



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr O Ogunbayo  
**Respondent:** Royal Mail Group Limited  
**On:** 6 November 2020  
**Before:** Employment Judge McAvoy Newns

## Appearances:

**For the Claimant:** In person  
**For the Respondent:** Ms S Lewis, Solicitor

## REASONS

### Background

1. These reasons follow the Judgment, sent to the parties on 26 November 2020, dismissing the Claimant's claims for:
  1. unfair dismissal, automatically unfair dismissal for having made protected disclosures, detriment for having made protected disclosures, wrongful dismissal/breach of contract and unauthorised deductions from wages for being out of time in circumstances where it was reasonably practicable for the Claimant to present these claims in time; and
  2. race discrimination and religion and belief discrimination for being out of time in circumstances where it was not just and equitable for the Tribunal to extend time.
2. On 7 January 2021, the Claimant requested written reasons. Although he made this request out of time, I decided that it was just and equitable to extend time and provide these reasons. This is because, on 6 November 2020 (before

the date that the Judgment was sent to the parties), the Claimant wrote to the Tribunal requesting a *"written Judgment... as directed by the Judge"*. In this regard, I find that the Claimant was referring to the statement that I made at the outset of the hearing, namely: *"If either party requires full written reasons they can request them in writing within 14 days of receiving the judgment"*.

3. In his emails the Claimant has referred to a request for reconsideration. Should the Claimant wish to pursue this following consideration of these Reasons, he should submit an application for reconsideration within 14 days following the date that these Reasons are sent to the parties.

#### Evidence

4. I heard evidence from the Claimant. With the parties' consent, the Claimant's letter to the Tribunal dated 17 August 2020 and the document that he emailed to the Tribunal on 5 November 2020 formed the basis of his evidence. I asked the Claimant a number of questions arising from this evidence, as did Ms Lewis. I also had sight of a bundle of documents which were numbered up to page 75.

#### Summary of claims

5. Following his termination date on 6 August 2019, the Claimant brought a number of dismissal related claims. He alleged that his dismissal was wrongful (in breach of contract), unfair and automatically unfair, in this latter regard for having made protected disclosures.
6. In respect of the discrimination claims, which were unclear from the pleadings, the Claimant confirmed to me that:
  1. his religious discrimination claims related to remarks allegedly made to him by an employee whose name I have abbreviated to YK such as a *"lying Christian"*. He could not say exactly when these remarks were made but believed they were made early on during his employment (which commenced in late 2011). There was also a reference in the documents to these remarks being made in or around 2015; and
  2. race discrimination claim related to remarks made by an employee whose name I have abbreviated to JH, albeit not to him, using words to the effect of a *"dancing African"*. The Claimant was not sure when these remarks were made but accepted that they significantly pre-dated his termination of employment date.
7. Although the Claimant did not state, during the hearing, that his discrimination claim included his dismissal as a separate act of discrimination, this could be inferred from his letter to the Tribunal dated 17 August 2020 in which he stated: *"I thought it was the Court that could hear a case of Wrongful Dismissal, while the employment Tribunal, deals with Unfair dismissal under the Equality Act 2010"* (point 4). I therefore considered this as part of reaching my judgment.

8. In respect of the whistleblowing detriment claim, the Claimant alleged that the instigation of the disciplinary proceedings (which pre-dated his dismissal) was a detriment.
9. In respect of the unauthorised deductions from wages claim, the Claimant alleged that he had not been paid wages or holiday pay prior to the termination date.

#### Time limits

10. The final act relied upon by the Claimant for his claims occurred on 6 August 2019, when his employment with the Respondent terminated. The Claimant initiated the ACAS early conciliation process in time, on 28 October 2019, within a month of his ordinary limitation date of 5 November 2019. The ACAS early conciliation process ended on 18 November 2019. Therefore, the final deadline for the claimant to present his claims was 18 December 2019. The Claimant acknowledged that, in submitting his claims on 3 August 2020, his claims were out of time. Therefore, the purpose of this preliminary hearing was to consider whether I should exercise my discretion to allow the claims to be considered out of time.

#### Reasons for late submission of claim

11. The Claimant confirmed that his reasons for submitting his claims late were as follows:
  3. He did not realise that claims for wrongful dismissal could be brought in the Tribunal;
  4. He had presented proceedings in the County Court which were not concluded until August 2020;
  5. As a result of the lockdown, the Claimant was unable to access his public library from March 2020;
  6. For a period between February and March 2020, the Claimant was unable to access the internet at home; and
  7. As a result of his low income he could not afford legal advice.

