



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Ehsan

**Respondent:** Telefonica UK Limited

**Heard at:** London Central Employment Tribunal **On:** 9 August 2019

**Before:** Employment Judge K Welch (sitting alone)

## Representation

Claimant: In person

Respondent: Ms N Atwal, Solicitor

# RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal was presented outside the primary limitation period and it was reasonably practicable to present it within time.
2. The Claimant's race and religious discrimination complaints were presented outside the primary limitation period and it is not just and equitable to extend time.
3. Accordingly, the Claimant's claim is dismissed in its entirety because the Tribunal does not have jurisdiction.
4. The preliminary hearing for case management listed for Thursday 31 October 2019 at 10am is vacated.

# RESERVED REASONS

1. This is a claim for unfair dismissal and race and religious discrimination brought by the Claimant against his former employer.
2. The claim was presented on 6 April 2019 and the Respondent contends that the Tribunal does not have jurisdiction to consider the complaints since they were all submitted out of time. On receipt of the response, Regional Employment Judge Wade listed the case for a

preliminary hearing to consider whether the Tribunal had jurisdiction to consider the Claimant's complaints due to them having been presented out of time.

3. The Claimant confirmed in the preliminary hearing that his claims of discrimination related to the following:-

3.1 Direct race discrimination (the Claimant is Bangladeshi British)

- (a) On 25 January 2017, Carl Banahan, James Blackmore and Matthew Rumbles called out "Paki" to the Claimant and two colleagues;
- (b) On 29 January 2017, the Claimant was subjected to verbal abuse by Carl Banahan due to his race.
- (c) the disciplinary procedure not being properly followed prior to his dismissal;
- (d) his dismissal on 7 January 2015.

3.2 Indirect Religious Discrimination (the Claimant is Muslim)

- (a) At the end of 2017/beginning of 2018, the Claimant attended a regional meeting, which had betting games as part of the session.

3.3 Racial Harassment

- (a) The Claimant also alleges that the incidents on 25 January 2017 and 29 January 2017 (set out above) were acts of racial harassment.

#### **Background Facts relevant to preliminary hearing**

4. The Claimant was employed for over 20 years by the Respondent and, prior to his dismissal for gross misconduct, was employed in a store leader role. He was suspended from 1 January 2018 over allegations of potential fraudulent and dishonest activity along with all other employees at the store in which the Claimant worked.

5. Following an investigation, including an investigation and outcome in respect of a grievance submitted by the Claimant, he was ultimately invited to attend a disciplinary hearing on 18<sup>th</sup> November 2019. The Claimant gave evidence that he was ill at this time, although his evidence was that this only lasted for approximately two weeks. He therefore requested an adjournment of the disciplinary hearing of approximately 10 days, in order that he could be well enough to attend and also so that his representative from the trade union could attend. This was refused and the hearing went ahead in his absence.

6. The Claimant was ultimately informed by letter received on 7 January 2019 that he was summarily dismissed from the Respondent's employment for gross misconduct. The Claimant accepted in evidence that he had received his dismissal letter.
7. The Claimant gave evidence that he spoke to his union at the time that he received his dismissal letter (around 7 January 2019). They advised him to appeal although the Claimant's evidence was that they did not provide him with any information concerning time limits for bringing a claim. They stated to him that he should wait for the outcome of his appeal and that they would support him with the appeal hearing.
8. The Claimant then appealed against the decision to dismiss him on 10 January 2019 and, due to getting no response from them, asked them on 30 January to acknowledge the email, which the Respondent did.
9. The appeal hearing took place on 19 February 2019 and the Claimant confirmed in evidence that his representative attended the appeal hearing and that he had no issues with his health at this time.
10. At the hearing on 19 February, the Claimant requested that the Respondent send him the outcome of his appeal by email and provided dates that he was going to be outside of the country.
11. Following the hearing, notes of the appeal hearing were sent to the Claimant, which required correction. He sent them back on 29 February 2019.
12. The Claimant gave evidence that he received the appeal outcome letter on either 3 or 4 April 2019. He could not confirm exactly when, as it was not sent by recorded delivery (despite the letter indicating that it had been). He went abroad by Eurostar on 8 April 2019 and confirmed that prior to going abroad he had received the appeal outcome letter. He also confirmed that he called the GMB (his union) and had a conversation with ACAS immediately prior to catching his train on 8 April 2019.
13. The union told the Claimant that they could not represent him due to him being out of time in which to present his claim. He then contacted ACAS to find out about the process and looked online at that point. However, he did not submit his claim until after his return.
14. He was out of the country from 8 April 2019 and came back a week later on 15 April 2019. He contacted ACAS on 16 April 2019 and presented his claim the same day.
15. During his holiday abroad, he reported a mugging to the police and had to claim on his travel insurance and report all his cards including his driving licence missing.

