



## EMPLOYMENT TRIBUNALS

**Claimant**

**Ms C Hedd**

**Respondent**

**Tesco Stores Ltd**

v

## REMOTE PRELIMINARY HEARING BY CVP

**Heard at: London Central**

**On: 9 December 2020**

**Before: Employment Judge Elliott (by CVP)**

**Appearances:**

**For the Claimant:**

**In person**

**For the Respondent:**

**Ms E Wheeler, counsel**

## RESERVED JUDGMENT ON PRELIMINARY HEARING

1. The claims for unfair dismissal, unlawful deductions from wages and holiday pay are out of time and the tribunal has no jurisdiction to hear those claims.
2. It is just and equitable to extend time for the claim for disability discrimination and this claim proceeds to a hearing.
3. The claim for a redundancy payment is within time and proceeds to a hearing.

## REASONS

1. By a claim form presented on 7 July 2020, the claimant, Ms Christiana Hedd, brings claims for unfair dismissal, disability discrimination, unlawful deductions from wages, holiday pay and for a redundancy payment.

2. The claimant worked for the respondent supermarket as an admin and wages clerk from 8 April 1996 until 3 February 2020. The claimant worked at the respondent's Monument Metro Store in Eastcheap, City of London. The respondent's case is that she was dismissed by reason of redundancy.
3. On a consideration of the dates given in the ET1 and the ET3, the dates of the claimant's service are not in dispute; being from 8 April 1996 to 3 February 2020. The claimant had 23 complete years of service.
4. Disability is conceded by the respondent in relation to the claimant's knee condition.
5. This case was originally listed for a case management hearing on 13 November 2020. It was converted on the respondent's application of 26 October 2020 to an open preliminary hearing to deal with time limitation and to be followed by case management as necessary.

### **Remote hearing**

6. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.
7. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
8. The participants were told that it was an offence to record the proceedings.
9. Evidence was heard from the claimant. I was satisfied that the claimant was not being coached or assisted by any unseen third party while giving her evidence.

### **The issue for this hearing**

10. The issue for this hearing is whether the tribunal has jurisdiction to hear the claims bearing in mind the statutory time limits.
11. The effective date of termination is agreed as 3 February 2020. The claimant commenced Early Conciliation via ACAS on 12 May 2020 and the EC Certificate was issued on 11 June 2020. The claim was presented on 7 July 2020. The claimant did not commence Early Conciliation within the primary time limit which expired on 2 May 2020 save for the claim for a redundancy payment which is accepted by the respondent as being within time.

### **Witnesses and documents**

12. The tribunal heard evidence from the claimant.

13. The respondent produced an electronic bundle of 69 pages for this hearing into which they included the claimant's Agenda for the case management hearing and her 13 page Schedule of Loss.

### **Findings of fact on the time point**

14. The claimant gave evidence as to the circumstances of bringing her claim.
15. She first took advice from ACAS on 9 June 2019 when she was unhappy at the way she was being treated by the respondent. They advised her to lodge a grievance which she did on about 17 June 2019. Although I did not see the grievance letter I accepted the claimant's evidence that she referred to disability discrimination in that letter. That grievance process did not come to an end until 5 May 2020. The parties are in agreement about that date. They also agree that the effective date of termination was 3 February 2020.
16. The claimant was given to understand that she had to complete a grievance before she could bring a claim. When she spoke to ACAS on receipt of the grievance outcome on 5 May 2020 she was told that she could now proceed with a claim.
17. The claimant was asked in cross examination why she did not present her claim at this time and why she waited until 7 July 2020, particularly as Early Conciliation came to an end on 11 June 2020 and she knew from this point that conciliation had not brought about a resolution. The claimant wanted time to get her dates and facts arranged and get them in to chronological order. She said she did not want to miss things out. She said it was still not exactly as she would want it to be.
18. The claimant took advice from the Citizens Advice Bureau but this was not until she received a Notice of Hearing from the tribunal, sent on 26 August 2020 and this was after the presentation of her claim. I find that she consulted the CAB in late August or early September 2020.
19. The claimant also told the tribunal that she has had [redacted] difficulties and she is [redacted]. There was no medical report but I did not doubt that her evidence that she has such difficulties and is [redacted].
20. I accept and find that the claimant had no knowledge of the time limit until she received the ET3 and the respondent took the point.
21. The claimant did know from 5 May 2020 that she could proceed with a claim and she did know from 11 June 2020 that Early Conciliation had not been successful. I asked the claimant if she took any steps to find out whether there was a time limit by doing some research or asking some questions. She said she did not do so.

