



# EMPLOYMENT TRIBUNALS

**Claimant:**

Miss Tanya Fiford

v

**Respondent:**

Homes2inspire Limited

**Heard at:**

Reading by video  
conference (CVP)

**On:** 12 October 2020

**Before:**

Employment Judge Hawksworth

**Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr I Lovejoy (legal executive)

**JUDGMENT** having been sent to the parties on **22 October 2020** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction

1. The claimant worked for the respondent from 1 May 2016. She was a deputy care home manager. The claimant was dismissed without notice on 11 June 2018 for gross misconduct.
2. The claimant brought her claim on 19 October 2018 after a period of Acas early conciliation from 29 September 2018 to 4 October 2018. Her grounds of complaint document, which was mainly in table form, was 34 pages long. (The same document had been sent to the respondent in June 2018 as part of a formal grievance complaint which the claimant made.)
3. The response was presented on 11 March 2019. The respondent defended the claim.
4. A private preliminary hearing for case management was held on 31 October 2019 before Employment Judge Vowles at which two further hearings were listed. A public preliminary hearing was listed for 12 May 2020 to decide:

- 4.1. whether any further clarification of the claims or response is required;
  - 4.2. whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010;
  - 4.3. any written application by either party;
  - 4.4. what case management orders are required for the full merits hearing.
5. A 5 day full merits hearing was listed for 12 to 16 October 2020.
  6. At the private preliminary hearing before Employment Judge Vowles, initial steps were taken to identify and clarify the legal claims being brought by the claimant. The case management summary said that the following complaints would be considered: unfair dismissal, direct and indirect disability discrimination, wrongful dismissal and failure to provide a written statement of reasons for dismissal.
  7. The claimant was ordered to provide further information about each of the complaints, including, in respect of the complaint of unfair dismissal, 'details of the unfairness alleged' and in respect of the complaint of wrongful dismissal, 'details of the notice pay claimed including a calculation of the amount claimed'. The case management summary recorded that the respondent said that the complaint of unfair dismissal was not included in the claim form; this remained an issue for determination.
  8. The claimant provided further information on 19 December 2019. She said in her covering letter that her claim included complaints of wrongful dismissal, failure to provide written reasons for dismissal, indirect and direct discrimination. She did not mention unfair dismissal in this document. In the part of the document which was headed 'wrongful dismissal', the claimant referred to the respondent's failure to give reasons for dismissal and the failure to provide written reasons for dismissal. She did not say that she was seeking notice pay or that she had been dismissed in breach of contract.
  9. On 16 January 2020 the respondent wrote to the tribunal and the claimant to make an application to strike out the claimant's complaints on the basis that they had no reasonable prospect of success because (among other things) they had been submitted to the tribunal outside the time limit. The tribunal wrote to the parties on 7 March 2020 to say that Employment Judge Vowles had directed that matters raised by the parties in correspondence (which included the respondent's application to strike out the claim) would be considered at the public preliminary hearing on 12 May 2020.
  10. The open preliminary hearing scheduled for 12 May 2020 was postponed because of the covid-19 pandemic restrictions.

11. The respondent wrote to the tribunal on 1 September 2020 to say that the case would not be ready for final hearing on 12 to 16 October 2020. The open preliminary hearing had not been relisted and the issues to be considered by the tribunal had not been fully clarified. Employment Judge Vowles directed on 5 October 2020 that the preliminary matters which had been identified for decision at the hearing on 12 May 2020 would be dealt with on 12 October 2020 and the remaining days would be vacated.

### **The hearing before me**

12. The hearing before me on 12 October 2020 was therefore to decide the following preliminary issues:
  - 12.1. whether any further clarification of the claim or response was required;
  - 12.2. the respondent's application of 16 January 2020 to strike out the claimant's complaints, including on the basis that they had been brought out of time;
  - 12.3. whether any case management orders are required for the full merits hearing.
13. The issue of disability was no longer to be considered as a preliminary issue because the respondent had conceded that the claimant was disabled at the material times.
14. The issue of whether the claimant's complaints had been brought out of time also required me to consider and reach conclusions on which complaints had been included by the claimant in her claim form. The respondent said that the claimant had not made complaints of unfair dismissal or wrongful dismissal.
15. The hearing was held by video conference (CVP). An audio recording was made of the hearing. I heard evidence from the claimant. I granted the respondent's application to strike out the claim. I gave judgment and reasons at the hearing, explaining my findings of fact and conclusions. The claimant sent an email to the tribunal on 19 October 2020 in which she asked for the written discussion with outcomes; I have treated her email as a request for written reasons.

