



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mrs Silvana Khalili-Tari**

**v**

**Cassiobury Court Limited**

**Heard at:** Watford

**On:** 11 February 2021

**Before:** Employment Judge Bedeau

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr T Sheppard, Counsel

## **JUDGMENT**

1. On the 11 February 2021, I gave orally the following judgment after which the claimant stated that he would like to appeal:
  - 1.1 The respondent conceded that, at all material times, the claimant was a disabled person suffering from Bi-polar Affective Disorder.
  - 1.2 It was reasonably practicable for the claimant to have presented her unauthorised deductions from wages and wrongful dismissal claims within the primary limitation period of 3 months, and they are struck out as the tribunal does not have jurisdiction to hear and determine them.
  - 1.3 It is not just and equitable to extend time to allow the claimant to proceed with her disability discrimination claims, and they are struck out as the tribunal does not have jurisdiction to hear and determine them.
  - 1.4 The final hearing listed on 5 and 6 August 2021, is hereby vacated.

## **REASONS**

1. In a claim form presented to the tribunal on 4 September 2019, the claimant claims against the respondent disability discrimination in respect of her bipolar affective disorder, wrongful dismissal, and unauthorised deductions from wages.
2. In the response it is averred that the claimant presented her claims outside of the primary limitation period of three months and requested that there

should be a preliminary hearing to determine the issue of whether or not the claims should be struck out as having been presented out of time.

3. In relation to the merits, the respondent asserts that the claimant was dismissed for gross misconduct having taken unauthorised absence. She had been overpaid in March 2019 and there was a deduction in April 2019 in respect of that overpayment. She is not entitled to any holiday pay as she did not accrue holiday.
4. The issue of the claimant's disability is not admitted, and the respondent requested further and better particulars.

### **The issues**

5. A preliminary hearing was held on 26 May 2020, before Employment Judge Smail who listed the case for a preliminary hearing for today for me to hear and determine the issues:

5.1 Firstly, whether the claimant was, at all materials times, a disabled person;

5.2 Secondly, whether time should be extended on just and equitable grounds in respect of her disability discrimination claims; and

5.3 Thirdly, in respect of her unauthorised deductions and wrongful dismissal claims, whether it was not reasonably practicable for her to have presented those claims in time?

6. The judge also listed the case for a final hearing on 5 and 6 August of this year, but that is subject to the outcome of these proceedings.
7. I heard from the claimant. No oral evidence was called on behalf of the respondent. In addition, the parties produced a joint bundle of documents comprising of 63 pages. Having heard from the claimant and having considered the documents in the joint bundle I made findings of fact.

### **Findings of fact**

8. The respondent is a drug and alcohol treatment and rehabilitation service provider and is situated at Cassiobury Court, Richmond Drive, Watford in Hertfordshire.
9. On 1 October 2018, the claimant commenced employment with the respondent as a Kitchen Assistant working part-time 20 hours a week. She stated that her pay was £780 gross per month working Mondays and Wednesdays, 9am to 7pm though on occasions she worked longer hours.
10. She was off work from 10 April 2019 and returned to work on 15 April 2019 when she was told that she would be dismissed, effective on that date. That information was given to her by Mr Matthew Penn, the registered Manager. Her dismissal was then confirmed in writing three days later by Mr Penn on

18 April 2019. Understandably, the claimant was quite distraught to have been dismissed. She stated that she enjoyed and loved her job; felt part of the community; and believed she had something to offer the community and the respondent.

11. For about 10 years or longer, she had been diagnosed as suffering from bipolar affective disorder. She suffered a psychotic episode in early April 2019 when, she told me, at that time she was upset thinking about the death of her much younger brother in 1992 at the age of 21 years. Her parents passed away over five years ago.
12. From 2 April to 31 May 2019, she was under the care of the South West Crisis Assessment and Treatment Team. In particular, under the care of Dr Rehan Siddiqui, Associate Specialist. She was prescribed medication for her condition, and showed me in her evidence, two boxes containing the medication she is required to take.
13. Dr Siddiqui wrote a letter dated 29 June 2020, the relevant part of which he wrote:

“Silvana engaged with SWCATT and over the time of her care with the team she was compliant with medication and showed an improvement and stabilisation in her mental health.

Silvana’s care transferred to the Community Mental Health Team on 31 May 2019 for follow up care and support.”

14. From 8 April 2019 to 9 April 2020, she was under the care of the Community Mental Health Team. Mr Joel Lagando, of the Community Mental Health Team, in his capacity as a Social Worker, sent an undated letter addressed to “Whom it may concern”. In it he wrote this:

“Silvana remained unwell for the majority of this time that is from 8 April 2019 to 9 April 2020, hence why we only discharged her early this year. At the time of dismissal from her job she was mentally unwell, and at the time of her appealing to the tribunal, she was also unwell.”

15. That passage attracted my attention because I wanted to know whether there was any medical evidence clarifying how unwell the claimant was over that period. The unfortunate thing from the claimant’s point of view, was that in the bundle of documents there is the absence of any medical reports setting out her condition covering that period of time, that is from April 2019 to April 2020. In going through the bundle of documents looking for a medical report or reports covering that period, I wanted to know whether the claimant was under a medical impediment effectively preventing her from pursuing her case in time. In the absence of that I had to consider the evidence before me.
16. In June 2019, she visited the local Citizen’s Advice Bureau in Rickmansworth and spoke to someone there, an advice worker, for one hour. She was informed of her potential claims and told that she did not have an ordinary unfair dismissal claim because of her short length of

service. She, however, had a wrongful dismissal, unauthorised deduction from wages, and a disability dismissal claims. Of importance, the advice worker advised her that she should first contact ACAS. That is important because ACAS must be first notified in most potential claims against an employer as a precursor to issuing tribunal proceedings, should conciliation fail. During the time of advice worker's involvement with her, she told me that he also, in relation to her disability, assisted her in getting a Personal Independence Payment. It follows from her evidence to me that she gave the advice worker an account of her employment history with the respondent and the circumstances leading up to the termination of her employment.