### **The relevant law**

22. Section 111 of the Employment Rights Act 1996 provides that:

(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.*

23. This is known as the reasonably practicable test. What is reasonably practicable is a question of fact and therefore a matter for the tribunal to decide. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. There is a duty upon her to show precisely why she did not present the complaint within time.
24. The reasonably practicable test applies to the claim for unlawful deductions from wages under section 23 ERA and to the claim for holiday pay under Regulation 30 Working Time Regulations 1998 or if brought as a claim for unlawful deductions, again under section 23 ERA.
25. In ***Riley v Tesco Stores Ltd 1980 ICR 323 CA*** where the claimant receives incorrect advice from an adviser from the CAB, this is treated as the fault of the claimant himself or herself. The claimant in ***Riley*** presented her claim out of time based on erroneous advice from the CAB. It was found to have been reasonably practicable for her to present her claim within time because she had engaged a skilled adviser.
26. ***London International College Ltd v Sen 1993 IRLR 333 CA*** concerned a claimant who had been wrongly advised by tribunal employees and held that it was not reasonably practicable for him to present the claim within time. It was found in that case that the effective cause of the failure to present the complaint in time was the advice received from a tribunal employee and not the earlier advice of the claimant's solicitor.
27. In ***Walls Meat Co Ltd v Khan 1978 IRLR 499 CA*** the then Master of the Rolls said in relation to ignorance of rights: *"Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making enquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an Industrial Tribunal that he behaved reasonably in not making such enquiries."*

### The just and equitable test

28. Section 123 of the Equality Act 2010 provides that:

(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.
29. This is known as the just and equitable test and applies to the claim for disability discrimination. It is broader than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see **Robertson v Bexley Community Centre 2003 IRLR 434**
30. The Tribunal may have regard to the checklist in section 33 of the Limitation Act 1980 as modified by the EAT in **British Coal Corporation v Keeble and Ors 1997 IRLR 336, EAT:**
- a. The length and reasons for the delay
  - b. The extent to which the cogency of the evidence is likely to be affected by the delay
  - c. The extent to which the party has cooperated with any requests for information
  - d. The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action
  - e. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action
31. However, in applying the just and equitable formula, the Court of Appeal held in **Southwark London Borough v Alfolabi 2003 IRLR 220** that while the factors above frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, *'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'*.
32. This was approved by the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050** when the Court noted that *"factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*
33. The tribunal must therefore consider:
- (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 prejudice that each party would suffer as a result of the decision reached
34. The decision of the Court of Appeal in **Apleogun-Gabriel v London Borough of Lambeth 2001 IRLR 116** makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

## Conclusions on the time point

### Unfair dismissal, unlawful deductions from wages and holiday pay claims

35. This is a case which is on the face of it out of time, save for the claim for a redundancy payment which under section 164 ERA has a six month time limit. The respondent accepted this. To be within time, the claimant should have commenced Early Conciliation by 2 May 2020 to have benefited from the extended time that Early Conciliation would otherwise provide.
36. I considered the reasonably practicable test and the case law authorities on this. **Riley v Tesco Stores Ltd 1980 ICR 323 CA** holds that incorrect advice from an adviser employed by the CAB can be treated as the fault of the claimant herself. However, this does not mean that any advice from a third party automatically means that it was reasonably practicable to present the claim within time. In the present case the claimant presented her claim nearly two months before she consulted the CAB and it is the advice she received from ACAS that she relies upon.
37. In **London International College Ltd v Sen** a claimant who was wrongly advised by tribunal employees successfully claimed that it was not reasonably practicable to present within time. Counsel for the respondent in this case also cited **Drewery v Carphone Warehouse 3203057/06**, an ET level case, where the claimant had taken advice from ACAS. The tribunal in that case found that it was not reasonably practicable for the claimant to present his claim within time and he presented 12 days late. He had contacted both the JobCentre and ACAS and he considered ACAS to be authoritative and relied on their advice. The incorrect advice he received from ACAS was that there was little point in pursuing a tribunal claim before he had completed his internal appeal against dismissal. Thus, incorrect advice from ACAS can mean that it is not reasonably practicable to present a claim within time.
38. My finding in the present case is that the claimant was unaware of the time limit and she was not told about it by ACAS. The advice she was given by ACAS was that she should complete her grievance process first. She relied on that advice. It is not in dispute that the outcome of the grievance was given on 5 May 2020 which was three days outside the primary time limit. I find that it was not reasonably practicable for her to present her claim within the primary time limit, based on her reliance on the advice she was given by ACAS.
39. I have gone on to consider whether, it not being reasonably practicable for the claimant to present her claim within time, she presented the claim within such further period as was reasonable. This is not a case where the claimant was ignorant of her right to bring a claim. She knew she had a right to bring a claim. On her own evidence she was told by ACAS on 5 May she could now proceed with her claim. She began Early Conciliation seven days later as a prerequisite to bringing that claim. Early Conciliation ended on 11 June 2020. She did not present her claim until nearly four weeks later because she wanted to get her facts and dates in order.