### **Clarification of the claim**

16. At the hearing before me we had a discussion to identify the issues in the complaint of disability discrimination.
17. The claimant clarified the allegations of direct disability discrimination she was making. There were 18 acts, 15 of which occurred during the period from May 2016 to June 2017 at the first home in which the claimant worked (Rothwell). The other 3 acts concerned treatment which occurred at the second home where the claimant worked (Banbury), during the

period from July 2017 to June 2018. The claimant did not allege any acts of direct discrimination occurring after the termination of her employment.

18. The claimant clarified that she had made six allegations of failure to make reasonable adjustments. She said that in each case the failure to make adjustments was ongoing at the date of her dismissal. (The complaints were originally described in the claim as complaints of indirect discrimination, but I have concluded from the opening paragraphs of her grounds of complaint that they are understandable as complaints of failure to make reasonable adjustments.)

### **The legal principles relevant to the strike out application**

19. To decide the respondent's application for strike out, I first have to consider, as a question of fact, whether the claim included complaints of unfair and wrongful dismissal. If those complaints are not already included, I need to go on to consider whether the claimant should be allowed permission to amend her claim to include them.
20. In Ali v Office of National Statistics 2005 IRLR 201, the Court of Appeal held that the act complained of by the claimant must be specified in the claim form, and that whether a claim form contains a particular complaint must be judged by reference to the claim form as a whole.
21. It may not matter if the relevant box has not been ticked or if the claim form does not refer to a specific section of a piece of legislation, if the claim overall 'in plain language asserts a particular claim or gives sufficient particulars from which one can spell out such a claim' (Redhead v London Borough of Hounslow EAT 0409/11).
22. If a claim form does not contain a particular complaint, the claimant will need permission to amend the claim in order to pursue that complaint. The key authority on amendment is Selkent Bus Company Ltd v Moore [1996] ICR 836. In determining whether to grant an application to amend, an employment tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include:
  - 22.1. the nature of the amendment (the tribunal should focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old, (Abercrombie & Ors v Aqa Rangemaster Ltd [2013] ICR 213));
  - 22.2. the applicability of time limits, which will need to be considered if a new claim or cause of action is proposed to be added by way of amendment. The tribunal can decide the question of whether time should be extended, or can allow the amendment and leave the question of whether time should be extended to be determined at

the main hearing (Galilee v Commissioner of Police of the Metropolis [2018] ICR 634); and

- 22.3. the timing and manner of the application (it is relevant to consider why the application was not made earlier and why it is being made now).
23. I also have to consider, in respect of those complaints which have been brought, whether the claimant brought them in time. The time limit for a complaint of unfair dismissal is set out in section 111 of the Employment Rights Act 1996:
- (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, 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.”*
24. The time limit for a complaint of failure to provide written reasons for dismissal is (by virtue of section 93 of the Employment Rights Act) the same as the time limit for unfair dismissal. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that the time limit for wrongful dismissal is also the same.
25. The extension provision should be given a ‘liberal construction’ in favour of the claimant (Dedman v British Building and Engineering Appliances Limited [1974] ICR 53). The burden of showing that it was not reasonably practicable to present a claim in time is on the claimant, and what is reasonably practicable is a question of fact for the tribunal to decide.
26. The time limit for a complaint of discrimination including disability discrimination is set out in section 123 of the Equality Act 2010, which provides that a complaint relating to a contravention of the act at work:
- “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.”*
27. The discretion to allow a discrimination complaint out of time is broader than the discretion to allow an unfair dismissal complaint out of time.

