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EMPLOYMENT TRIBUNALS

Claimant

Respondents

Ms R Bakali

AND

Waitrose Superstores Ltd
(John Lewis Plc)

Heard at: London Central

On: 12 October 2017

Before: Employment Judge Walker (Sitting alone)

Representation

For the Claimant: Mr A J Offiah, Solicitor

For the Respondent: Mr E Campbell, of Counsel

JUDGMENT

The Claimant's claims are struck out on the grounds that this Tribunal has no jurisdiction to consider them as the claims are out of time.

REASONS

1. This is a Judgment in an application made by John Lewis Plc in relation to a claim brought by Ms Bakali against them for unfair dismissal.
2. The Respondent's application is to strike out the Claimant's claim on the grounds the Tribunal has no jurisdiction to hear it. The reason for this is that the Claimant's claim appears on its face to be out of time. The Claimant has brought an unfair dismissal claim. The time limits for bringing an unfair dismissal claim are relatively strict. Section 111 of the Employment Rights Act 1996 sets out the time limit which is essentially a period three months from the effective date of dismissal. However, where it is not reasonably practicable for the claim to be

presented within that time, there is a possibility of the time being extended for such further period as is reasonable. The three months period is extended by the early conciliation process.

Issue

3. The claim in this case is not about the question whether it was not reasonably practicably as is often the case. Rather, the sole issue is what was the effective date of dismissal?

4. In the ET1, the date of dismissal was recorded by the Claimant as 11 February 2017. If that was the date of dismissal, both parties accept that the claim is out of time by one day. No attempt had been made by the Claimant to say that it was not reasonably practicable for her to have bought the claim in time.

5. The Claimant now says the effective date of dismissal was later than 11 February 2017. If she is right on that, the position would be that her claim would be in time. Therefore the question before me was, when was the Claimant dismissed?

Evidence

6. At the hearing today I made it clear that in order for me to reach a view as to the date of receipt of the letter which notified the Claimant of her dismissal, particularly after the Claimant had specified in her ET1 that the date of dismissal was 11 February, I would need to hear evidence. I was told that the Claimant had prepared a witness statement but it had not been shared with the Respondent. We therefore allowed time for that witness statement to be copied with sufficient copies to be made for the Respondent and myself and the witness to have a copy. Time was given for the Respondent to review it, as I did. The Claimant then came back into the Tribunal and we heard her evidence.

7. I also had some degree of information in terms of two bundles of correspondence put forward to me by each of the parties.

Facts

8. Section 5 of the ET1, under the employment details, includes a question, “when did your employment end”, to which the Claimant had answered, 11 February 2017.

9. In paragraph 17 of the Grounds of Claim in which the Claimant had explained what had happened to her, she recorded “on 11 February 2017 the Claimant was advised that following investigation at the disciplinary hearing into the allegations, she had been summarily dismissed”.

10. After the Respondent wrote requesting a strike out, the Claimant’s solicitors wrote on 18 August and their letter said, they agreed that the Claimant was employed continuously from April 2010 to 11 February 2017. However, the letter then continued saying, the Claimant was “subsequently dismissed after a reserved decision by a letter dated 10 February 2017. That letter was received by the Claimant on 12 or 13 February 2017”. The Tribunal note that 12 February was a Sunday.

11. Before the Tribunal, the Claimant said in her witness statement that she met Mark Porter of the Respondent on 23 January 2017 in relation to a previous interview which took place on 12 January but was asked to leave on further suspension. She was then contacted by Kevin Shipley, her immediate manager, who asked her if she had received a letter from the Respondent which contained among other things, Minutes and other material. She had not, so the Claimant was told to call Mark Porter of the Respondent when she had received that letter. She did call, and they made an arrangement to meet. She could not recall the exact date when they arranged to meet, but she thought it was either 3 February or 10 February. This was changed, due to the Claimant not being able to meet then. They did arrange an alternative date which she thought was 13 February.

12. The Claimant said that she had a meeting that day; i.e.13 February. She could not remember what was said except that she was told at about 7pm that she was dismissed. About one week later, she said she received a letter of dismissal. The letter was dated 10 February, but from her evidence it would

appear the Claimant now believes she got that letter on about 20 February. She therefore thought she had received the letter of dismissal about ten days after it was dated and it bore a date earlier than the date of the last meeting.

