



## **EMPLOYMENT TRIBUNALS JUDGMENT ON PRELIMINARY ISSUE**

**Claimant:** Mr Craig Chatten  
**Respondent:** Sky Subscribers Services Ltd  
**Heard at:** North Shields Hearing Centre On: 30 October 2018  
**Before:** Employment Judge Johnson  
**Representation:**  
**Claimant:** In person  
**Respondent:** Mr R Dunn (Counsel)

### **JUDGMENT ON PRELIMINARY ISSUES**

1. The claim of unfair dismissal was presented outside the time limit prescribed for doing so in circumstances where it was reasonably practicable for it to be presented within time. It cannot be considered and is dismissed.
2. The claims of unlawful sex discrimination and unlawful age discrimination were presented more than 3 months after the date of the acts complained of in circumstances where it is not just and equitable for time to be extended so that they may be considered. Those claims are dismissed.

### **REASONS**

1. This matter came before me this morning by way of public preliminary hearing, to consider whether the Employment Tribunal has jurisdiction to hear the claimant's complaints of unfair dismissal, unlawful sex discrimination and unlawful age discrimination, all of which appear to have been presented out of time. The claimant attended in person and gave evidence himself. The respondent was represented by Mr Dunn of Counsel who called to give

evidence the respondent's the sales manager, Mr Paul Lynch. Mr Dunn had prepared a paginated bundle of documents containing Mr Lynch's witness statement and supporting documents which numbered 95 pages. The bundle was marked R1. The claimant's witness statement was marked C1.

2. By a claim form presented on 10 July 2018, the claimant brought complaints of unfair dismissal, unlawful sex discrimination and unlawful age discrimination. The respondent defended the claims. Upon examination of the claim form it was identified that the effective date of termination of the claimant's employment was 23 February 2018. It is the act of dismissal which forms the subject matter of the unfair dismissal complaint and both complaints of unlawful discrimination. Under the relevant statutory provisions, an employee must present his complaint to the Employment Tribunal within the period of 3 months commencing with the effective date of termination of his employment in the unfair dismissal claim and the date of the alleged act of discrimination in the other claims. The claims must therefore have been presented to the Employment Tribunal by not later than 22 May 2018. The claims are over 7 weeks out of time.
3. The following is the relevant chronology, which was agreed by the claimant and Mr Dunn:-

23 February 2018 -	dismissal of claimant
4 March 2018 -	claimant lodges appeal
29 March 2018 -	claimant's appeal hearing
11 June 2018 -	claimant receives appeal outcome
1 July 2018 -	claimant commences ACAS Early Conciliation
2 July 2018 -	ACAS Early Conciliation certificate issued
10 July 2018 -	claimant presents claim form ET1.

4. It is accepted that between 29 March (when the appeal was presented) and 11 June (when the claimant was notified of the outcome of the appeal) the claimant was told on not less than 6 separate occasions by Mr Lynch that he was attending to the appeal. The relevant timeline is as follows:-

4 March 2018 -	appeal submitted by email
9 March 2018 -	appeal acknowledged by Mr Lynch
20 March 2018 -	Mr Lynch notifies the claimant of the appeal hearing
29 March 2018 -	appeal hearing

12 April 2018 -	Mr Lynch informs the claimant that the outcome was expected within 2 weeks
24 April 2018 -	Mr Lynch informs the claimant that he was in the final stages of concluding all investigations
8 May 2018 -	Mr Lynch informs the claimant that he has now completed all the investigations and is in the process of reviewing the information
9 May 2018 -	Mr Lynch confirms that he has before him all of the information he requires
18 May 2018 -	Mr Lynch informs the claimant that he needs to clarify something with a witness
11 June 2018 -	appeal outcome received by email

5. The claimant accepts that claim form was presented out of time. The claimant accepts that his first approach to ACAS to commence Early Conciliation was also out of time. The claimant's explanation for the delay is as follows:-

- (i) He had a lack of knowledge of the appeal procedure and its requirements.
- (ii) He believed he had 3 months from the outcome of the appeal in which to commence proceedings, rather than 3 months from the date of dismissal.
- (iii) That the respondent through Mr Lynch was aware throughout that the claimant intended to commence Employment Tribunal proceedings if his appeal was not successful.
- (iv) That the respondent's delay in handling the appeal was a deliberate act so as to ensure that the claimant missed the 3 month deadline.
- (v) That had the claimant received the outcome of the appeal within a reasonable period of time, he would not have missed the deadline.
- (vi) On 11 June when the claimant received the appeal outcome, he commenced new employment, which meant he had to familiarise himself with his new employer's procedures and training programmes so that he could successfully pass that new employer's course knowledge tests and probationary period.