40. The claimant admits she did not take any steps to find out about a time limit. She accepts that she did not make any enquiries. She did not, for example, ask ACAS or anyone else, whether she needed to bring her claim within a certain time. She had known from 5 May 2020 that she could so. She did not make any enquires or look the matter up online.
41. I accept that the claimant has had some [redacted] difficulties. This has not prevented her from contacting ACAS or the CAB to assist her. She has engaged with a grievance process and Early Conciliation. She has also been able to put her own claim together and present it in person and online without assistance on 7 July 2020.
42. I find that she has not presented her claim within such further period as was reasonable in the circumstances. I find that in the knowledge that she had the right to bring a claim it was incumbent upon her to make some enquiry as to whether she had to do so within a certain time. I find following **Walls Meat v Khan** that it was not reasonable for the claimant to fail to make any enquiry about this in the knowledge that she had the right to bring a claim and the door was open to her to do so. She knew that the door was open to do so when ACAS told her on 5 May 2020 that she could now bring her claim.
43. Even if, due to her [redacted] situation, it would have taken her a bit longer, I find that on the conclusion of her grievance process and on the conclusion of Early Conciliation, it was reasonably practicable for her to present her claim within a week of the close of Early Conciliation, namely by 18 June 2020.
44. As such the claims for unfair dismissal, unlawful deductions from wages and holiday pay are out of time and the tribunal has no jurisdiction to hear them. The claim for a redundancy payment is within time; this is accepted by the respondent.

#### The discrimination claim

45. On the just and equitable test, the tribunal has a broader discretion. I have considered the length and reasons for the delay. The claim is about two months out of time. This is not a long delay and the reasons for it are set out above.
46. I have considered the extent to which the cogency of evidence is likely to be affected. A delay of about two months is unlikely in my view to significantly affect the cogency of evidence. The respondent said in submissions that the claim went back to 2014 but in practical terms probably only as far back as 2018.
47. In her claim form the claimant cites her medical history going back to 2014 but the complaints start from 2018. The respondent accepted in submissions that there are Occupational Health Assessments records of return to work meetings and documents that are likely to assist. There has been a lengthy grievance process which has no doubt generated documentation along the way. That grievance

process started in June 2019 so I find that the respondent will be assisted with documentary evidence.

48. The respondent gave no specific examples of situations where the cogency of evidence is likely to be affected, other than saying that the same managers may not now be in place and it will be more difficult with harassment allegations where witnesses will have to rely on their memories. No names or precise situations were put forward. Without being given concrete examples I am unable to find that the cogency of evidence will be negatively affected or that there is prejudice to the respondent other than the prejudice of having to face a claim.
49. The respondent also submitted that this is a claim without strong prospects. It is a discrimination claim and these are often fact sensitive. On what was before the tribunal I am unable to make a finding that this is a claim without strong prospects. The evidence will need to be tested. The claimant's case is that the respondent wanted to dismiss her because of her medical condition. The prejudice to her if time is not extended is that she loses the opportunity to bring a claim after nearly a quarter of a century of employment with the respondent and in circumstances where she believes she was discriminated against and raised this in a grievance in June 2019.
50. The respondent said that by the time witnesses come to prepare their statements in the spring of 2021 it will be harder to recollect. There is nothing to stop witnesses from starting preparation on their statements before the spring of 2021.
51. Taking all the above matters into consideration I consider that it is just and equitable to extend time for the discrimination claim.
52. The claim for disability discrimination and the claim for a redundancy payment therefore proceed to a full merits hearing. As it was necessary to reserve this decision, a further preliminary hearing for case management will be listed and the parties will receive a notice of hearing.

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**Employment Judge Elliott**

**9 December 2020**

Sent to the parties on:

10<sup>th</sup> Dec 2020.

For the Tribunal:

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