



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Y Sharafeldeen Abdeirh

**Respondent:** Asda Stores Limited

**Heard at:** Leicester      **On:** Tuesday 22 January 2019

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

## Representatives

**Claimant:** Dr R Ibakakombo, Lay Representative

**Respondent:** Miss K White of Counsel

## JUDGMENT

The Employment Judge gave judgment as follows: -

The Tribunal does not have jurisdiction to hear these claims. They are dismissed.

## REASONS

### Background to this Hearing

1. This hearing follows on from an attended Preliminary Hearing conducted by myself on 13 December 2018 when I refused the application made by the Claimant to amend his claim to include a claim of race discrimination.

2. At that hearing we identified that the complaints of disability discrimination were out of time. This hearing had been set to determine whether the Tribunal has jurisdiction to hear the claims. This involves a 2 stage process namely: -

2.1 Were the claims presented in time ie within the 3 months' time limit set out in Section 123 of the Equality Act 2010 ("EQA").

2.2 If the claims or any of them were out of time would it be just and equitable to extend time and allow the claims to proceed to a hearing.

### Evidence

3. I heard evidence from the Claimant only and there was an agreed bundle of documents before me. Where I refer to page numbers it is from that bundle.

## Relevant Facts

4. The Claimant was employed by the Respondent as a Warehouse Operative from 3 August 2009. He says that he suffers from a number of complaints and in particular: -

- Stomach problems
- A chest infection

5. He says that this amounts to a disability as defined in Section 6 of the EQA.

6. He made his complaint to the Employment Tribunal on 11 January 2018 and listed the following matters: -

6.1 That on 7 April 2017 his sickness payments were suspended.

6.2 That on 29 April 2017 he was issued with a verbal warning.

6.3 That he was not allocated duties which would not require him to bend.

6.4 He complained about the process of dealing with this procedure.

7. He acknowledged that he has not been at work since August 2017.

## The Facts

8. The Claimant commenced his employment as a Warehouse Operative on 3 August 2009.

9. On 29 March 2017 he went off sick. He met with Danny Binks on 1 April 2017 to discuss this matter. A note of that discussion is at page 143 of the supplemental bundle. The Claimant does not dispute that the note is accurate. It confirms that he had been off work since Wednesday 29 March 2017 and says:

“He still has severe pain to his left side of chest he claims. He states he went back to GP Thursday as pain on left side so bad, they sent him to hospital again but as hospital couldn't find him a bed to wait on he returned home.”

10. A decision was made by Sharon Hammond the General Manager to withhold his sick pay following a meeting between the Claimant and Sharon Hammond on that day. The letter confirming the outcome of that meeting is at page 145 of the supplemental bundle. The reason for this was that Ms Hammond believed that the Claimant was abusing the company sick pay scheme. He was told of his right to appeal.

11. On 10 April 2017 the Claimant complained about the with-holding of the company sick pay (“CSP”). His letter is at page 146 of the supplemental bundle.

12. The Claimant returned to work on 26 April 2017.

13. On 29 April 2017 there was a meeting between the Claimant and his Line Manager at which they discussed the reason for his absence which was his chest infection. The notes of the meeting are at pages 151-2. The decision to confirm the withholding of his sick pay was confirmed to him on 5 May 2017 (page 155). The reason for that decision was that the Claimant had refused to undertake alternative duties as recommended by occupational health which could have facilitated his return to work. He had seen occupational health on 12 April 2017 and the notes in respect of that are at pages 148-9.

14. The Claimant was then subjected to a disciplinary investigation in respect of his abuse of the company sick pay and a meeting was held with him on 9 May 2017. The notes of the meeting are at pages 156-9. A typed version is at pages 160-2. There was then a further meeting on 23 May 2017 and the note of that is at page 163-5. The decision was to issue him with a verbal warning.

15. The Claimant decided to appeal against this verbal warning on 24 May 2017 (page 166). An appeal hearing was conducted on 30 May 2017 and the notes are at page 167-8.

16. The Claimant was again referred to occupational health on 8 June 2017. The report is at page 169 and confirms that the Claimant was deemed to be fit to return to his full substantive role. It says:

“On days when his pain levels are significant there may be a decrease in his performance and pick, however on days when he has no pain, there is no medical reason why he cannot deliver a full and effective service and achieve his pick rates.”

17. The report went on to say that it was imperative that the Claimant eat the right food as certain foods were known to trigger stomach ulcer pain and he had been advised regarding some actions that he could take to assist with his own management of the condition.

18. On 9 June 2017 he raised a formal grievance (page 170). He wanted an apology letter and an acknowledgement that the process was wrong and an agreement that they would not do so again.

19. At this point the Claimant notified ACAS of his potential claim on 9 June 2017. He was issued with an ACAS early conciliation certificate on 5 July 2017. At that stage he could have issued his claim to the Employment Tribunal.

20. On 18 July 2017 the Claimant had a meeting with Natali Hersey, HR Business Partner for the Respondent. She conducted a review of his file following an issue raised by the GMB (his trade union) about the stopping of the company sick pay. She wrote to the claimant on 19 July 2017 (page 172 of the supplemental bundle). At the review she decided that it was not appropriate for him to have been issued with a verbal warning. She apologised on behalf of the company and confirmed that they would be reinstating his CSP with immediate effect.

