THE EMPLOYMENT TRIBUNALS

Case 2503229/2018

Claimant: **Mrs Philippa Lagan**

Respondent: **North Yorkshire Fire and Rescue Service**

RESERVED JUDGMENT

Heard at: **Teesside**

On: **5 April 2019**

Before: **Employment Judge Beever (sitting alone)**

Representation:

Claimant: **Mr Howley, Trades Union representative**

Respondent: **Mr Menon, Counsel**

JUDGEMENT

The tribunal does not have jurisdiction to hear the claimant's complaints and they are hereby dismissed

RESERVED REASONS

1. On 21 March 2019, EJ Buchanan listed a Preliminary Hearing to deal with the issue of time and whether the claimant had brought her current claims in time. This is an issue of jurisdiction.

2. The underlying claim relates to the claimant's employment with the respondent as a Station Manager control (Control Manager) for the North Yorkshire Fire and

Rescue Service, for whom she worked for 32 years until her resignation on 26 February 2018.

3. The claimant resigned and claims unfair constructive dismissal ("the dismissal claim"). She claims a shortfall in sickness absence pay ("the wages claim"). The relevant ACAS dates are 11 May 2018 and 11 June 2018. The ET1 was issued on 4 October 2018.

<u>Evidence</u>

4. The tribunal was provided with a tabbed bundle and was also assisted by a cross referenced chronology provided by Mr Menon. The claimant gave oral evidence and was cross examined. References to the bundle are in [square brackets] below. Following the conclusion of submissions, the tribunal reserved its decision.

<u>Findings of Fact</u>

5. The claimant had worked for the respondent for 32 years. In 2017, the claimant commenced a period of sickness absence from which she did not return prior to her resignation on 26 February 2018. The claimant suffered significant levels of stress which she attributed to her workplace. The claimant exhausted her sick pay entitlement to full pay. The underlying dispute in this case relates to the application of "Grey Book" procedures and in particular an alleged entitlement to continued pay at full pay during her ongoing absence.

6. On 27 November 2017 [G61], the respondent wrote to the claimant and informed her that they intended to seek repayment of what they considered was an overpayment of salary. This caused the claimant significant levels of added stress and set her back in her quest to recover and return to work. She had hoped that, following the Xmas break, the respondent might recognise that it had acted in error and cease its claims for repayment.

7. In this way, the lines of dispute became drawn. In the six months prior to the claimant's resignation, she was paid in effect at a rate of half pay. Unusually, this was not satisfactory to either side. The claimant continued to believe that she was entitled to full pay and thus there was a shortfall in her pay each month up to her resignation. The respondent on the other hand considered that there was an overpayment and was therefore deducting sums from the claimant's half pay.

8. The claimant says that she had to endure aggressive calls from her line management about repaying the money. She contacted her union for advice. The claimant felt, as she says, that her health meant more to her than the money that she felt she was owed, and the stress of the situation was making her ill. Her

union spoke to their legal term and the advice was initially to “stay and fight” rather than resign.

9. The claimant resigned. Her resignation letter [G109] is detailed and refers to a series of matters, including in the penultimate paragraph her complaint about the shortfall in her pay. She told the tribunal that she had intended to provide contractual notice of 1 month but recognises that the objective wording of her letter states that she gave notice with immediate effect on 26 February 2018. The respondent treated it as a resignation with immediate effect.

10. When the claimant resigned, she had no present intention of bringing a constructive dismissal claim. She did however consider that she was owed a significant sum. Her union, in the person of Mr Howley, advised her to submit a grievance. As a result, the claimant commenced a grievance procedure by letter dated 19 March 2018 [D4] for the recovery of her deduction of wages.

11. The claimant had been receiving counselling. Her counsellor suggested in fact that what she was describing looked like a constructive dismissal. The claimant told the tribunal that, at that time, she felt she was not strong enough to make a claim. She also spoke to Mr Howley and he said that he would speak to legal but Mr Howley cautioned the claimant that constructive dismissal claims rarely win. The claimant was unable to recall when that conversation took place.

12. The claimant told the tribunal that in the course of preparing for the grievance meeting (which took place on 11 May 2018), and as she was typing up her thoughts, she knew that a claim to an employment tribunal was open to her. It was apparent to both the claimant and Mr Howley that the respondent was not sympathetic to the claimant’s claims for payment of money.

13. The advice from Mr Howley was to go to ACAS for the EC procedure. The ACAS certificate is dated 11 May 2018. This is the same date as the grievance meeting. It can be seen therefore that the claimant had commenced Early Conciliation procedure prior to the grievance meeting or its outcome.

14. The claimant’s recollection is vague; but in cross examination she was asked a specific question about when it crossed her mind to bring an ET claim. Her response was that she had discussed her options with Mr Howley while preparing for the grievance meeting. When pressed, she accepted that it was, “either before or after 11 May, around that time” that she knew she could bring an ET claim.

