an appeal hearing on 8 November 2017 and a 20 page letter from the respondent to the claimant dated 15 March 2018 in which it rejected her appeal against dismissal.

Findings

4. The claimant worked at the respondent's Kings Lynn store as a sales assistant/supervisor. She commenced employment 29 July 2014.

5. The claimant was dismissed on 4 September 2017. She alleges that her dismissal was unfair though that is not the issue that I have to determine today. In arriving at my decision today I express no view as to the fairness or otherwise of her dismissal. This tribunal has not made any findings against her that she was guilty of misconduct or any other wrong doing.

6. According to form ET3 the respondent commenced a disciplinary investigation in relation to the claimant in or around August 2017 and held an investigation meeting with her on 21 August 2017. She was subsequently dismissed on 14 September 2017 at the conclusion of a disciplinary hearing which had lasted over three hours. The notes of that hearing are at pages 29–47 of the hearing bundle. The hearing was chaired by Miss Thomas who gave evidence to the tribunal. The claimant was accompanied at that hearing by a work colleague Sarah Harrison. There was also a note keeper present.

7. Miss Thomas' decision is at page 46 of the hearing bundle. Her decision was to dismiss the claimant for alleged gross misconduct. Having confirmed her decision to the claimant Miss Thomas said:

> "You have seven days to appeal this decision. You will need to put in writing to Michelle Tyson, regional manager. This can be forwarded to the department. Do you understand?"

8. The claimant confirmed that she did understand. At that point there was no suggestion by claimant that she intended to take the matter further in the sense of by way of a legal claim. Having confirmed that she understood the decision, Miss Thomas asked the claimant if she had any further questions. The claimant observed that she thought it was not fair. Miss Thomas then asked her to sign the final page of the hearing notes, as indeed she had been asked to sign all the preceding pages.

9. Miss Thomas' evidence is that the claimant and her representative left the room at that point whilst Miss Thomas and her colleague remained in the room for a few more minutes to clear away their notes and a lap top. However, the claimant's evidence is that there was a further exchange, specifically that she asked Miss Thomas how she would take it further, to which Miss Thomas allegedly responded that she would have to take two appeals first. The claimant was questioned by Mr Hollaway about this. I was interested to hear her explanation around this claimed exchange and, why she might have referred to taking it further if in fact she only first became aware in January this year of her right to pursue an employment tribunal claim and of the primary three month time limit for bringing that claim. Her evidence in response to Mr Hollaway's questions was that she knew there was something or somewhere you could go to. I asked her whether she could elaborate further and she said that from the point at which she was suspended (this was in or around August 2017) she knew from her parents that there might be something further that she could do but that she did not know how, or what, or where.

10. The claimant's letter dated 25 September 2017 appealing against her dismissal seems to bear out that the claimant had some understanding that there may be avenues open to her beyond the appeal process. That letter of appeal concludes with the assertion:

> "I believe this is unfair dismissal when I was not aware I had done anything wrong with my role".

11. The question then is what, if anything, was said on 14 September 2017 beyond that which is recorded in the meeting notes. I have come to the conclusion that nothing further was said, certainly not to the effect that the claimant must exhaust her rights of appeal before taking matters further. I do not consider that the claimant has sought to lie about the matter, on the contrary, she gave her evidence honestly and to the best of her recollection. But I believe she is mistaken in her recollection. I believe that she had in mind that she might take matters further but that she did share these thoughts with Miss Thomas since her focus, as I accept, was on getting her job back, a job she evidently loved and had hoped she would progress further in. I am influenced in reaching that conclusion by the following factors:

    11.1 The meeting notes are detailed, running to 19 pages. The respondent went to some trouble in asking the claimant to sign each page to confirm it was a true reflection of what had been discussed. If there had been a further exchange between the claimant and Miss Thomas I believe this would have been documented.

    11.2 The claimed exchange was not referred to in the claimant's letter of appeal dated 25 September 2017 and there was no other evidence before me that at any time between 14 September 2017 and 26 January 2018 when she filed her employment tribunal claim that

the claimant was deferring taking action pending the appeal outcome (which in the event was not forthcoming until 15 March 2018). The claimant said in evidence that she had chased the respondent by telephone a number of times, but in spite of her articulate letter of 25 September 2017 the claimant had failed to put anything in writing evidencing what she claims was her position.

11.3 The claimant's evidence at tribunal differed from what she said in her form ET1 (page 17 of the hearing bundle). In the ET1 she claims that she asked Miss Thomas how to take it further "as unfair dismissal". Had she made that comment it would, of course, have evidenced more clearly that in September 2017 the claimant was contemplating a legal claim. I have already found that she did have legal proceedings in her mind but did not share these thoughts with Miss Thomas. To the extent there was a discussion about, "taking it further", that discussion and the claimant's belief that she was being treated unfairly are fully recorded at pages 48 and 49 of the hearing notes. Reference to taking it further concerns the claimant's intention to appeal against the decision to dismiss her.