21. It finally said:

“We also discussed information given to yourself by your department Manager, after reading this information I can only apologise for the way this has come across and I can guarantee you that in no way did we intend to treat you unfairly, again I can only apologise and can promise you that the appropriate action will be taken with all involved.”

22. That appeared to be satisfactory to the Claimant and concluded the matter regarding his CSP.

23. On 29 August 2017 the Claimant raised further grievances against: -

- Danny Binks (page 173)
- Shaun Wells (pages 174-5)
- Matt Turner (page 176)
- Ashley Johns (page 177)
- Atul Madwdia (page 178)
- Tony Ash (page 179)

24. At that time the Claimant was represented still by his trade union. He met with Natali Hersey on 7 September 2017 with his representative to discuss this. It was agreed that the Claimant would provide Ms Hersey with a list of his grievance points against each of the people he had complained about. She did not hear anything from him and wrote to him on 9 October 2017 asking him to provide her with those details within 7 days (page 180).

25. The Claimant's response to this was a short letter of 10 October 2017 (page 181) which did not provide any details of the allegations against each of the Managers other than the briefest detail.

26. However, a grievance hearing was held on 3 November 2017. This was conducted by Mark Stafford, Warehouse Operations Manager. His letter of 16 November 2017 sets out the details of that meeting and Mr Stafford's conclusions (page 183-8). At that meeting the Claimant was again represented by his trade union. The Claimant had a right to appeal against that decision and did so on 1 December 2017 (page 189).

27. His grievance appeal hearing was conducted on 22 February 2018.

28. In the meantime, the Claimant submitted his application to the Tribunal finally on 11 January 2018. At that stage he was being advised by a solicitor. His complaint was of 3 matters namely: -

28.1 The withholding of his sick pay. This had occurred on 7 April 2017.

28.2 That withholding the sick pay resulted in his membership of the share scheme being cancelled.

28.3 The Respondent's had refused to allocate him work which would not require him to bend. His claim form makes no mention of any complaint about the delays in procedure.

29. The Claimant had been on long term sick since July 2017.

30. In his witness statement to the Tribunal dated 15 November 2018 (pages 67-72) he says that he acknowledges that he had forgotten to issue his complaints. In the final paragraph he says:

“On 5 July 2017 I was issued with an ACAS early conciliation certificate (first certificate) but due to my health conditions (post-traumatic stress disorder) and also I was preparing to have a “helicobacter pylori test” to investigate my long term stomach pain, I forgot to submit my claim to the Tribunal up to December 2017 when I was asked by my GP about the resolution of my employment matters.”

### **The Law**

31. Section 123 EQA provides:

“(1) Proceedings on a complaint within Section 120 may not be brought after the end of: -

(a) The period of 3 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.

(3) For the purpose 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.”

32. The burden of proof is on the Claimant to establish that it would be just and equitable to extend time. I have to be persuaded that I should exercise my discretion to extend time presenting a complaint provided I think it would be just and equitable to do so. I referred myself to the cases of:-

- **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**
- **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327**
- **British Coal Corporation v Keeble and Others [1997] IRLR 336**

33. I must look at all the circumstances of the case and in particular: -
- The length of and reasons for the delay
  - The extent to which the cogency of the evidence is likely to be affected by the delay
  - The extent to which the party sued as co-operator with any request for information
  - The promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action
  - The steps taken by the Claimant to obtain appropriate replies once he or she knew of the possibility of taking action

### **My Conclusion**

34. In this case I am satisfied that the last act complained of was in fact 30 May 2017. In this case the Claimant had obtained an ACAS certificate on 5 July 2017. The period of time between notification of his claim and the issuing of the certificate between 9 June 2017 and 5 July 2017 should not be counted in calculating the time. I am therefore satisfied that time ran out for him on 24 September 2017.

35. I am satisfied that the Claimant has not provided any adequate explanation for failing to issue his claim by 24 September 2017. His explanation that he simply forgot is not at all satisfactory.

36. I am satisfied that he had intended to proceed with a claim in July 2017 but after the meeting with Ms Hersey and her letter of 19 July 2017 retracting the warning reinstating his sick pay and apologising he had no intention or pursuing a claim. He simply then changed his mind.

37. I am satisfied that any health issues he had do not excuse his failure. It should not have prevented him from completing a claim form and submitting a claim. In deciding this I note: -

- He was able to attend a grievance meeting on 3 November 2017
- He was able to attend the appeal hearing on 1 December 2017
- He was able to attend the grievance appeal hearing on 12 December 2017

38. He still then delayed until 11 January 2018 before he submitted his claim.

39. I am satisfied in this case that: -

- 39.1 The length of the delay is substantial and the claim is over 3 months out of time.
- 39.2 The reason for the delay that he forgot to make a claim is not credible. I am satisfied that he simply changed his mind.
- 39.3 I am satisfied that the cogency of the evidence is likely to be affected by the delay. The events took place almost 2 years ago now.

- 39.4 There is no evidence that the Respondent has done anything but cooperate with any request for information.
- 39.5 At the time of going through his grievance the Claimant was advised by his trade union.
- 39.6 He subsequently had access to legal advice.
- 39.7 He knew of facts giving rise to the cause of action in June 2017 when he contacted ACAS. His delay in submitting his claim until 11 January 2018 is inexcusable.
- 39.8 Strict time limits apply to all claims before the Employment Tribunal and I am satisfied that it would not be just and equitable to extend time in this case.

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Employment Judge Hutchinson

Date 28 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE