



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Thorpe

**Respondent:** Sainsbury's Supermarkets Ltd

**Heard at:** Croydon  
Deliberations 24 September 2020

**On:** 23 September 2020

**Before:** Employment Judge T.R.Smith

## **Representation**

Claimant: In Person

Respondent: Mr. Gordon (Counsel)

## **RESERVED JUDGMENT**

It was reasonably practicable for the Claimant to present her complaint within three months beginning with the effective date of termination.

If it was not reasonably practicable, it was not presented within such further period as the Tribunal considered reasonable.

It was not just and equitable to extend time in respect of the Claimants discrimination complaints, which were lodged at the Tribunal out of time

In the circumstances the Claimant's complaints are dismissed.

## **REASONS**

### **The Issues**

1.This case had been originally listed for 10 am. Due to listing difficulties the case could not commence until 2 pm.

2.The case had been listed today for a preliminary hearing to determine issues of time, a deposit order and/or a strike out order, and whether the Claimant was a disabled person within the meaning of the Equality Act 2010.

3.With the agreement of the parties, given the time constraints and the multitude of issues, the Tribunal determined it would simply deal with the time points.

4.Following the earlier hearing with Employment Judge Hyde the outstanding claims were agreed to be limited to unfair dismissal, disability discrimination, sex discrimination and unlawful deduction from wages.

5.The parties had agreed a list of issues (71 to 75) and the Tribunal clarified with the parties the date of the alleged discriminatory acts. It was common ground that all the discriminatory acts occurred as at dismissal.

6.In respect of time it was agreed the correct tests the Tribunal had to apply were contained within section 111 of the Employment Rights Act 1996 (“ERA 96”) and section 123 at the Equality Act 2010 (“EQA 10”).

### **Evidence**

7.The Tribunal had before it an agreed bundle totaling 125 pages.

8.The Tribunal heard oral evidence from the Claimant, Ms Thorpe and also had a statement from her, which formed the core of her evidence, dated 17 August 2020

9.The mere fact that Tribunal has not referred to each or every document or each or every element of evidence presented to it does not mean it did not give full consideration to that evidence.

### **Findings of fact.**

10.The Claimant was initially employed by the Respondent at one of its branches near Croydon.

11.Unfortunately, the Claimant encountered domestic abuse at the hands of her then partner whilst living in the Croydon area.

12.In January 2019 the Claimant was allocated alternative accommodation in Chichester, although she could not move to that property due to the cost of furnishing, until June 2019.

13. In the interim she remained with her parents who reside in Croydon and who were and remain supportive of the Claimant.

14. The Claimant's former partner was and remains unaware of the Claimant's current location. She has suffered no domestic abuse after her move to Chichester.

15. The Claimant has three children. The children continue to reside with the Claimant, although have been subject to an intervention from the local authority. It would appear that intervention was principally because of the abusive relationship the Claimant had encountered and also due to issues of her own mental health, a matter the Tribunal will return to in due course.

16. The Claimant was dismissed on 20 April 2019 by the Respondent. However, notice of dismissal was not communicated to the Claimant until 07 June 2019.

17. It was expressly conceded by Mr. Gordon that 07 June 2019 was the effective date of termination.

18. The Claimant immediately considered that her dismissal, and the way she had been treated by the Respondent, was unfair.

19. She engaged in communication with the Respondent raising various issues and also appealing her dismissal.

20. In early August, having exhausted internal procedures, she was advised by her store manager, Mr. Hogarth that the only way she would obtain what she considered to be appropriate redress, was to pursue matters via an Employment Tribunal.

21. The Claimant presented her claim form to the Tribunal on 20 August 2019. She failed to lodge with it an ACAS early conciliation certificate. It was common ground that the nature of the Claimant's claims required such a certificate.

22. The Claimant discovered how to lodge a Tribunal claim form by utilising the government website. That website describing the procedure to make a claim and also specifically mentioned the need, in almost every case, for ACAS early conciliation certificate. The Claimant contended that while she read the guidance, she did not understand this aspect.

23. The Claimant ticked box 2.3 of her claim form explaining why she was not enclosing an early conciliation certificate. The box she ticked stated "*my claim consists only of unfair dismissal which contains an application for interim relief (see guidance).*" Although

this specifically drew a person's attention to the guidance, she said she did not read it due to her mental health difficulties.

24.The Claimant contended she did not know who ACAS were but having regard to the guidance on the government website for those completing a claim form, the note on the claim form itself and also having regard to the subsequent prompt action of the Claimant, the Tribunal did not accept she could not have taken steps to obtain an ACAS early conciliation certificate. Given she had the capacity to pursue matters via internal proceedings with the Respondent, to navigate the government website and to complete a claim form the Tribunal did not accept she did not have the capacity to understand the issue of an ACAS early conciliation certificate.