11.4 Miss Thomas' evidence, which I accept, is that she has never been involved in an employment tribunal claim before and has no prior knowledge of the procedure or time limits. In which case there would be no reason for her to discourage the claimant from taking further legal action. I accept that the meeting notes accurately record that she told the claimant what the next step in the process would be. Namely, that the claimant would need to pursue an appeal within seven days and that in response to the claimant's assertion that it wasn't fair, she reiterated in summary form, why she had come to the decision which she had.

12. In January 2018 the claimant was in contact with the job centre in Kings Lynn and following a conversation about her right to claim unfair dismissal she contacted ACAS under the early conciliation scheme. Her evidence was that she went on-line that evening and submitted the request for early conciliation the following morning. In fact, the early conciliation certificate which is at page one of the hearing bundle confirms that ACAS was notified of a potential claim on 22 January 2018 which was a Monday. I find on balance that the job centre would not have been open on Sunday 21 January 2018, in which case this is further evidence that the claimant is mistaken in her recollection of events and discussions.

13. In or around February 2018 the claimant took legal advice. It seems to me that this is not relevant to the issues which I have to determine today.

14. I have referred already to the fact that the appeal decision was issued on 15 March 2018. Appreciating that it runs to some 20 pages I was not told however, why it had taken over four months from the appeal hearing for that letter to be finalised. On any view, that seems an inordinate length of

time. My provisional view, having not heard evidence on the point, is that the claimant should not have been kept waiting that long for a decision on her appeal.

The Law

15. Section 111(1) of The Employment Rights Act 1996 provides that a complaint may be presented to an employment tribunal against an employer by any person that he, or in this case, she, was unfairly dismissed by an employer.

16. Section 111(2)(a) provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination. It was common ground in this case that the effective date of termination was 14 September 2017 and accordingly that any claim to the employment should, ordinarily be presented, on or before 13 December 2017.

17. Section 111(2)(b) enables an employment tribunal to consider a complaint which has not been brought before the end of the period of three months beginning with the effective date of termination. If a complaint is brought 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 the three month period. There are two limbs to that test.

18. The employment appeal tribunal, in the case of John Lewis Partnership v Charman, has recently reviewed for authorities in relation to the application of section 111(2)(b), in particular, the employment appeal tribunal referred to historic cases such as Singh v Post Office [1973] and Bodha v Hampshire Area Health Authority [1982]. In the Singh case it was found to be practicable to commence proceedings while an internal appeal was pending and in Bodha, the mere fact of an internal appeal did not mean that it was not reasonably practicable to bring a claim. The decision in Bodha was confirmed by the court of appeal of appeal in Palmer v Southend-on-Sea Borough Council [1984]. There have been cases pointing in the other direction. However, one of those cases, Ashcroft v Haberdashers' Aske's Boys School [2008], issued at a time when a different statutory framework was in place in relation to dispute resolution, that decision can no longer apply. In Marks and Spencer PLC v Williams Ryan, the employer had given the claimant advice which misled her into believing that she could defer employment tribunal proceedings before her internal appeal was disposed of. It will be clear from my findings above that that is not the case here. I have not found that the claimant was misled by the respondent.

19. According to the employment appeal tribunal in Charman, the starting point is that if an employee is reasonably ignorant of the relevant time limit, it cannot be said to be reasonably practicable for her to comply with them.

However, in answering that question, the tribunal will be required to consider whether the claimant ought to have made enquiries about how to bring an employment tribunal claim. To which I might add, the tribunal will also want to consider what point and how, ie would that be following dismissal, following the outcome of an appeal, or at some other point. In every case that is a question of fact. In Charman the employment appeal tribunal observed that, "there is an obvious good sense in a party awaiting the outcome of an internal appeal before resorting to legal proceedings". However, that is not elevated to a rule of law or a principle.

20. In both the Bodha and Palmer cases, courts were not concerned with the ignorance of the claimant. In both cases the claimant had been advised throughout by trade union. Having regard to my findings that the claimant was aware that she might have some form of recourse, as early as when she was suspended in August 2017, on her evidence it was a further five months before she engaged in discussions with the Job Centre about her rights and options. Of course, at that time, she did not know that she would be dismissed, even though two other colleagues had been dismissed at that time. However, by 14 September 2017, the claimant had been dismissed. Although she pursued an appeal and hoped this might mean she was reinstated, she clearly had in mind that she had been treated unfairly and that she might pursue this further. In all the circumstances, I am of the view, that she ought reasonably to have made enquiries about her options, including her potential legal remedies, on or around that time. Whether by speaking with friends, researching the issue on-line, possibly with the assistance of her parents, speaking to the Job Centre, or ACAS, or seeking legal advice sooner. By taking any one or more of those steps, she might reasonably have informed herself of the position, specifically the need to file a claim with the employment tribunal on or before the 13 December 2017, (subject to contacting ACAS on or before that date and securing an extension of time under the early conciliation scheme). I conclude that it was reasonably practicable for the claimant to have filed her claim on or before 13 December 2017, notwithstanding her appeal was then outstanding.

21. In the circumstances, the tribunal has no jurisdiction to hear the complain of unfair dismissal and the claim shall therefore be dismissed.

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Employment Judge Tynan

Date: 16 August 2018

Sent to the parties on: .....

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For the Tribunal Office