28. Both section 111 of the Employment Rights Act and section 123 of the Equality Act are subject to provisions relating to Acas early conciliation. These are contained in section 207B of the Employment Rights Act and section 140B of the Equality Act. Both say at sub-section (3) that:

*“In working out when a time limit ... expires the period beginning with the day after Day A and ending with Day B is not to be counted”.*

29. Day A is the day on which Acas is notified for early conciliation, and Day B is the day on which the claimant receives the early conciliation certificate.

### **Findings of fact and conclusions on the strike out application**

30. I made relevant findings of fact, applied the legal principles set out above and reached conclusions on the respondent's application to strike out the complaints.

### **Unfair dismissal and wrongful dismissal (failure to give notice)**

31. The issue for me to determine in relation to these two complaints is, first, whether, as a question of fact, the claimant's claim includes complaints of unfair dismissal and wrongful dismissal. If I decide that the claim does not include these complaints, I need to go on to consider whether the claimant should be allowed permission to amend her claim to include them.
32. Were the complaints included in the claim form? On the claim form which the claimant submitted, the claimant ticked boxes at section 8.1 indicating that she was making a complaint of disability discrimination and for other payments. She did not tick the box which said 'I was unfairly dismissed' or the box which said 'I am owed notice pay'.
33. Attached to the claimant's claim form was a 34 page document. On page 1 the claimant said she wanted to complain about bullying and discrimination. She said:

*'I am making it clear that I am not complaining about the termination of my employment, but that a man I made allegations of domestic violence was the one dealing with my case (this should not have happened), that the company has failed to provide me with a clear letter setting out clearly what I was dismissed for (the letter stated what I was investigated for and not what I was fired for) and that since leaving employment home managers have given me illegal and unfair verbal references'.*

34. The claimant's claim document included a table with a column headed 'What the problem is'. This column had sub-headings including bullying and discrimination. There was a reference to constructive dismissal in respect of managers' treatment of her. There was no reference to unfair dismissal or wrongful dismissal (or failure to give notice).

35. On page 26 of her complaint document the claimant said,
- 'I want it clear that I am not contesting the dismissal, only the treatment I endured through the investigation.'*
36. The claimant was not asserting that she had been unfairly or wrongfully dismissed. On the contrary, she was expressly saying that she was not complaining about or contesting her dismissal. Viewed overall, and particularly based on the boxes that the claimant ticked in section 8.1 and the comments made by the claimant in her claim document, I find that the claim form and the attachment to the claim form do not include complaints of unfair dismissal or wrongful dismissal.
37. If a claim form does not contain a particular complaint, permission to amend the claim will be required. I need to carry out a balancing exercise, considering the relevant factors and having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.
38. I have first considered the nature of the amendment. I have concluded that unfair dismissal and wrongful dismissal complaints would require the tribunal to deal with different factual and legal matters, broadening the scope of the case which is before the tribunal. This is not a case where the claimant complained about her dismissal being discriminatory, so that the tribunal would be considering matters relating to dismissal in any event. The discrimination complaints relate to matters which occurred during employment. The unfair dismissal and wrongful dismissal complaints would bring in new factual and legal matters which would require whole new factual and legal enquiries by the tribunal.
39. I have next considered the applicability of time limits. Time limits need to be considered where a new claim or cause of action is proposed to be added by way of amendment. The tribunal can decide the question of whether time should be extended, or can allow the amendment and leave the question of whether time should be extended to be determined at the main hearing.
40. At the time the claimant presented her claim, an unfair dismissal complaint (if included) would have been out of time. Her dismissal took place on 11 June 2018, so the 3 month period would have ended on 10 September 2018. The claimant notified Acas for early conciliation on 29 September 2018, 19 days after the time limit ended. The early conciliation period did not affect the time limit as it had already passed. The claimant then presented her claim on 19 October 2018, over five weeks after the time limit ended. Her complaint would only have been in time if the tribunal was satisfied that it was not reasonably practicable to present it in time and that it was presented within such further period as it considered reasonable.

