# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Salter

**Respondent:** Harry Ramsden's Limited

**Heard at:** Manchester **On:** 28 November 2018

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

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Miss A Smith, Counsel

# WRITTEN REASONS

## Introduction

1. These are the written reasons for the Judgment given with oral reasons at the conclusion of the hearing on 28 November 2018, and sent out to the parties in writing on 11 December 2018.

2. These proceedings began with a claim form presented on 26 June 2018. The claimant said he had worked as the Assistant Manager of one of the respondent's branches between June 2015 and 16 July 2017 when his resignation took effect. He resigned for health reasons following an incident on 23 May 2017 and some other factors outlined in the claim form. His form indicated he was pursuing complaints of unfair dismissal, disability discrimination and of unlawful deductions from pay. The details provided were relatively brief and, as one might expect of a person representing himself, the precise legal basis for the various complaints was not fully articulated.

3. No response form was filed within the time required by the Rules. The claimant attended a case management preliminary hearing before Employment Judge Robinson on 7 September 2018. Employment Judge Robinson identified a time limit issue and listed the case to be heard today. The claimant was required to provide any medical evidence on which he relied in advance of the hearing.

4. On 2 October 2018 solicitors instructed by the respondent made an application for an extension of time to present a response form, accompanied by a draft of the response. The draft response form asserted that the complaints pursued were hopeless, but in any event that they were brought out of time. The respondent denied that there had been any breach of contract which could mean that the claimant's resignation should be construed as a dismissal, and it denied any discriminatory treatment of the claimant. It said that no pay was due to him.

5. At the hearing before me the claimant represented himself and the respondent was represented by Miss Smith. I indicated that I would deal with the time limit issue first, and then if appropriate consider whether time should be extended for the response form and any other matters of case management which might arise. I explained to the parties that under rule 21(3) I was allowing the respondent to participate fully in the time limit part of the hearing to ensure that there was a fair hearing on that point.

6. I heard oral evidence on affirmation from the claimant. He answered questions from me and from Miss Smith. He also relied on some documents which were attached to an email of 2 October 2018, and provided two further documents at the start of the hearing. I will refer to those documents as appropriate below. The respondent did not call any evidence or rely on any documents.

**Relevant Legal Framework – Time Limits**

Unfair Dismissal/Unlawful Deductions

7. The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996:

> **(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.**

8. Provisions to the same effect (where time runs from the last in a series of deductions) appear in section 23 of the Act in relation to complaints of unlawful deductions from pay.

9. Two issues may therefore arise: whether it was not reasonably practicable for the claimant to present the complaint within time; and, if not, whether it was presented within such further period as is reasonable.

10. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal).

11. Health issues can make it not reasonably practicable to present a claim (e.g **Schultz v Esso Petroleum Co Ltd [1999] ICR 1202** Court of Appeal). In

**University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12** on 23 July 2012 the EAT upheld a Tribunal decision that a late claim was within section 111(2) even though the medical evidence "did not entirely support the Judge's findings about the Claimant's mental health" (EAT judgment paragraph 12) and even though the claimant had been able to move home and find a new school for her child during the period when the Tribunal found it had not been reasonably practicable to have presented a claim.

12. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Disability Discrimination

13. The discrimination claim was brought under the Equality Act 2010. The time limit for bringing a claim appears in section 123 as follows:-

> **"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –**
>
> > **(a) the period of three months starting with the date of the act to which the complaint relates, or**
> >
> > **(b) such other period as the Employment Tribunal thinks just and equitable.**
>
> **(2) …**
>
> **(3) for the purposes of this section –**
>
> > **(a) conduct extending over a period is to be treated as done at the end of the period;**
> >
> > **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

14. The case law on the application of the "just and equitable" extension (and its predecessor in the Race Relations Act 1976) includes **British Coal Corporation –v- Keeble [1997] IRLR 336**, in which the Employment Appeal Tribunal (Smith L J presiding) confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in **Keeble**:-

> **"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –**
>
> **(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 appropriate professional advice once he or she knew of the possibility of taking action."**

15. In **Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]** the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

> **"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. 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 a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."**

16. Subsequently in **Chief Constable of Lincolnshire –v- Caston [2010] IRLR 327** the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

17. In **Department of Constitutional Affairs –v- Jones [2008] IRLR 128** the Court of Appeal emphasised that the guidelines expressed in **Keeble** are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. Nor are they necessarily the only relevant factors. Each case turns on its particular facts.