13. During cross examination, the Claimant said she recalled that she was sacked on a Monday, even if she could not remember the exact date and she knew it was around 12 or 13 February that she was asked to leave before she actually received a letter of dismissal.

14. I think it is important to record what was said in the ET1. In the Claimant's ET1 she describes the process of an incident occurring on 11 January 2017 when she was stopped and searched. She says on 12 January that she was called to the Duty Manager's office and asked questions and then it was explained that she was suspended for one week. After one week she said she was invited to a disciplinary investigation meeting and she was suspended for another week. That would mean the Claimant was suspended for about 14 days after 12 January taking her to 26 January. The ET1 then provides no further details. It simply skips straight to saying on 11 February the Claimant was advised, following the investigation and the disciplinary hearing, she had been summarily dismissed.

15. The ET1 goes on to allege that the Claimant was not given details of the allegations prior to the investigation meeting and/or the disciplinary hearing. It alleges the Claimant was not provided with the minutes of the investigation or the investigation report.

16. I have noted that in the witness statement the Claimant describes a situation where she was asked if she had received documentation including the Minutes and it is not until she received that documentation that she then phoned in to arrange an appointment, so one of those statements is incorrect.

17. On cross-examination the Claimant repeatedly said that she was not good with dates. She was clear about the incident which triggered the entire situation being on 11 January. She was certain she was informed of her

dismissal on a Monday. She was never totally certain when the dismissal letter arrived and indeed as I have noted she seemed to be saying it came in a week or so later after a meeting on a Monday where she was told of her dismissal. She said repeatedly that 13 February stuck in her mind. The correspondence produced by the Respondent and Claimant both include the letter date 10 February.

18. The Respondent's ET3 explains the Respondent's procedure which ought to have been followed and what that says was that, given the Claimant's length of service of over five years, if there was a disciplinary hearing which led to a decision to dismiss, she would have to be told about her dismissal but not actually dismissed. The Respondent's process was that staff with longer service remained employed through the period when they could appeal. Only after the appeal or, if there was no appeal, after the failure to make an appeal, would the Respondent proceed to dismiss.

19. The Respondent did not give evidence but the correspondence that they produced indicates that the disciplinary hearing took place on 30 January 2017 and, on that date, the Claimant was informed that she was going to be dismissed but not actually dismissed. Rather she was given the opportunity to appeal but, when no appeal was received, the Respondent then wrote to the Claimant to say she was dismissed and that they say as done by the letter of 10 February. The Respondent produced an email from, what I believe is, the HR department to Kevin, presumably Kevin Shipley, that the final closure letter for Rakma Bakali had been posted today. The letter is headed "first class post".

20. The Claimant asked me to note that the Respondent initially wrote to the Tribunal saying the letter had been hand delivered. That was not the case. The Respondent realised there had been some confusion by the member of staff concerned with an early letter and that in fact was posted so they sent the copy email from HR saying that the person concerned had posted it.

21. The Respondent's case is based on their assumption that the letter of dismissal was posted on 10 February and would have arrived the next day and

indeed in that letter of dismissal dated 10 February, they put the date of dismissal as 11 February which would have been the next day and a Saturday.

Submissions

22. I have carefully considered all of the submissions. In essence the Respondent says that I should not accept the Claimant's evidence as it was so vague, it has changed and is unreliable and that I should take 11 February as the date of receipt of the letter of dismissal.

23. The Claimant's submissions were that the Respondent's email, in which they referred to the posting of the letter, was dated on Friday afternoon. The timing of the email is recorded a fraction after 2pm. They say that with no evidence given by any witnesses for the Respondent that is nothing more than evidence of an email being sent and not actually evidence of posting. They say that I should accept the Claimant's evidence. They point out that the Claimant was very clear about being dismissed on a Monday and recalled 13 February.

Conclusions

24. At the outset it had not been the parties' intention to call evidence. It appeared that they expected this would be considered on submissions alone. It was only when I pointed out that I would need witness evidence to deal with factual issue that the Claimant's representative then explained that they had got a witness statement and could call the Claimant. As I have noted, I gave the Claimant time to sort matters out so this would be fair.