#### Findings of fact

12. On 28 October 2019, the Claimant started the ACAS early conciliation process.
13. On 4 November 2019, the Claimant lodged proceedings in the County Court. In those proceedings he referenced the ACAS guidelines. In evidence the Claimant told me that he commenced these proceedings, rather than Tribunal proceedings, at this time, for 'tactical' reasons.

14. The Claimant accepted that, prior to lodging proceedings and starting the ACAS early conciliation process, he had undertaken his own research. In respect of the ACAS process, the Claimant accepted that, from this research, he knew that he needed to start this process within 3 months of the act complained of.
15. Although the Claimant's evidence was that he did not know that claims for wrongful dismissal could be brought in the Tribunal, he did confirm that, at the time when he started the ACAS early conciliation process, he realised that claims for unfair dismissal, as well as claims under the Equality Act 2010, could be brought in the Tribunal.
16. During the course of the County Court proceedings, the Judge encouraged the Claimant to obtain legal advice. In or around March 2020, the claimant had a free discussion with a Barrister during which the Barrister provided him with some initial advice.
17. The Claimant told me that at this point he considered ending the civil proceedings and proceeding to the tribunal. However he did not do so until 3 August 2020.

## The Law

### *Unfair dismissal*

18. Section 111(2) Employment Rights Act 1996 ("ERA") states that in respect of a complaint for unfair dismissal, the 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".*

### *Breach of contract*

19. Pursuant to Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 ("Order"), a Tribunal:

*"shall not entertain a complaint in respect of an employee's contract claim unless it is presented—*

*(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*

*(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable”.*

#### *Unlawful deductions from wages*

20. Section 23(2) of the ERA states that, subject to subsection (4), a Tribunal shall not consider a claim for unlawful deduction from wages:

*“unless it is presented before the end of the period of three months beginning with—*

*(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made”*

21. Section 23(4) of the ERA states:

*“Where the Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable”.*

#### *Detriment for making protected disclosures*

22. Section 48(3) of the ERA states:

*“A Tribunal shall not consider a complaint under this section unless it is presented—*

*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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”.*

#### *Discrimination*

23. Section 123(1)(a) of the Equality Act 2010 (“EA”):

*“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”.*

*Early conciliation*

24. Section 207B(4) of the ERA states:

*“If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period”.*

25. Section 140B(4) of the EA states:

*“If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period”.*

*Not reasonably practicable test*

26. Following *Porter v Bainbridge 1978 ICR 943*, the Claimant has to satisfy the Tribunal not only that he did not know of his rights throughout the period preceding the complaint and there was no reason why he should know, but also that there was no reason why he should make enquiries. In this regard, the burden of proof is on the Claimant.

27. Following *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53*, this test should be given a ‘liberal construction in favour of the employee’.

28. Following *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372*, the term ‘reasonably practicable’ means something like ‘reasonably feasible’. As Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* explained: ‘the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done’.

29. In *Marks & Spencer v Williams Ryan [2005] ICR 1293* at paragraph 21:

"it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an Employment Tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and the time limit for making such a complaint...It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances."

30. In *Royal Bank of Scotland Plc v Theobald UKEAT/0444/06* the EAT held that a two-week delay, viewed against a three-month time limit, was 'quite significant' and the claim was held to be out of time.

*Just and equitable test*

31. s.123(1)(b) Equality Act 2010 allows a Tribunal to consider a complaint out of time where it is just and equitable to do so, there is no presumption that the Tribunal should exercise its discretion to extend time.
32. The onus is on the Claimant to convince the Tribunal that it is just and equitable *Robertson v Bexley Community Centre [2003] EWCA Civ 576*.
33. Following *British Coal Corporation v Keeble [1997] IRLR 336*, Tribunal's discretion to extend time under the 'just and equitable' requires consideration of the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:
  8. The length of and reasons for the delay;
  9. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time;
  10. The extent to which the party sued had cooperated with any requests for information;
  11. The extent to which the claimant acted promptly and reasonably once he knew of his potential cause of action;
  12. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Submissions

34. I received written submissions from both the Claimant and the Respondent's representative and I invited both parties to provide oral submissions if they wished.

Conclusions

35. Tribunal time limits are not simply legal niceties that can be waived at the Tribunal's discretion. They are clearly expressed in mandatory terms that an Employment Tribunal shall not consider a complaint unless it is presented within the prescribed time limit. Time limits are short for a good purpose: to get claims before the Tribunal when the best resolution is possible.

*Unfair dismissal, automatically unfair dismissal, breach of contract (wrongful dismissal), unauthorised deductions from wages and detriment for having made protected disclosures*

36. It was reasonably practicable for these complaints to be presented by 18 December 2019. Following *Dedman*, I have given this test a liberal interpretation in favour of the Claimant. However, the Claimant had access to

the internet and undertook his own research soon after his dismissal. As part of that research he had learned that he needed to commence the ACAS early conciliation process within 3 months of his termination date and did so. He learnt about ACAS and was aware that claims for unfair dismissal were within the jurisdiction of the Tribunal. Although he was not aware that claims for wrongful dismissal were within the jurisdiction of the Tribunal, he could have learned this had he made sufficient enquiries. He learned how to commence proceedings in the County Court and did so. He was engaged in litigation in the County Court from November 2019 until August 2020. Therefore, it was reasonable to expect the Claimant to have presented his claim in the Tribunal by 18 December 2019.

37. I am conscious that the Claimant did not have access to legal advice until March 2020. Therefore, if this had resulted in it not being reasonably practicable for the Claimant to present his claim until March 2020, I have considered whether the Claimant presented his claim within a reasonable period of time thereafter. I find that he did not. The Claimant took some advice in March 2020 and contemplated ending the civil proceedings and starting the Tribunal proceedings then. However, he did not do so until August 2020, some five months later. Considering *Theobald*, this is not a reasonable period of time. Although I recognise that the closure of the Claimant's local library (as a result of the COVID-19 pandemic) from March 2020 would have created problems for the Claimant, this did not prevent the Claimant from lodging his claim as he had access to the internet at home between April and August 2020. Allowing for the Claimant to draft and submit his claim, it would have been reasonable for the Claimant to submit his claim by May 2020 at the latest.

#### *Discrimination*

38. Considering the factors set out in *Keeble* as a guide, I conclude that it is not just and equitable to extend time to consider the Claimant's discrimination claims.
39. In regard to the balance of prejudice, if the Claimant's claims for discrimination are dismissed, the Claimant will be prejudiced in that he will not be able to pursue these claims. However, if they are allowed to proceed, the Respondent will be required to defend allegations in respect of which the Claimant could not say exactly when the relevant incidents occurred. It would certainly prejudice the Respondent to defend allegations concerning incidents that allegedly occurred at the outset of the Claimant's employment (in or around 2011) and in 2015. This significant passage of time will undoubtedly effect the cogency of the evidence which the parties can bring. In regard to the length of the delay, the deadline for the Claimant to bring these claims would have likely been many years ago. The Claimant offered no evidence as to why these particular claims were not brought at the time.
40. In regard to the dismissal related claims, the deadline was 18 December 2019 and the claims were brought on 3 August 2020, over seven months later. There would be significantly less prejudice to the Respondent if these claims were



allowed to proceed. However, the balance of prejudice is only one factor I am required to consider when deciding whether it is just and equitable to extend time. In addition to the balance of prejudice, I must also consider the reasons for the delay. In this regard, the reasons given by the Claimant were not reasonable. Although he said he was not aware that wrongful dismissal claims could be brought in the Tribunal, he was aware that claims pursuant to the EA could be. Although he did not obtain legal advice until March 2020, and his public library was closed from March 2020 as a result of the pandemic, he had access to the internet for the vast majority of the time between October 2019 and August 2020, he had undertaken his own research, he had learned that he needed to start the ACAS early conciliation process within three months and he did so. He was clearly aware of his potential cause of action soon after his dismissal and did not act promptly or reasonably once the ACAS early conciliation process had concluded. Furthermore, rather than initiate the Tribunal proceedings, the Claimant engaged in County Court litigation between November 2019 and August 2020. He told me he had brought such proceedings for 'tactical' reasons which I do not consider to be reasonable, particularly because there was nothing preventing the Claimant from bringing proceedings in the Tribunal at the same time.

**Employment Judge McAvoy News**

**2 February 2021**