



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Mbawa  
**Respondent:** Care UK Ltd  
**Heard at:** Leeds      **On:** 10 December 2018

**Before:** Employment Judge Davies

**Representation**

**Claimant:** Did not attend  
**Respondent:** Mr Sweeney (counsel)

## JUDGMENT

1. The Claimant's claims of unauthorised deduction from wages and unfair dismissal were not brought within the time limits under the Employment Rights Act 1996. It was reasonably practicable to do so. They are therefore dismissed.
2. The Claimant's claims of race and disability discrimination were not brought within the time limit under the Equality Act 2010. They were not brought within such further period as the Tribunal considers just and equitable. They are therefore dismissed.

## REASONS

### Introduction

- 1.1 The Claimant brings claims of (associative) disability discrimination, race discrimination, unauthorised deduction from wages and unfair dismissal, against her former employer Care UK Ltd. This was a preliminary hearing in public to decide whether time should be extended for bringing the claims, and whether parts of them should be struck out or a deposit ordered.
- 1.2 The Respondent was represented by Mr Sweeney of counsel. The Claimant did not attend and was not represented. The circumstances are as follows. I refused a postponement application last Friday, 7 December 2018, for the reasons set out in my order. As explained there, it appeared that there had been an attempt to mislead the Tribunal. The Claimant's legal representative subsequently emailed the Tribunal on Friday evening. In that email, he said that his firm had simply passed on information provided by the Claimant. He suggested that the Claimant had previously told him that her relative was terminally ill and that travel had been booked in September, with a view to confirming arrangements once the individual passed away. He also indicated that his firm was coming off the record. It does not seem to me that this email takes matters further. The hearing was listed at a time when the Claimant had already booked to travel to Sierra Leone and for a date when she was due to be there. The Tribunal was not told of that until Friday afternoon, despite two postponement applications having been made. The Tribunal was not told at any time that the relative was unwell. The Claimant's

signed document at the time of the original postponement application referred to her having passed away. The Tribunal has not been told when that happened. The Claimant appears to have travelled in accordance with the booking made in September. It remains the case that there appears to have been an attempt to mislead the Tribunal.

- 1.3 In view of the fact that the Claimant's representative has come off the record, I considered whether to proceed with the hearing today. I decided that it was not consistent with the overriding objective to postpone it. Employment Judge Lancaster had ordered the Claimant to disclose in advance any evidence she relied on, including medical evidence, to show the reason for not presenting her claims sooner and to prepare a witness statement. She had had a full opportunity to provide all the evidence on which she would rely, and that was available to me. Her representative had also provided written representations in respect of the extension of time, in advance of the previous preliminary hearing. I was confident that the Respondent's counsel would in accordance with his duty to the Tribunal draw my attention to any points that ought properly to be made on the Claimant's behalf. Postponing the hearing would cause delay and further expense on the Respondent's behalf. It was not in the interests of justice to postpone it.

#### **The issues**

- 2.1 The first matter to be determined today related to time limits. There was no dispute that the claims were not brought within the relevant primary time limits. The issues were therefore:
- 2.1.1 Was it reasonably practicable to present the unauthorised deduction from wages and unfair dismissal claims in time?
  - 2.1.2 If not, were they presented within a reasonable period after the expiry of the time limits?
  - 2.1.3 Were the discrimination complaints presented within such further period following the expiry of the time limit as the Tribunal considers just and equitable?

#### **The background and chronology**

- 3.1 The unauthorised deduction from wages claim relates to events in January 2017. The Respondent indicated that the wages the subject of that claim were, in any event, paid to the Claimant in May 2017.
- 3.2 The Claimant resigned with immediate effect in an email sent on 13 March 2018. That was her effective date of termination and the last date on which the discriminatory treatment of her of which she complains can have taken place.
- 3.3 The resignation email is written in legal terms. It refers to constructive dismissal, and identifies what is said to be a fundamental breach of contract, an anticipated breach of contract and a breach of trust and confidence. It refers to the last straw doctrine and explains the basis on which the Claimant considers herself entitled to resign with immediate effect. It has all the hallmarks of being written with legal advice. Even if it were not, it would show that the Claimant was able to find out and apply the relevant legal principles.
- 3.4 On the same day as she resigned, the Claimant contacted ACAS to commence early conciliation. It is likely that ACAS sent her information that referred to the time

limits for bringing Tribunal claims and/or discussed them with her. The early conciliation certificate was issued on 13 April 2018. The last date for presenting claims of unfair dismissal and discrimination was 13 July 2018. The date in respect of the unauthorised deductions claim was very much earlier. The claim was not presented until 31 July 2018. It was presented by the legal representatives who continued to act for the Claimant until late on Friday.