- (vii) That during the relevant period the claimant had caring responsibilities for his ill father and also had to undertake football refereeing duties, that being a career which he wants to pursue.
6. Mr Lynch's evidence to the Tribunal was that he did his best to deal with what was a complex and detailed appeal from the claimant, as soon as he possibly could. Mr Lynch's evidence was that the claimant's appeal runs to 5 ½ pages, containing numerous allegations which he had to fully investigate. That investigation involved speaking to a number of witnesses over a period of time. During that time Mr Lynch had additional duties to undertake for the Respondent, which meant that he could not devote all of his time to dealing with the claimant's appeal. Mr Lynch sets out in his witness statement the various steps he undertook in dealing with the appeal.
  7. The Tribunal found Mr Lynch to be an honest and credible witness. The Tribunal found that there was no deliberate intention by Mr Lynch, or indeed anyone else within the respondents' organisation, to deal with the appeal in such a manner that the outcome would not be delivered until a date beyond the 3 month time limit for commencing proceedings in the Employment Tribunal. The Tribunal found it unfortunate that there was not included in the hearing bundle a copy of the respondents' disciplinary procedure, which would have included its appeals procedure. No-one present was able to give any indication as to whether the appeals procedure sets out a timescale for the delivery of the outcome of the appeal. Mr Lynch accepted that he was aware that the claimant had made it clear that it was his intention to commence Employment Tribunal proceedings if he was dissatisfied with the outcome of the appeal. The Tribunal found that, whilst Mr Lynch was aware of this, it had no bearing upon the manner in which he dealt with the appeal itself.
  8. The Tribunal found the claimant to be an intelligent, educated and articulate man. His role within the respondents' organisation was one of tele-sales, which involved the claimant having frequent access to his computer. The Tribunal accepted the claimant's evidence that he had made it clear to the respondents through Mr Lynch that he would commence Employment Tribunal proceedings if his appeal was unsuccessful. The Tribunal was satisfied that the claimant was aware throughout that he had the right to bring a claim to the Employment Tribunal.
  9. The claimant having made it clear to the respondent that he would commence Employment Tribunal proceedings, the Tribunal found that it was reasonable to expect the claimant to be aware not only of his right to bring a claim, but the means by which a claim would have to be pursued. The claimant informed the Tribunal that following his decision to issue the claim, he was directed to the ACAS website, the Employment Tribunal website and the Government's own website. I am satisfied that by so doing, the claimant would have been made aware immediately of the existence of the 3 month time limit in respect of all of the claims he wished to pursue. I am not satisfied that the claimant was ignorant of his rights to present the claim to the Employment Tribunal. I am not satisfied that it was unreasonable to expect him thus to be aware to the existence of the time limits.

10. I accept the claimant's evidence that, having waited for the outcome of his appeal, that outcome came at a time which was particularly inconvenient for him in that he had caring responsibilities for his father, obligations to his football refereeing duties and also the need to ensure that he was properly prepared to undertake his new duties with his new employer. I am not satisfied that those matters amount to any impediment such that it was no longer reasonable for him to present his claim form to the Employment Tribunal within the specified time limit.
11. The relevant statutory provisions are set out in section 111 of the Employment Rights Act 1996, which states:-
- (i) A complaint may be presented to an Employment Tribunal against an employer by any person that feels unfairly dismissed by the employer.
  - (ii) An Employment Tribunal shall not consider a complaint under this section unless it is presented to the Employment Tribunal:-
    - (a) Before the end of the period of 3 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 period of 3 months.
12. It is accepted that the correct interpretation of that statutory provision is that the claim form must be presented within the period of 3 months less one day from the effective date of termination of employment. If not, then the Employment Tribunal has a discretion to extend time, but that discretion can only be exercised in circumstances where the Tribunal is first satisfied that it was not reasonably practicable for the complaint to have been presented within the time limit.
13. It is now generally accepted from the decision of the Employment Appeal Tribunal in ***Asda Stores Limited -v- Kauser*** [EAT/0165/07] 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.
14. The claimant's case is simply that he genuinely believed that it was not necessary to present his claim form until such time as he received the outcome of his appeal. Mr Chatten argued that even if the respondent did not deliberately delay the outcome of the appeal, its failure to deal with the appeal within a reasonable period of time meant that it could not be reasonably practicable for him to have presented his claim form within the time limit.