15. She cooperated with the ACAS process, and Mr Howley guided her. She said to the tribunal that she supposed that it was in May 2018 that she might want to bring a claim for unfair dismissal. When she spoke to the ACAS facilitator, she was told, “to continue with the grievance and see what happens, and then we’ll talk later, if that doesn’t work”. The tribunal notes that this is inconsistent with what the claimant wrote later on 20 January 2019 [A26] wherein she recollects

that the ACAS advice was that she "needed" to continue with the grievance process before going to the employment tribunal. The tribunal notes also that her response on 4 January 2019 [A21] to an enquiry from the tribunal makes no reference to being advised that she needed to undertake the grievance process prior to ET proceedings.

16. The tribunal is satisfied that the claimant has given evidence as best as she could. Her recollection is limited. She does not recall any specific form of words or advice that can be interpreted as preventing her from making an ET claim during the currency of the grievance process. The tribunal finds that the ACAS facilitator encouraged the claimant to continue with the grievance process but did not give advice that no ET claim could or should be made prior to the conclusion of an internal grievance process.

17. By letter dated 24 May 2018, the grievance process rejected the claimant's underlying complaint of a shortfall in pay albeit the claimant was paid an additional £105.89. The claimant appealed on 31 May 2018. In the meantime, the ACAS EC process concluded on 11 June 2018.

18. There was a grievance appeal meeting and the grievance appeal outcome was communicated to the claimant on 3 August 2018. The claimant's grievance was again broadly rejected but a further recalculation has resulted in an additional payment to the claimant of £2,332.57 on 3 August 2018. This still left the claimant significantly short, Mr Howley intimating that the claimant's initial claim had been in the region of at least £4,500.

19. Mr Howley and the claimant then attempted to seek a compromise outside of the grievance process. By 17 August 2018, the respondent by email made it clear that it would not increase its offer of settlement and that, "the matter is concluded".

20. In cross examination, the claimant was asked why she then delayed in issuing a claim until 4 October 2018. This was a delay of a further 7 weeks. Her answer was telling: she did not state that she was unaware of her rights or that she did not know she could make a claim: she said, "I was not in a hurry to come to court, and I wanted to look at all the other options".

21. In cross examination, the claimant was also asked when she was first told about a 3-month time limit. She replied that it was when she was told that her claim was out of time: this was at the time of the ET3. Her evidence is that she did not have time limits in mind when she submitted her ET1. It was only in the course of a later (post-ET1) discussion with the ACAS facilitator that the claimant appreciated that she had the option of raising a request for an extension of time. That was the reasoning behind the email on 4 January 2019 [A21] although, as noted above, the email makes no reference in fact to being out of time or seeking to explain why the claim might have been made late.

Submissions

22. Mr Menon submitted that by s.13(3) ERA, a deficiency in pay is to be treated as a deduction for the purposes of the wages claim. The payments made by the respondent on 24 May and 3 August were reimbursements and are immaterial to the question of deductions.

23. He contends that the wages claim is out of time. He notes that it is common ground that the dismissal claim is out of time. The claimant was not under a disability and had the benefit of union advice from as early as the ACAS EC process. In short, there was no reason why a claim could not have been presented in time. He emphasised the emails of 4 January 2019 and 20 January 2019, which indicated a muddled and unreliable recollection of events and reasoning. He said that, on balance, the ACAS advice was to continue with the grievance but not a requirement that she do so before issuing a claim. As to whether any further period was reasonable, he relied on the claimant's evidence that she was, "not in a hurry" which was not nearly sufficient justification and in fact showed that the claimant simply put matters on ice pending other attempts at resolution. There was a significant period of extra delay even after the conclusion of the grievance. He referred to the case of M&S v Ryan.

24. Mr Howley asserted that it was impossible to bring a claim for wages until the end date of the grievance because it was not possible to "see what was still outstanding". He reminded the tribunal to bear in mind the mental state of a claimant who had endured a level of stress and pressure that coerced her into resigning after 32 years of service. The grievance had been conducted in good faith. The conclusion of the process could be linked to a date when the respondent made clear that there would be no more payment. He considered that in that way the claim for wages was still in time. He accepted that the dismissal claim was out of time. He accounted for delay by saying that he and the claimant were doing everything that they could to try to come to an amicable settlement.

The Law

25. There are time limits in which to bring claims to the Employment tribunal. It is well established that the issue is one of jurisdiction for the tribunal.

26. In respect of an unfair dismissal claim:

By s.111 ERA:
111 Complaints to employment tribunal.
(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 the following provisions of this section, an employment 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.

27. In respect of a Wages claim:

By s.13 and s.23 ERA:

13 Right not to suffer unauthorised deductions.
(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)I this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion

23. Complaints to employment tribunals.
(1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay

day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A)Section 207A(3) (extension because of mediation in certain European cross border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

28. These extension provisions should be given a liberal interpretation in favour of the employee. Dedman v British Building [1974] ICR 53. However, what is or is not reasonably practicable remains a question of fact for tribunal.

29. Once it is established that a claim has been brought out of time in a dismissal claim or in a wages claim, what a tribunal is required to do is to answer two questions: (i) was it not reasonably practicable for a complaint to be presented before the end of the relevant period, and if so (ii) has the complaint been presented within such further period as the tribunal considers reasonable.