16. His claim form made reference to a 'legal team' and he confirmed that this was the union legal team who he had discussions with, including his union representative and the general union helpline who he contacted once he received his dismissal letter on 7 January 2019.
17. Other colleagues of the Claimant (other than one) had been dismissed although the Claimant was not clear on the exact date that the other people had been dismissed.
18. The Claimant's evidence was that if his appeal was unsatisfactory, he would take his claim to an Employment Tribunal and made reference to this in the appeal hearing on 19 February. However, he wanted to compromise and clear his name and therefore considered that he should allow the appeal process to be completed before considering bringing a claim.
19. There was no evidence that the Respondent had led the Claimant to believe that he could not bring a claim until after the appeal had been completed.
20. The Claimant also gave evidence that he had access to the internet and knew there were time limits for bringing claims, although did not know exactly how long these were.

**Submissions**

21. Both parties addressed me orally in the hearing and the Respondent provided written submissions.
22. In brief, the Respondent contended that the claims were significantly out of time and that the burden of proof for establishing that it was not reasonably practicable to present the claim within time was on the Claimant, which he had failed to do. The Claimant's ignorance of the relevant time limit was not reasonable in this case. Even if it was not reasonably practicable to have presented his claim within the time limit, the claim was not presented within such further periods as the Tribunal should consider to be reasonable. As regards to the discrimination complaints, the Respondent contended that it was not just and equitable for the Tribunal to extend time in these circumstances. It contended that the Respondent would suffer significant prejudice should the Tribunal extend time on a just and equitable basis and that there were no exceptional circumstances to do so in this case. The Claimant had received the appeal outcome letter before the end of the limitation period and it was not appropriate to extend time to allow the claims to continue.
23. The Claimant had prepared a paper prior to the hearing, which contained comments on the grounds of resistance. He was given the opportunity to raise any issues relating to

the late submission of his claims. He, therefore, went through the parts in his paper relating to why he had not presented his claim within time.

24. The Claimant contended that there were lots of mistakes in the procedure followed by the Respondent, which he had had to correct to the best of his ability. This all took time. The three month deadline had been 'wasted' by the Respondent. On 29 March 2019, the Respondent contacted the Claimant to say that a decision would be in the post, rather than by email which he had requested, which the Claimant believed would have taken him outside of the time limit to bring a claim. The Claimant wanted an amicable solution, he waited for the appeal outcome to see if it could be resolved. The Claimant had been mentally, physically and financially devastated by the decision to dismiss him after 20 years' service. He therefore requested that the Tribunal consider his claims.

## **Law**

25. The time limit for presenting a claim for unfair dismissal is three months from the effective date of termination ("EDT") as set out in Section 111(1) of the Employment Rights Act 1996 ("ERA"), which provides:
- "Complaints to employment tribunal*
- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*
- (2) Subject to the following provisions of this section 2 , 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."*
26. The burden lies with the claimant at both stages of this test. It is a question of fact in each case whether it was reasonably practicable to present a claim for unfair dismissal within time.
27. There are a number of factors that may be relevant, including the Claimant's knowledge of the facts giving rise to his claim, his knowledge of his rights to claim and the enforcement of those rights. However, mere ignorance of the time limit for bringing a

claim for unfair dismissal does not of itself amount to reasonable impracticality, especially where the employee is aware of his or her rights to bring a claim. The question is, was the Claimant's ignorance reasonable in all the circumstances?