41. The timing and manner of the application to amend is also a relevant factor.
42. At a preliminary hearing on 31 October 2019, the claimant was ordered to provide further information, including details of the unfairness of her dismissal and the notice pay she was claiming. The claimant provided further particulars on 19 December 2019. She said in her covering email that her claim included wrongful dismissal, failure to provide written reason of dismissal, indirect and direct discrimination; she did not mention unfair dismissal.
43. In the section of the further information headed 'wrongful dismissal' the claimant said:

*"In my original claim I stated that I wasn't contesting my dismissal, which to me meant that I wasn't wanting my job back but I was concerned that no one in the company could tell me why I was dismissed, was giving negative and illegal references and refusing to tell me why I was dismissed.*

*I wish to resolve this issue... I have repeatedly asked for a clear statement of why I was dismissed and this has been refused."*
44. The claimant did not say that her dismissal was unfair, that she had been dismissed in breach of contract or that she was seeking her notice pay. She did not comply with the order to provide details of the unfairness of her dismissal or the amount of notice pay she was claiming.
45. In the respondent's strike out application of 16 January 2020 the respondent pointed out that the claimant had failed to comply with the order and that she continued to assert only that written reasons were not provided. It said that the basis of the claimant's claims remained unknown to the respondent.
46. At the hearing before me the claimant initially said that she did not want to bring a complaint of unfair dismissal and was not claiming unfair dismissal. She said the failure to provide reasons was what made the dismissal unfair. It has not been clear and it was still not clear at the hearing before me whether the claimant wanted to bring complaints of unfair and wrongful dismissal. It is now well over two years since the date of the dismissal and very nearly two years since the claim was presented. This hearing was due to be the start of the full merits hearing to decide the claim, but has had to deal with preliminary matters instead, including clarification of the claim.
47. Taking all these factors into account, and weighing up the prejudice to the parties from allowing or not allowing the amendment, I decided that the balance falls with the respondent. I refused the claimant's request to amend her claim to include a complaint of unfair dismissal or wrongful dismissal at this stage of proceedings.



Time limit - failure to provide written reasons

48. I next moved on to consider the question of whether those complaints which the claimant has brought were brought within the time limit. I have first considered the complaint of failure to provide written reasons, and then the complaints of disability discrimination.
49. The respondent's strike out application in respect of this complaint was made on the basis that it has no reasonable prospects of success and that it is out of time. I have only dealt with the time point because this brings the complaint to a conclusion in any event.
50. The three-month period for pursuing this complaint ended on 10 September 2018. The complaint was brought on 19 October 2018. The claimant notified Acas for early conciliation but did so after the three-month period had expired and so the period of Acas early conciliation has no impact on the calculation of the time limit. Therefore, this complaint was made around five weeks outside the three-month period and is out of time unless I am satisfied that it was not reasonably practicable to bring the complaint in time, and that the claim was brought within a further period which I consider reasonable.
51. I have taken into account the fact that the claimant was a litigant in person from the time she left her employment to when she first notified Acas for early conciliation on 29 September 2018. She only took legal advice after that time.
52. Also, as the respondent has accepted, the claimant was at the material times disabled for the purposes of the Equality Act, and her symptoms include pain and fatigue. She told me that she was diagnosed with mental health issues in about June 2019, about a year after she left her employment with the respondent. There was no evidence before me that the claimant's health conditions from June 2018 to September 2018 were such that they prevented the claimant from presenting a claim.
53. The claimant's document which accompanied the ET1 was sent to the respondent in June 2018 when the claimant made a formal complaint. The claimant prepared this herself. She googled the definition of discrimination to help her, but she was not aware of the possibility of bringing an employment tribunal complaint. She thought that she could only raise her concerns with her employer direct. She said that she found out about the possibility of Acas early conciliation on 27 September 2018 from a former colleague who was also bringing a complaint against the respondent. After that she notified Acas on 29 September 2018 and then submitted her tribunal complaint on 19 October 2018.
54. Not knowing about the possibility of bringing an employment tribunal complaint and not knowing about the time limit does not automatically mean that it was not reasonably practicable to bring a claim within the time

limit. I have to consider whether the claimant ought to have known about her rights. The claimant was able to take steps to pursue her complaints with the respondent, to google 'discrimination' and to take legal advice after she notified Acas. I have concluded that the claimant could have investigated her rights earlier and brought her claim in time. In particular, she could have sought information online or sought legal advice about her legal rights at an earlier stage.