25. I also made it clear at that time that there may be an issue about the question of the discrepancy between the ET1 and the witness statement and I gave the Claimant's representative the opportunity of asking supplemental questions of the Claimant. I even suggested at the outset that it may be that the Claimant's solicitors could give evidence themselves without a witness statement on an ad hoc basis to explain why it was that they put 11 February as the date of dismissal in the ET1 when in fact we are now being told that it was a later date. They chose not to do that. They did not ask the Claimant any specific questions

about the discrepancy, rather focusing on what she was saying now with no explanation about the past.

26. In the light of the unexplained discrepancy between the Claimant's evidence now and her ET1 and correspondence from her solicitors, I had to consider the evidence carefully. I have re-read the Claimant's witness statement and her evidence and I thought about this carefully.

27. The case law makes it clear that the dismissal is effected when the Claimant was told or notified of it or when she should reasonably have known. This case turns on the factual question of precisely when the Claimant was notified of her dismissal.

28. The Claimant's witness evidence as I have mentioned, was vague. Going through it very carefully I have noted that she says in her cross-examination for example that she just remembered 13th as it sticks in her head. She said on another occasion she remembers being called by Mr Shipley who was the manager at the Respondent who had notified her of the dismissal. He signed the letter of 10 February. She said it was on 9 or 10 February, she was not sure, he tried to get her on Friday. She referenced the fact that she had other commitments and then said she came in on a Monday. She was then told that she was dismissed. She said she was sure he said there will be a letter in the post. She did not receive it for over a week. She knew she needed to get that letter.

29. When pressed again, the Claimant said she said she was not good with dates. All she remembered was the incident which took place on 11th and roughly 13 when I was fired. She said they were the only two dates that stuck in her mind and she could not remember anything else before or after. She also said she just cannot remember the dates; she was not very good at dates.

30. I have to say it is clear that the Claimant was extremely hazy about the process and about the dates. It is also clear that the date of disciplinary hearing which is given by the Respondent was Monday 30 January. I regarded that as significant because of the Claimant's evidence that she recalled being dismissed

on a Monday. Moreover, that dates tallies with the initial description in the ET1 given by the Claimant of being suspended for about two weeks.

31. Given the unexplained discrepancy between the Claimant's ET1 and her current evidence, and the Claimants admission she has trouble with dates, I do not believe I can rely on the Claimant's evidence at all. For example, in the ET1 the Claimant says she did not receive the minutes or details of the allegations. In her current evidence she says she did.

32. In particular, I find the current assertion that the Claimant got the letter of 10 February so long after 10 February very strange. Her current assertion is that she had a meeting on Monday 13 February and got the letter about one week later. The letter was dated 10 February and referred to dismissal of 11 February, so if it was received on or about 20 February, the Claimant would have found that was very strange and told her solicitors about it. If she had done so, that would inevitably have been reflected in the ET1. It was not.

33. Importantly, as I have said, there has been no explanation of the discrepancy between the evidence that is now being given and the ET1 or the earlier solicitor's letter in which they said that they had taken instructions and the Claimant said the letter arrived on 12 or 13 February. 12th February was a Sunday, therefore there was no postal delivery on that date. It could only have been on Monday 13 February. I can only conclude the Claimant was right when she says she has trouble with dates.

34. I have to conclude that the Claimant's witness evidence is incorrect. Taking the evidence I do have, it seems clear that the Claimant was told of the dismissal at the meeting which I accept took place on Monday 30 January. She was told that she had a right of appeal and a letter would be sent explaining that in more detail. What happened to the letter about the process for appeal is not a question for me and I have not heard any evidence on it. The Claimant did not appeal. There having been no appeal, she then got the letter of dismissal, which was the letter dated 10 February sent by first class post. I have no doubt it arrived on Saturday 11 February in accordance with normal first class post. I am confident about that as I regard the contents of the ET1 as important. In the ET1,

the date of dismissal was stated to be 11 February, not once but twice. I regard that as significant.

35. The Claimant was dismissed and that dismissal was notified by a letter received on 11 February and therefore the claim is out of time.

36. No reasons have been given for the delay nor any application made to extend time on the basis that it was not reasonably practicable to lodge the claim in time and therefore this Tribunal has no jurisdiction.

Employment Judge Walker on 12 December 2017