## Relevant Facts

18. Having heard the evidence I made the following findings of fact.

Background

19. The claimant has a longstanding history of mental illness resulting from traumatic experiences in his childhood. This has predominantly manifested itself as low mood and anxiety. He also has mood swings, so that at times he can feel elated. Sometimes these periods can last for several months before he "crashes" into a low mood again for a prolonged period. He has long been in receipt of medication. Despite his difficulties he performed a managerial role at a high level for a number of years but eventually had to give that up. His role with the respondent as an Assistant Manager was at a much lower level.

June - December 2017

20. The claimant resigned from his job in June 2017 following some experiences which are summarised on his claim form. He was finding himself increasingly anxious and unable to cope with the stresses of the job. Although he knew about the right of an employee to go an Employment Tribunal from his previous experiences as

an Operations Manager in a different company, he was not thinking about that at the time he resigned. He was too ill to give that consideration. His daily routine was affected and he found that he had stopped washing, dressing or cooking for himself properly. He did not want to leave his house. He described one incident where an accident occurred outside his house but even though he was qualified in first aid he could not face going outside to help.

21. At the end of September 2017 the claimant rang his former line manager, Michelle, whom he regarded as a friend. He arranged to go to see her and managed to get a bus to the branch where she worked. He discussed with her the possibility of him returning on a part-time basis in order to help him get better. She said she would make enquiries with Human Resources. A few days later she told him on the telephone that the company would not have him back. This was a significant setback for him and his symptoms deteriorated. He remained effectively confined to home and not looking after himself properly.

22. In order to apply for DWP benefits he had to complete a complicated form with the assistance of a friend. It took him about a week to complete.

23. His immediate family do not live in the North West but they came up to see him at Christmas. Unfortunately, on Boxing Day 2017 he suffered a dissociative state in the course of a family event, and his medical condition deteriorated rapidly over the month or so that followed.

<u>January - February 2018</u>

24. A significant factor in his deterioration was a decision by the Department for Work and Pensions that he was fit for work. This was issued on 23 January 2018. It was based upon a misunderstanding of some information he had provided about the fact that he was registered with the Open University for an online degree course. He had been registered for this for some years but had not been well enough to pursue it. The assessment was based on the view he was fit enough to be actively engaging in that course. The claimant promptly lodged a reconsideration application within a few days. Once again this was a complicated form and he required assistance in completing it. Eventually the DWP assessment was reviewed and overturned in his favour.

25. However, about a week after the decision of 23 January he had a nervous breakdown. Although he was not hospitalised he was put on "wakeful watch" which required him to see his General Practitioner every day, and for him to be given a sleeping tablet each night to ensure he slept through. This was a reflection of the fact that he was troubled by suicidal thoughts. He explained in this period he was particularly reluctant to leave his house because in order to get to the shops he had to cross a bridge, which was an opportunity for suicide. These symptoms continued until early March 2018

<u>March – April 2018</u>

26. The claimant was referred to the Community Mental Health Team and was assessed by a nurse on 6 March 2018. That resulted in a letter dated 12 March 2018. It confirmed that he had depression and anxiety since his teenage years and

that he described "episodes of mania". He was on citalopram for his mental health. A number of contributing factors were identified in the report. He was to be referred to Primary Care Psychology.

27. The claimant found the approach of the nurse at this assessment very helpful and supportive. She encouraged him to face up to his problems. He began to experience an improvement in his symptoms.

May – June 2018

28. On 3 May 2018 the claimant saw a trainee psychiatrist working with the consultant, Dr Birtwhistle. That trainee, Dr Ahmad, provided a report to his GP the same day. It confirmed a diagnosis of post traumatic stress disorder with mixed anxiety and depressive disorder. It recommended that the citalopram be stopped and replaced by sertraline. The report recorded that the claimant presented well kempt with no sign of somatic retardation or agitation. His speech was normal and there was no formal thought disorder observed. He was properly orientated and willing to engage to with the help provided. He had still made no progress with his Open University course due to lack of concentration and motivation.