55. For these reasons, I have concluded that it was reasonably practicable for the claimant to present her claim of failure to give written reasons for dismissal by 10 September 2018. This means that the complaint was presented out of time and it cannot be pursued.

#### Disability discrimination

56. For the complaints of disability discrimination the three month time period is the same, but the test as to whether a complaint can go ahead when it is submitted outside that three month period is different. The test for complaints of disability discrimination is whether it is just and equitable to allow the complaint to proceed.
57. I need to consider when the acts of discrimination took place, as this is the start date for the three-month time period. As part of the hearing before me we identified the precise allegations of discrimination which the claimant is making, and when they took place. This was not clear from the further information the claimant provided on 19 December 2019.
58. The claimant identified 18 acts which she said were direct discrimination, 15 of which occurred in the first home in which the claimant worked. These acts took place during the period from May 2016 to June 2017. The time limit for those matters would have expired in September 2017 unless they were part of a series of acts amounting to conduct extending over a period which ended later than that.
59. Three later acts alleged by the claimant to be direct discrimination occurred at the second home where the claimant worked, during the period from July 2017 to June 2018. The time limit for these matters would have expired on 10 September 2018 at the latest (three months less a day from the date of the claimant's dismissal). The claimant notified Acas on 29 September 2018, and the complaint was brought on 19 October 2018.
60. The claimant also makes 6 complaints of failure to make reasonable adjustments. These were originally described in her claim as complaints of indirect discrimination, but I have concluded from the opening paragraphs of her grounds of complaint that they are understandable as complaints of failure to make reasonable adjustments. The failure to make these adjustments is said in each case to have been ongoing until the claimant's dismissal.

61. All of the alleged acts of disability discrimination took place on or before 11 June 2018. They were presented outside the 3 month time limit. This is not a case where some of the allegations were presented in time, so that the tribunal will need to consider whether earlier acts are part of a series amounting to conduct extending over a period. As all of the acts relied on by the claimant occurred more than 3 months before the claim was submitted, the complaints can only be heard if I think that it is just and equitable to extend time to hear them.
62. When considering whether it is just and equitable to extend time, I have taken into account the claimant's status as a litigant in person, her lack of knowledge about the employment tribunal and the time limits, and her disability. However, the complaints cover a considerable period of time. There was no evidence before me that the claimant was unable to commence her claim any earlier because of ill health during the relevant period. In June 2018 she was able to put her complaints to her employer and carry out some investigations on the internet. It has now taken almost 2 years since the claim was first presented to clarify the issues. One of the people against whom most of the complaints have been made, Ms McKenzie, has now left the respondent's employment, and this will give rise to prejudice to the respondent.
63. Taking these factors into account, I have concluded that it is not just and equitable to extend time to hear the claimant's complaints of disability discrimination. This means that the complaints of discrimination cannot proceed.

### Summary

64. The claimant's claim did not include complaints of unfair dismissal and wrongful dismissal, and permission is refused to amend the claim to include these complaints.
65. The claimant's complaint of failure to give written reasons for dismissal was presented outside the period of three months from the dismissal. It was reasonably practicable for it to have been presented in time and therefore the time limit cannot be extended. The tribunal does not have jurisdiction to hear this complaint.
66. The claimant's complaints of disability discrimination were presented outside the period of three months from the date of all of the alleged acts of discrimination. It is not just and equitable to extend time to allow the complaints to be heard outside the time limit. The tribunal does not have jurisdiction to hear these complaints.
67. Therefore, the claimant's claim cannot proceed as it was not brought within the time limits and the tribunal does not have jurisdiction to hear it.

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**Employment Judge Hawksworth**

Date: 24 November 2020

Sent to the parties on: .....

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For the Tribunal Office

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