28. Where the employee has knowledge of their rights to bring a claim of unfair dismissal, there is an obligation on them to seek information or advice about enforcement of those rights.
29. If a solicitor or trade union representative is at fault, the Tribunal will usually consider that it was reasonably practicable for the claim to have been presented within time.
30. A Claimant's illness may be relevant to the question of reasonable practicability and a Tribunal is prepared to exercise leniency in such situations but the Tribunal still needs to decide whether it was reasonably practicable for the Claimant to have presented his claim within time.
31. The existence of an internal appeal is not, by itself, sufficient to justify a finding of fact that it was not reasonably practicable to present a claim in time to the Tribunal.
32. For discrimination complaints, the Tribunal needs to consider firstly section 123(1) of the Equality Act 2010 ("EqA") which provides:
  - 32.1 *"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 fact which the complaint relates or (b) such other period as the employment tribunal thinks just and equitable.*
    - (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".*
33. It was noted that this was a lower hurdle than the reasonably practicable test for the Claimant's unfair dismissal complaint. It is necessary to consider the prejudice caused to either party should an extension be granted or refused. The factors under section 33 of the Limitation Act 1980 can be relevant to the consideration of an extension on a just and equitable basis. These include (1) the length and reasons for the delay (2) the extent to which the cogency of the evidence is likely to be affected by the delay (3) the extent to which the parties sued had cooperated with any request for information (4) the promptness with which the Claimant acted once they knew the possibility of taking action and (5) the steps taken by the Claimant to obtain appropriate professional advice once

they knew of the possibility of taking action. The importance on being whether the delay had affected the ability of the Tribunal to conduct a fair hearing.

34. However, the checklist in section 33 of the Limitation Act 1980 should not be adhered to slavishly. The main factors which are relevant in any consideration of exercise of a discretion under Section 123 EqA as outlined in *Southwark London Borough Council v Afolabi [2003] ICR 800* where the Court of Appeal stated that the two factors which were almost always relevant were the length of and reasons for the delay and whether the delay had prejudiced the Respondent.
35. Ignorance of rights can assist a Claimant who has submitted a discrimination complaint out of time however only where the ignorance of rights was reasonable in the circumstances. It is possible to take into account the fact that a Claimant has waited for the outcome of an internal grievance procedure/appeal before making a complaint when considering the late submission of a discrimination complaint. *Apelogun-Gabriels v Lambeth Borough Council & Another [2002] ICR713* which approved the EAT decision in *Robinson v Post Office [2000] IRL804* confirms that the general principle is that a delay caused by a Claimant awaiting completion of an internal procedure may justify the extension of the time limit but it is only one factor to be considered in any particular case.

### **Conclusion**

36. The Claimant was dismissed on 7 January 2019. The time limit for bringing his complaint of unfair dismissal and discrimination relating to his dismissal therefore expired on 6 April 2019. As the Claimant had not contacted ACAS for early conciliation prior to the end of the time limit, no extension of time was appropriate in this case. The Claimant presented his complaints on 16 April 2019.
37. I find that the Claimant's discrimination complaints relating to the procedure followed leading to his dismissal was conduct extending over a period such that the last act of alleged discrimination was his dismissal on 7 January 2019. Therefore, for his unfair dismissal and direct race discrimination complaints set out at 3.1(c) and (d) above, his complaint was 10 days out of time.

38. For his complaints of racial harassment/ direct race discrimination relating to incidents in January 2017, and indirect religious discrimination they were presented even more out of time.
39. I did not consider that the alleged race discrimination incidents in January 2017 (set out at paragraphs 3.1(a), 3.1(b), and 3.3(a) above) and the religious discrimination in late 2017/ early 2018 (paragraph 3.2(a) above) were linked to the later allegations of race discrimination so as to be classed as conduct extending over a period. The incidents appeared, even on the Claimant's case, to be completely unrelated. Therefore, I considered that time for presenting these complaints ran from when the alleged incidents took place in January 2017 and late 2017/ early 2018 respectively.
40. I considered that the Claimant's only reason for the delay in presenting his complaints was that he was waiting for confirmation of the appeal outcome, which was dated 29 March 2019 and which he confirmed he received on 3 or 4 April 2019.
41. The Claimant's evidence of his illness was that he had recovered shortly after the November 2018 disciplinary hearing and therefore this did not materially affect his ability to present his claim within time. He had certainly recovered by the time of his dismissal and did not rely upon any medical issues during the period following his dismissal.
42. From the Claimant's own evidence, the appeal outcome was received on 3 or 4 April 2019 which was still within, albeit towards the latter part of, the time limits for presenting a claim for unfair dismissal and discrimination concerning the dismissal/ disciplinary procedure.
43. Had the Claimant contacted his union on receipt of the appeal outcome, he would have still been within time and was in a position to contact ACAS, which would inevitably have extended the time in which to bring a claim. However, his own evidence was that he contacted his union on 8 April 2019, just prior to boarding a Eurostar train to go abroad. By this time, his complaint would have already been out of time and I accept his evidence that his union told him this at this time. He then went on holiday and did not contact



ACAS for further advice until the day after his return on 16 April and went on to present his claim on this date.