29. About a week or so after this assessment the claimant contracted the Citizens Advice Bureau about his employment rights. They referred him to ACAS. He telephoned ACAS on 20 May 2018 to initiate early conciliation. There was an issue about the proper address of the respondent and ACAS required him to initiate early conciliation a second time ten days later. ACAS told him that because of the time limit issue there would be no attempt to contact the respondent, and the certificate was issued the same day.

30. The claimant understood from some online research that he had a month from the date ACAS issued the early conciliation certificate in which to bring a claim. Instead of doing so immediately he wrote to the respondent on 7 June. He set out the position as he saw it, raising his concern about how he was treated before he resigned and the wages he thought he was due. He said his letter was the last attempt to resolve matters amicably. He asked for a response by 20 June to give him enough time to pursue his claim if necessary.

31. The respondent replied to the claimant by a letter of 12 June saying that he had not raised complaints about these matters at the time and it was now too late to deal with them. However, the claimant did not receive that letter. From his perspective there was no reply. Accordingly, on 26 June 2018 he lodged his Employment Tribunal claim form.

**Submissions**

32. At the conclusion of the evidence each representative made an oral submission.

33. Miss Smith submitted that the claims were out of time whichever legal test was applied. The overwhelming reason for delay was the claimant's health. It was relevant that the delay was a long period, not just a few days or weeks. The respondent was prejudiced by the delay because witnesses would find it more difficult to recall the relevant events and most of them had left employment in any

event. Although the claimant had plainly been unwell during the period he had attended appointments, claimed benefits and sought reconsideration of the refusal, and had visited the respondent in person at the end of September 2017. Further, although he pursued matters in May, on his case the change in medication would have taken four or five weeks to have effect and therefore it was unclear why he had not pursued matters in April. He had also delayed unreasonably after going to ACAS because in fact he did not have a month to bring the claim. That extension would only apply if he had gone to ACAS within the primary three month time limit. Overall she submitted that it had been reasonably practicable for the claim to have been brought within time, and that it would not be just and equitable to allow an extension for the discrimination complaint. Miss Smith also submitted that the claim plainly lacked merit given what appeared on the claim form.

34. The claimant disputed that approach. He had made it clear at the previous preliminary hearing that he had more details to provide and would have done so had he not been aware that his claim was potentially out of time. Although he had been to medical appointments that was always with someone accompanying him there, and when he had been able to send letters or complete forms it had been tremendously difficult and only achievable with assistance. Although some managers had left, his line manager and friend, Michelle, was still working for the respondent. The fact he had been to see Michelle at the end of September did not mean that he had been capable of lodging a claim, and nor did the fact he had completed the benefits application form in late 2017. He had been unfit for work, as the DWP eventually accepted. Once the ACAS certificate was issued he was trying to be reasonable in allowing the respondent time to reply. He therefore argued that I should extend time and allow all his claims to proceed.

**Discussion and Conclusions – Unfair Dismissal and Unlawful Deductions**

35. The first issue was whether it was reasonably practicable (in the sense of being reasonably feasible) for the claim to have been presented within time. That required me to consider the period between the termination of employment (assuming in favour of the claimant that there was a series of deductions up to that point) and mid October 2017.

36. I accepted the claimant's oral evidence, even though it was not supported in any detail by medical evidence, that in that period he was severely troubled by anxiety and effectively unable to leave his home. I acknowledged that in September 2017 he had managed to make it into his former place of work to speak to Michelle about the possibility of returning, but that was not in my judgment such as to show that he was mentally capable of starting legal action. I was struck by the fact that he described Michelle as a friend and that he thought that coming back to work in a limited capacity might help him recover. I therefore found as a fact that due to his very poor state of mental health in the relevant period it had not been reasonably practicable for the claimant to have lodged his claim by expiry of the primary time limit in October 2017.