- 3.5 All the claims were therefore presented outside the statutory time limits. The Respondent identified that in advance of the preliminary hearing on 18 September 2018. The Claimant's representatives sent an email objecting to the claims being struck out. They drew attention to the Tribunal's broad discretion. They said that the Claimant had suffered mental ill health and stress and that she would provide medical evidence in support of that. They drew attention to the prejudice to the Claimant that would arise from striking out the claims. They further contended that the claims had a reasonable prospect of success.
- 3.6 At the preliminary hearing on 18 September 2018, EJ Lancaster listed today's hearing to deal with the question of time limits and also applications to strike out or order deposits in respect of parts of the claim. He ordered the parties to disclose any documents relevant to those issues by 30 October 2018. He made clear that this should include documents relevant to any argument that the Claimant was medically unfit to present her claim. He also ordered the preparation of witness statements, to be exchanged by 20 November 2018.
- 3.7 The Claimant provided some medical information, which was sent to the Tribunal on 9 November 2018. I have considered it carefully. Her GP wrote a brief letter on 8 November 2018 reporting that the Claimant had presented with work related stress in December 2017. She had suffered with symptoms of anxiety and low mood since then and had seen the doctor on multiple occasions. She was also experiencing tiredness and headaches. She had been started on antidepressant medication. A prescription indicated that sertraline was prescribed on 7 November 2018. That appears to have been the first time such medication was prescribed. The Claimant also produced fit notes showing that she had been signed unfit for work between 19 October and 1 December 2018. She also provided the Occupational Health report that was prepared when she still worked for the Respondent, on 12 March 2018. That reported a build up of anxiety from January 2017 onwards. The Claimant was then taking sleeping tablets. She had no history of mental ill health, but was physically and psychologically unwell at the time and was unfit for work.
- 3.8 In the light of that information, I accept that the Claimant has been suffering from anxiety and low mood from before her dismissal to date. She has recently been started on antidepressant medication.
- 3.9 The Claimant did not provide a witness statement in accordance with EJ Lancaster's order, so I was unable to take that into account.
- 3.10 There was a suggestion in the second postponement application that the Claimant was awaiting a specialist medical report, but no information was provided about what that was, when it would be provided or what it would deal with.

## Legal Principles

- 4.1 The time limits for bringing claims of discrimination are governed by s 123 Equality Act 2010. For present purposes I have assumed that all the conduct of which the Claimant complains extended over a period that ended on 13 March 2018.
- 4.3 As regards extending time, the Tribunal has “the widest possible” discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances. Whether time should be extended in any particular case is a question of fact and judgment, to be answered case by case by the Tribunal: see *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, CA; *Abertawe bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194.
- 4.5 The factors that are to be considered by the civil courts under s 33 of the Limitation Act 1980 in determining whether to extend time in personal injury actions may provide a helpful checklist: see *Southwark London Borough Council v Afolabi* [2003] IRLR 220, CA. Factors that are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh): see *Abertawe bro Morgannwg University Local Health Board v Morgan*.
- 4.6 The time limit for bringing claims of unauthorised deduction from wages and unfair dismissal and the circumstances in which those time limits can be extended are governed, respectively, by s 23 and s 111 of the Employment Rights Act 1996. If the claims were not brought in time, it is for the claimant to satisfy the Tribunal that it was not reasonably practicable to do so. Reasonably practicable means something between “reasonable” and “physically possible”: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. It is a question of fact for the Tribunal whether it was reasonably practicable for a claim to be brought in time.
- 4.7 If the Tribunal finds that it was not reasonably practicable for a claim to be brought in time, it must then consider whether it was brought within a reasonable period thereafter. This requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for the proceedings to be instituted.

## Application of the legal principles

- 5.1 I start with the unauthorised deduction from wages claim. The relevant wages should have been paid in January or February 2017. The claim was not presented until July 2018, more than a year outside the time limit (and indeed more than a year after the Respondent says the wages were in fact paid). The Claimant continued to attend work until December 2017. There is no information before me that could form the basis of a finding that it was not reasonably practicable for her to bring a complaint of unauthorised deduction from wages during that period. I find that it was reasonably practicable for her to do so.
- 5.2 I turn next to the unfair dismissal claim. I have accepted that the Claimant was suffering from mental ill health from at the time of her dismissal, and throughout the period before she presented her claim. That is the only basis on the documents before me upon which she says that it was not reasonably practicable for her to present a claim within the statutory time limit. The medical evidence does not go so far. It refers to a level of mental ill health, but the Claimant was not, for example,

prescribed anti-depressant medication and the medical evidence does not suggest that the Claimant was unfit to deal with her affairs or present a Tribunal claim. As I have indicated, the resignation letter was either written on legal advice or demonstrates that the Claimant was at that time able herself to ascertain the relevant legal principles and take action based on those. The fact that she contacted ACAS to start early conciliation the same day also suggests either that she obtained legal advice that she needed to do so, or that she ascertained that for herself. Either way, she was plainly not prevented by her ill health from dealing with her employment situation, including establishing the relevant legal principles. The claim form itself was submitted by legal representatives. No information has been provided about when they were instructed. It is likely that ACAS told the Claimant about Tribunal time limits. Weighing all that information, I am not satisfied that it was not reasonably practicable for the Claimant to present a claim in time. She either had legal advice or was able to ascertain and act on the relevant legal principles. Her state of mental health did not prevent that and did not make it “not reasonably practicable” for her to present her claim in time.

- 5.3 I turn finally to the discrimination complaints. Here, my discretion is much broader. I take into account all the information set out above about the Claimant’s state of health and access to legal advice or ability to ascertain the relevant legal principles. As indicated, I am not persuaded that her state of health was such as to prevent her from dealing with her affairs. She wrote a cogent resignation letter, contacted ACAS the same day and certainly had legal representation by the time she presented her claim. I have noted that the delay is not very substantial, but in the context of a primary time limit of three months a more than two week delay is not insignificant. However, it is unlikely to have a particular impact on the cogency of the evidence. Plainly, if time is extended, the Respondent will be prejudiced by having to defend claims brought outside the time limit. If it is not extended, the Claimant will be prejudiced by not being able to advance those claims. The Claimant does not identify anything on the face of the claim form on which she would rely in asking the Tribunal to infer that the treatment of which she complains in her race discrimination complaint was done because of race. The events she describes relate to annual leave and sickness absence. The complaint of associative discrimination under s 15 Equality Act 2010 cannot be sustained in law. The Claimant does not identify clearly any unwanted conduct related to disability. While plainly I have not heard any evidence, the claims are not on the face of the claim form strong. Weighing all those factors, I find that the prejudice to the Respondent in allowing these out of time claims to proceed is greater, and that it is not just and equitable to extend time.

**Employment Judge Davies**

**10 December 2018**