25.Pausing at this juncture if the ACAS documentation had been enclosed on presentation of the claim form it would have been in time, as putting aside any extension of time under the ACAS early conciliation provisions, the time for the Claimant to present her claim form expired on 06 September 2019.

26.The Claimant received an email from the Tribunal dated 19 September 2019 (82) requesting a response from her by 30 September 2019 as to the whereabouts of the ACAS early conciliation certificate or the unique number, or why a certificate was not required. There was no documentary evidence before the Tribunal that the Claimant responded to that email.

27.The Tribunal did not accept the Claimant's explanation for the failure to respond to the Tribunal. She said she was told by the Tribunal that the file was before a Judge and she did not need to do anything. That does not sit comfortably with the fact that she been specifically reminded to lodge her early conciliation certificate by 30 September 2019.

28.As the claim form was not properly presented the Tribunal rejected it on 28 October 2019. It was again drawn to the Claimant's attention the need for ACAS early conciliation certificate.

29.On 29 October 2019 the Claimant notified ACAS of her dispute with the Respondent and a certificate was issued on 11 November 2019 (98). The Tribunal observed that the Claimant was able to proceed very quickly in obtaining information in respect of ACAS when her claim was rejected. There was no cogent evidence before the Tribunal that the Claimant's mental health substantially different between August 2019 and 29 October 2019.

30.On 11 November 2019 the Claimant presented a further claim form. It was common ground between the parties that the claim form complied with the statutory requirements.

31. At this stage it is appropriate the Tribunal records its findings as to the Claimant's health. The Claimant in addition to suffering from domestic abuse, has faced mental health challenges.

32. The Claimant underwent cognitive behavioral therapy in 2018 and the Tribunal accepted that her health deteriorated particularly towards Christmas 2018 due to the behavior of her former partner. Thereafter she remained ill, probably because her condition had not been fully diagnosed and correctly treated.

33. In April 2019 her health was such that she required the intervention of mental health services and was hospitalised between the 14 to the 17 of April (109).

34. She was prescribed new medication on 21 May 2019 and adjusted in June which the Tribunal found, and the Claimant accepted, led to a marked improvement in her condition. The Tribunal noted a handwritten document authored by the Claimant to her GP (119) where she referred to the new drug prescribed to her namely Olanzapine and said *"it helped me to focus on bringing an ET case against Sainsbury for wrongful unfair dismissal and discrimination"*

35. A medical report dated 14 November 2019 (103 to 106) was before the Tribunal. Whilst aspects of that report involve looking forward it also contained useful information as regards the history of the Claimant's medical challenges and life experiences. It noted the Claimant had done well in GCSE's and retained the support of her family. The treating physician noted the Claimant previously *"possibly experienced an acute psychotic episode triggered by stressful life circumstances which include the abuse from her ex-partner and living under threat in the same property after that. She possibly experienced symptoms of adjustment disorder after that. She has improved and is currently stable in her mental state."*

36. Whilst the report describes the Claimant's medical condition in November 2019 the Tribunal concluded it could infer that the Claimant's condition was not having a significant impact on her after her medication was changed in June 2019. This tallies with the comments the Tribunal was already referred to made by the Claimant in a letter to her GP set out above (119)

37. Despite her mental health condition, and the other challenges any single parent would face with young children and moving into a new area, the Claimant was able to operate with the benefit of her medication normally. She undertook domestic chores and the children were fed and clothed and attended school regularly.

38. She continues to receive support from her family.

39.If time was extended there would be no substantial prejudice to the Respondent in terms of witnesses having disappeared or evidence no longer being available.

**Time limits**

40.Section 111(2) of the ERA96 provides:

*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*

41.Similarly, any claim for unlawful deduction or breach of contract is subject to the same formula.

42.There are two limbs to the test.

43.Firstly, if the claim is out of time, which it was conceded it was, was it not reasonably practicable for the claim form to be presented within time? If the Claimant does not satisfy limb one that is the end of the matter.

44.If the Claimant did satisfy limb one was it then presented within such further period as the Tribunal considered reasonable?

45.Rule 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ('the 2013 Regulations'), is a mandatory Rule that requires the Tribunal to reject a claim if, at (1)(c), '*it does not contain all of the following information*', namely, '(c)(i) *an early conciliation number*'. As such, the Tribunal has no option but to reject a claim.

46.Rule 12 provides:

*(1) The staff of the Tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—*

*(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;*

*(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;*

*(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs .... (c) or (d) of paragraph (1).*

47. As to the correction of defects, Rule 13 provides:

*(1) A Claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—*

*a) the decision to reject was wrong; or*

*(b) the notified defect can be rectified.*

*(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.*

48. To summarise the effect of the Rules is that the Tribunal had to reject the Claimant's first claim form presented on 20 August 2019 and time continued to run against the Claimant until the defect was rectified, here by the Claimant presenting an ACAS certificate on 11 November 2019.