15. In general, the fact that a claimant is pursuing an internal appeal against dismissal does not mean that he will be given extra time within which to present an unfair dismissal claim. In ***Palmer and another -v- Southend on Sea Borough Council [1984] ICR 372*** the Court of Appeal held that the existence of an internal appeal cannot by itself justify extending the time limit. However, the existence of an internal appeal may be one of a number of factors a Tribunal takes into account in determining whether it is reasonably practicable for an employee to submit his or her claim within the 3 month time limit. For example, in ***John Lewis Partnership -v- Charman [EAT/0079/11]*** the Employment Appeal Tribunal upheld an Employment Judge's decision that it was not reasonably practicable for the claimant to present his unfair dismissal claim because he was awaiting the outcome of an internal appeal, in circumstances in which he was reasonably ignorant of the existence of the time limit.
16. In the claimant's case, I am not satisfied that this was a case where it could fairly be said that the claimant was reasonably ignorant of the time limit. I am satisfied that if he was aware of his right to bring a claim, then he could reasonably be expected to be aware of the time limits.
17. This is not one of those cases where there is any specific impediment which prevented the claimant from presenting his claim form in time. He was not ignorant of his rights, nor was he ignorant of any facts which form the subject matter of the proceedings. At no stage was he deliberately misled by the respondent. The prolonged appeal could not reasonably be regarded as such an impediment. Other matters in the claimant's personal life, which he says adversely effected his ability to present the claim form following the issue of the appeal, are not in my judgment sufficient to discharge the burden of showing that it was not reasonably practicable to present the claim form in time.
18. I am not satisfied that it was not reasonably practicable for this claim form to have been presented within the 3 month time limit.
19. Furthermore, the claimant was unable to provide a meaningful explanation as to why it took him a further 3 weeks to undertake ACAS Early Conciliation and a further 8 days thereafter to present the claim form. On first view those may not appear to be particularly long periods of time, but when examined in the light of the tight 3 month time limit, both represent an inordinate period of time. The claim form was certainly not presented within a reasonable period of time after the original time limit had expired.
20. For those reasons the complaint of unfair dismissal was not presented within the 3 month time limit and is dismissed.
21. The claims of unlawful sex discrimination and age discrimination are based upon what the claimant described as a "throw away comment" made to him during the disciplinary hearing. The claimant's case is that he asked the Dismissing Officer at the dismissal hearing:-

“If I was an 18 year old girl who had been through that experience and was taking this call during grad bay, what would your reaction have been?”

The reply given to the claimant is alleged to have been,

“you aren’t and it would be a different story.”

That is the sole allegation about unlawful age discrimination and unlawful sex discrimination. The claimant alleges that these comments meant that the respondent had a mindset which meant that he as a male in a different age group to an 18 year old girl was treated less favourably by being dismissed.

22. Section 123(1)(a) of the Equality Act 2010 states that a claim must be presented to the Employment Tribunal within the period of 3 months beginning with the date of the acts complained of or such other period as the Employment Tribunal deems just and equitable.
23. The claimant relies upon exactly the same facts as are set out above in seeking to persuade the Employment Tribunal that it would be just and equitable in his case to extend time so that his complaint of unlawful discrimination may proceed.
24. It is accepted that the “just and equitable test” is different to that required to show that it was “not reasonably practicable” for an unfair dismissal claim to be presented in time. The claimant employee does not have to overcome that hurdle of establishing why it was not reasonably practicable. It was however said in **Robertson -v- Bexley Community Centre [2003] IRLR 434** by the Court of Appeal that time limits are exercised strictly in the Employment Tribunal and when Tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify failure to exercise the discretion. The Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. Exercise of the discretion is the exception rather than the rule. There are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law – it is a question of fact and judgment to be answered case by case by the Tribunal.
25. Reference is frequently made to the list of criteria contained in Section 33 of the Limitation Act 1980. Discrimination in all those factors have become known as “**Keeble**” factors [1997] IRLR 336.
  - (a) The length of and reasons for the delay
  - (b) The extent to which the cogency of the evidence is likely to be affected by the delay

- (c) The extent to which the party sued had cooperated with any request for information
  - (d) The promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action
  - (e) The steps taken by the plaintiff to obtain professional advice once he knew of the possibility of taking action.
26. There is no legal requirement on a Tribunal to go through that checklist in every case, provided that no most significant factor has been left out of account by the Tribunal in exercising its discretion.
27. The first factor (the length of and reasons for the delay) tends to be the most important in practice in discrimination cases.
28. The length of the delay in the claimant's case is considerable, particularly that period after he received the outcome of the appeal. The reasons for the delay are not in my judgment sufficient for this claimant to discharge the burden of proving that it is just and equitable for time to be extended. "Just and equitable" applies equally to the claimant and the respondent. Whilst the respondent may be open to criticism for the length of time it took to undertake the claimant's appeal, I am not satisfied that in this case the delayed appeal itself is sufficient for me to find that it would be just and equitable for time to be extended up to an including the date of presentation of this claim form.
29. For those reasons the Tribunal cannot consider the complaints of unlawful age and sex discrimination. Those claims are dismissed.

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**Employment Judge Johnson**

**Date 13 November 2018**