44. I consider that it was reasonably practicable for the Claimant to have presented his claim for unfair dismissal within the three month deadline. He took advice from his union at the time of his dismissal and confirmed that he was fully able to find out about the exercise of his rights to claim unfair dismissal by using the internet. He was aware of the opportunity to bring a claim to assert his rights, and failed to make any further enquiry. He was aware that there must be a time limit, but did not take steps to ascertain what this might be, despite having access to the internet. Therefore, I do not consider the unfair dismissal claim should continue. This is therefore dismissed.
45. Turning to his discrimination complaints, the claim for indirect religious discrimination relates to an incident in late 2017/early 2018. His complaints for religious discrimination do not amount to conduct extending over a period since he is claiming race discrimination in respect of his other complaints and is citing different alleged perpetrators. These complaints were some 15 or 16 months out of time when presented. Whilst the Claimant had given evidence that he had submitted a grievance in respect of these, there were no grounds put forward by the Claimant on which to base an extension of time in these circumstances when considering whether to do so on a just and equitable basis. I consider that the Respondent would be seriously prejudiced in that a fair trial would be extremely difficult for witnesses to present cogent evidence this long after a training session. Therefore, his claim of indirect religious discrimination is dismissed.
46. Turning to his remaining race discrimination complaints, as stated previously, I consider that the incidents on 25 and 29 January 2017 are separate and distinct from the alleged discriminatory acts relating to the disciplinary procedure and/or the Claimant's dismissal. Therefore, assuming these incidents were conduct extending over a period, these complaints should have been brought by 28 April 2017, subject to any extension for Early Conciliation.
47. Again for the reasons set out above, I do not consider that I should exercise my discretion to allow these claims to continue on the grounds that it just and equitable to do so. There

is no good reason submitted by the Claimant for the significant delay in bringing these claims. There is, however, real prejudice caused to the Respondent if I were to exercise my discretion due to the length of this delay, since witnesses are likely to be unable to recall these alleged incidents.

48. The remaining discrimination complaints relating to the disciplinary procedure not being followed and the Claimant's dismissal (as set out in paragraphs 3.1(c) and 3.1(d)) I am satisfied constitute conduct extending over a period such that the last act of alleged discrimination was his dismissal on 7 January 2019.
49. These complaints for race discrimination were also out of time, having been presented on 16 April 2018 and not by 6 April 2019. Again, as the Claimant did not contact ACAS for early conciliation prior to 6 April 2019, there is no extension of time in which to present his complaints.
50. Whilst there is a wider discretion to extend time in discrimination complaints, we need to consider whether it is just and equitable to do so having regard to the prejudice caused to the respective parties.
51. I consider that the reason for the delay, namely the Claimant waiting for the outcome of the appeal, whilst a factor to consider, was not sufficient for me to exercise my discretion to extend time in this case. The Claimant was aware of his dismissal in January 2019 and sought advice from his union. He knew that he had the option of bringing a complaint for discrimination at the time of his dismissal and indeed referenced this in his appeal hearing on 19 February 2019. He was represented at the time by his trade union and was fully able to bring a claim within time should he have checked the position. There was no illness preventing him from presenting his complaints. The Claimant was aware of his right to bring a complaint, and could have checked with his union what the time limits were for doing so, and/or could have searched on the internet to ascertain this information. Once he knew that his appeal had been dismissed on 3 or 4 April 2019 (accepting the Claimant's evidence that this was when he received it), he still did nothing until 8 April, when he contacted his union prior to catching a train abroad. It then took a further 8 days before he contacted ACAS and presented his complaints.

52. Therefore, I find that there was no sufficient reason for delaying in bringing his complaints. Further, the Respondent would be prejudiced by the Claimant's claim continuing. Some of the events upon which the Claimant relies predate his dismissal on 7 January 2019 and therefore I consider that there is not the possibility of a fair trial.
53. I therefore dismiss the Claimant's discrimination claims.
54. This means that all claims of the Claimant are dismissed and the further preliminary hearing for case management purposes, which was listed for 31 October 2019 at 10am is vacated.

Employment Judge Welch

Date: 02/09/2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

03/09/2019

.....  
FOR THE TRIBUNAL OFFICE