37. That raised the second question: had he presented it within such further period as is reasonable? Again I accepted his evidence about his poor state of health in the period up until his assessment in early March 2018. He had been able to complete his benefits forms and the reconsideration form only with assistance,

and those were matters of key importance because that was his only means of financial support at the time. It was reasonable to concentrate his efforts on those matters rather than starting legal proceedings against his former employer in this period.

38. However, I was troubled by the lack of action by the claimant in the period from late March to mid May 2018. The later improvement in his condition following the change in medication would not have taken effect until late May. The claimant was unable to identify anything which had prevented him from contacting the CAB in April as opposed to mid May 2018. It seemed to me that knowing that time was passing since his employment ended, he could reasonably have given this matter more priority in that period. He had therefore failed to show that the delay from early April was a reasonable delay. For that reason alone, the unfair dismissal and unlawful deductions from pay claims were out of time and were dismissed.

39. That conclusion should not be seen as in any way a criticism of the claimant. Nor do I doubt in any way the substantial mental health challenges he has faced and continues to face. His claim failed because he had not established that he could not have reasonably have done in April what he eventually did in late May 2018.

**Discussion and Conclusions – Disability Discrimination**

40. The legal test here was different. I had to balance a range of factors and decide whether it was just and equitable to extend time. I assumed in favour of the claimant that there was a continuing act of discrimination up to the point his employment ended. The primary time limit therefore expired in mid October 2017.

<u>Length of Delay</u>

41. The length of the delay in this case was considerable. Employment time limits are short because employers need to know whether they will face a claim so that evidence (which frequently is not in writing) can be gathered and preserved. The claim presented in June 2018 was more than eight months late. That is a very significant period.

<u>Reason for Delay</u>

42. The reason for the delay was at first a medical reason. I was satisfied that the claimant was not well enough to put a claim in until late March 2018 at the earliest.

43. From that point onwards, however, the reason for the delay was not primarily a medical reason. It was unclear to me why the claimant had not gone to ACAS and then brought a claim in April or early May 2018.

44. Once he had gone to ACAS in late May, the reason he delayed was because of a mistaken (but reasonable) impression that he had a further month from the date ACAS issued the early conciliation certificate. That was a technical error because that one month extension only applies where the primary time limit would expire in the period beginning with day A (when he started early conciliation). Where the primary time limit has already expired no such extension arises: see section 140B(4) Equality Act 2010. It was reasonable of the claimant, however, to make a mistake

about that, and reasonable of him to want to give the respondent a chance to resolve the matters before he brought his claim.

Impact on Evidence

45. I was satisfied that the delay had a significant impact on the cogency of the evidence which would be available. From the details on the claim form it appeared very likely that there would be a need for witnesses to recall events which were not committed to writing at the time. That included, for example, the claimant's reference to breaches of the noise abatement rules, the lack of vermin controls and verbal abuse from his line manager. There was also an allegation about a practice of not recording actual working hours which was not likely to be something on which there was conclusive written evidence. The delay of more than eight months was likely to have a negative effect on the quality of the evidence available to the Tribunal, and impact upon the respondent’s ability to have a fair trial of its defence to these allegations.

46. That difficulty was exacerbated by the fact that a number of the main witnesses had left employment, including the claimant’s line manager against whom some of these complaints were brought. Even if traced, those witnesses had moved on to other employment and could well be less likely to recall day to day details of their old job.

Merits

47. I declined, however, to have any regard to the potential merits of the case. I rejected Miss Smith’s contention that the case was necessarily hopeless. From the claim form it was possible to discern matters which could amount to a fundamental breach of contract and which might amount to disability discrimination.

Conclusion

48. Ignoring the merits, therefore, but putting the other matters together I concluded that it would not be just and equitable to extend time. Although the claimant could not be criticised for the delay up to late March 2018, he had failed to explain the delay in the 4-6 weeks that followed. The delay overall would have a significant adverse impact on the cogency of the evidence and the ability of the respondent to defend itself fairly. In all the circumstances it was not just and equitable to extend time.

49. The discrimination complaints were dismissed as well.

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Employment Judge Franey

19 December 2018

REASONS SENT TO THE PARTIES ON

21 December 2018

FOR THE TRIBUNAL OFFICE

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