49. The approach the Tribunal has to take is to decide what could this particular Claimant reasonably have been expected to have done.

50. The difficulty the Claimant faced was that in her lengthy statement (63 to 70) she does not deal precisely with why it was not reasonably practicable to present her claim in time. While she deals in some detail with the delay in notifying her of her dismissal that is not relevant. What is relevant is what happened after she knew she was dismissed. At his highest she makes reference to her health issues. The Claimant has not disclosed any medical evidence that shows it was not reasonably practicable to present her claims in time. The Claimant's oral evidence was not strong enough for her to satisfy the burden on her, for the reasons already given.

51. As the Tribunal has noted after dismissal, despite the Claimant's health condition, she was improving and was able to engage in discussions with the Respondents as to her dismissal and to issue Tribunal claim form.

52.The Claimant was on notice from the government website, the Tribunal form itself and from the Tribunal staff prior to rejection of the need for an ACAS early conciliation certificate.

53.The Tribunal noted that in the relevant period from 7 June 2019 to 11 November 2019 the Claimant had the assistance of her family.

54.Of course, the mere fact the Claimant was able to “present” a claim on 20 August 2019 does not automatically mean that she cannot rely upon a later claim for utilising the not reasonably practicable test. It is, however a fact of the Tribunal is entitled to take into account in the overall assessment. The Tribunal was not satisfied that the Claimant did not know, certainly from 20 August that an ACAS certificate was needed for the reasons already given. In any event she certainly knew which she received the letter from the Tribunal on 19 September 2019. On what was understood by the Claimant it was reasonably practicable for her to lodge her claim in time.

55.It follows the Claimant does not surmount limb one.

56.If the Tribunal is wrong on that point and it is held elsewhere that it was not reasonably practicable to present a valid claim form prior to 28 October the Tribunal would not have regarded the Claimant as having presented her claim within such further time as was reasonable. At the very latest the claimant knew explicitly from the 19 September 2019 that she needed an early conciliation certificate because the Tribunal told her so. She did not apply for one until 29 October 2019, a delay of almost 6 weeks.

57.It follows the Claimant has not demonstrated that time should be extended under the provisions of section 111ERA96.

**Just and equitable**

58.The test the Tribunal must apply grants to the Tribunal a far wider discretion than under the provisions of Section 111 ERA 96.

59.Section 123(1) EQA 2010 provides:

*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 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.*



60. Applying the timeline and having regard to the date of the alleged discriminatory acts the claim form was out of time.

61. Whilst it is sometimes said that the Tribunal should concentrate upon whether a fair trial is still possible that, in this Tribunal's judgement, is incorrect. The starting point must always be that time limits should be enforced strictly with the onus being on the Claimant to show why the discretion should be exercised in her favour, see **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**,

62. The Tribunal has approached matters by seeking to discover why the claim was brought out of time and why it was not presented sooner than it was.

63. This is not the case where the Claimant was unaware of her legal rights. Indeed, she been expressly advised of the right to go to a Tribunal by an employee of the Respondent.

64. This is not the case where there has been concealment by the Respondent of any relevant evidence.

65. This is not a case where the Claimant was exploring internal proceedings and the statutory time limit expired during those proceedings.

66. The Claimant contended it was her mental health that inhibited her obtaining an ACAS early conciliation certificate. However, the medical evidence does not support that conclusion. Whilst the Claimant was in a particularly difficult position up until June 2019, thereafter there was considerable improvement. She started to function well. She engaged with the Respondents as to her dispute. She was able to fill in a Tribunal claim. The Tribunal has looked at the Claimant's medical condition and other challenges in the round and had regard to the fact that whilst those conditions may not have been a total impediment, were they such that they still impeded the Claimant correctly completing a claim form? On the basis of the evidence before it the Tribunal found that was not the case here.

67. There were numerous prompts available to the Claimant both on the government website and in the claim form itself and from the Tribunal as to the need of an ACAS certificate. The Claimant could not give a satisfactory answer to why she did not act upon those prompts.

68. The delay is relatively limited and it cannot be said that a fair trial would not be possible. Whilst any delay will affect the cogency of evidence this is not a case where it would be significant. The Claimant will suffer prejudice because her concerns will not be ventilated before the Tribunal. These are factors the Tribunal must take into account in favouring the

Claimant. If the matter was allowed to proceed that would be prejudice to the Respondent who would face a claim which might well take many days, at considerable cost.

69.The Claimant's explanation as to her health does not satisfy the Tribunal that it explains the delay in presenting the claim form. The only time the Claimant acted with any alacrity was when her claim form was rejected by the Tribunal.

70.In the circumstances the Claimant has not discharged the burden of proof upon her to satisfactorily explain why the Tribunal should exercise its discretion in her favour.

Employment Judge T.R.Smith

Date 24 September 2020