30. Guidance is given in Walls Meat Co v Khan [1979] ICR 52 and latterly in Asda Stores v Kauser EAT 165/07 which stated that 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. The tribunal had regard to M&S plc v Williams-Ryan [2005] IRLR562, particularly at para 20.

31. Where a claimant is generally aware of her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is

aware of her rights will generally be taken to have been put on inquiry as to the time limit. Indeed, in Trevelyans (Birmingham) v Norton [1991] ICR 488, it was said that when a claimant knows of her right to complain of unfair dismissal, she is under an obligation to seek information and advice about how to enforce that right.

32. The fact that a claimant has the benefit of trades union representative advice is a relevant feature and if they are helping the claimant it might generally be assumed that they would know the time limits and at least appreciate the need to present claims in time. Alliance and Leicester PLC v Kidd 0078/07.

Discussion and Conclusion

33. Both Mr Howley and Mr Menon provided considerable assistance to the tribunal. Both parties accepted that the dismissal claim was out of time. The tribunal accepted that position and concluded that the claimant should have brought her unfair dismissal claim before the expiry of 1 month after the completion of the ACAS EC procedure. Her unfair dismissal claim should therefore have been brought by 11 July 2018.

34. Mr Howley contended that the Wages claim was in time. It is necessary to deal with that contention first.

Is the Wages claim in time?

35. A deficiency in payment is a deduction for the purposes of the Wages claim: s.13 (3) ERA. The claimant complains that she suffered a shortfall in her sick pay during her employment. Assuming that to be the case throughout the latter months of her employment, there was a series of deductions. However, salary payments cease after the claimant resigned. There were no continuing deductions.

36. Mr Howley relies on the payments made to the claimant in the course of the grievance and the grievance appeal. Payments were made on 24 May 2018 and 3 August 2018. These payments reflected an acknowledgement by the respondent that further sums were due to the claimant. However, these payments made by the respondent did not constitute a “deduction”. By their nature they were a reimbursement of monies that may have been due to the claimant. They served to reduce the amount owing to the claimant but they do not amount to a deduction of wages and cannot be material to the question of identifying when a deduction had been made for the purposes of a Wages claim.

37. The tribunal concludes that the Wages claim is out of time. As with the dismissal claim, and by reference to the ACAS EC procedures, the date by which the claimant should have issued her Wages claim was 11July 2018.

38. Instead, the ET1 was issued on 4 October 2018.

Was it not reasonably practicable to present the claims in time?

39. The claimant commenced the ACAS EC procedure on 11 May 2018. By that date, the claimant knew that it was open to her to bring a claim in the employment tribunal and furthermore had the knowledge that she could bring a claim for constructive dismissal. Her union had told her that such a claim might be difficult to win.

40. The claimant told the tribunal that she had wanted to pursue the grievance process and latterly had wanted to try other options to resolve the matter rather than issuing in the employment tribunal. This is a relevant factor for the tribunal to consider as all parties should take what steps they reasonably can to seek alternative resolution of their disputes.

41. However, the simple fact remains that the claimant was aware from May 2018 at least that she could bring employment tribunal proceedings. He commenced the ACAS EC procedure. She knew at the stage that she could make a claim to the employment tribunal for unfair dismissal. The tribunal finds that the ACAS facilitator did not rule out a tribunal claim or advise the claimant that a grievance process was necessary prior to any tribunal proceedings. Instead, the ACAS facilitator encouraged the grievance process. The claimant was not misled by the ACAS facilitator.

42. The claimant does not assert that she was given wrong advice, either by ACAS or her trades union representative. The material cause of her delay was her desire to seek a compromise of the dispute. The claimant states that she was not aware of the time limits. However, she knew of her right to complain of unfair dismissal and she was under an obligation to seek information and advice about how to enforce that right.

43. Looking at the overall positon, the tribunal rejects the claimant's assertion that it was not reasonably practicable to present her claim within the relevant time period, that is, by 11 July 2018.

If not, were the claims presented within such further period as the tribunal considers reasonable?

44. If the tribunal was wrong on the first question, it has gone on to consider the necessary second question.

45. The ET1 should have been issued by 11 July 2018. Even if one accepts the claimant's evidence that the internal grievance process was sufficient reason to

delay an ET claim (a proposition that the tribunal does not accept because the grievance process dealt only with the shortfall in pay and did not seek to deal with the matters relating to constructive dismissal), then on any view by 3 August 2018 (or 17 August 2018) at the latest, the claimant knew that the grievance process had concluded and indeed the respondent regarded the whole matter as "concluded".

46. There is no justification for the further 7 weeks' delay. The claimant says that she was "in no hurry" because she wanted to explore possible compromise further. That is a laudable aim but it was not reasonable to delay issuing of proceedings. There was no explanation for why it took until October 2018 to issue proceedings.

47. The claim was issued out of time and it was not issued within a reasonable period of 11 July 2018, the expiry of the relevant time period.

Conclusion

48. In the light of the tribunal's findings and because of s.111 (2) ERA in respect of the dismissal claim and by s.23(4) ERA in respect of the wages claim the tribunal is unable to consider the claims and they are hereby dismissed.

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EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
9 April 2019
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