17. I am satisfied the claimant was advised as to the relevant time limits by which she must present her claims. That would have been explained to her by the advice worker as well as the need for her to first make contact with ACAS. She saw the advice worker on at least two or possibly three occasions, who assisted her in relation to the Personal Independence Payment and in relation to matters relevant to her potential employment claims.
18. I accept that this situation had not happened to the claimant before. It was all new her and framed in legal jargon which she had difficulty understanding. I am satisfied she got the requisite legal advice from the Citizen's Advice Bureau.
19. With the assistance of the Bureau, she wrote to the respondent in June 2019 referring to her earlier communication to them. She wanted the respondent to pay her what she was entitled to which was the sum of £720.
20. I was satisfied that the matter that was uppermost in her mind was the need either be to be paid by the respondent or for the respondent to allow her to return to work. Either way, she wanted to pursue matters outside of the remit of the Employment Tribunal.
21. It is not clear, having had advice and assistance from Rickmansworth Citizen's Advice Bureau, why the claimant did not pursue her claim to the tribunal between June 2019 and 14 July 2019, that being the end of the primary three months limitation period taking into account the termination of her employment on 15 April 2019. It was clear that the respondent, in June, did not agree to her terms of settlement and it is unclear, with that in mind, why she did not pursue the advice of the Bureau and present her claim form to the tribunal prior to 14 July 2019.
22. On 21 August 2019, ACAS was notified, this was five weeks after the expiring of the primary three months limitation period. Conciliation was unsuccessful and the certificate was issued on 27 August 2019.
23. The claimant presented her claim form, as I have stated earlier, on 4 September 2019. She told me that it was presented to the tribunal by her husband.

24. In cross-examination, she said that she wanted payment from the respondent rather than to go to a tribunal.

### Submissions

25. I took into account the submissions by Mr Sheppard, Counsel on behalf of the respondent, who invited me to strike out the claims as being out of time, applying the two different tests as the claims are different.
26. The claimant's submissions were quite brief. She said that she was not in the right frame of mind at the time and did not understand the legal jargon. She enjoyed her job and loved working for the respondent. During her submissions she became upset. At that point I invited her husband to make submissions on her behalf, but he was not focussing on the relevant issues. I then invited the claimant's son to assist but he introduced new evidence, which was not put before me or disclosed to the respondent, much of which was his opinion on medical issues which Mr Sheppard objected to.

### The law

27. Under section 123(1) Equality Act 2010, a complaint must be presented within three months,
- “starting with the date of the act to which the complaint relates” (a), “or such other period as the employment tribunal thinks just and equitable,” (b) and “conduct extending over a period is to be treated as done at the end of the period,” (3)(a).
28. The time limit is extended if there is an ACAS certificate, section 140B Equality Act 2010.
29. Time limits are to be applied strictly. The Court of Appeal held that the exercise of the discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the Tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the Claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule and the matter remains one of fact.
30. In the case of Abertawebro Morgannwg University Health Board v Morgan EWCA/Civ/EAT/640, it was held by the Court of Appeal, that the Tribunal has a broad discretion to consider factors, such as the length of and reasons for the delay; whether the delay has prejudiced the respondent; and the prejudice to the claimant.
31. In relation to an unauthorised deduction from wages claim, the time limit is 3 months either from the date of the deduction, section 23(2)(a), or in a case of a series of deductions, from the date of the last deduction in the series, section 23(3)(a) and (b) Employment Rights Act 1996.

32. Where it was not reasonable practicable to have presented the claim in time, the tribunal may consider the claim if presented within “such further period as the tribunal considers reasonable.”, section 23(4).
33. Time is extended if there is an ACAS certificate, section 207B Employment Rights Act 1996.
34. There are similar time and extension provisions in respect of a breach of contract claim, articles 7 and 8A Extension of Jurisdiction (England and Wales) Order 1994.
35. The claimant bears the burden of proving both that it was not reasonably practicable for him or her to have presented their claim in time and that they presented it within a reasonable time thereafter.
36. In the case of Dedman v British Building and Engineering Appliances Limited [1974] ICR 53, the claimant was summarily dismissed. He knew he had some rights under the relevant statute at the time but did not know about the limitation period. He sought advice from a firm of solicitors, but they did not advise him as to the time limit. He presented his claim form out of time. He failed in his application that he be allowed to pursue his unfair dismissal claim as it was not “practicable” for the claim to have been presented in time as he was unaware of the time limit and had sought legal advice but was not told about the time limit. The case was considered by the Court of Appeal.
37. Lord Denning MR, held that, “If a man engages skilled advisers to act for him and they mistake the time limit and present it too late, he is out. His remedy is against them.”, page 61, paragraph F.
38. A claimant may know of his or her rights but prevented from exercising them through either “illness, absence, some physical obstacle, or by some untoward an unexpected turn of events” which would make it not practicable to have presented the claim in time. Where the claimant is pleading ignorance of the law, questions had to be asked as to what were his or her opportunities for finding out their rights? Did they take them? If not, why not? Were they misled or deceived? Were there acceptable explanations for a continuing ignorance of the existence of their rights? Ignorance of his or her rights does not mean that it was impracticable for him to present a complaint in time.”, Scarman LJ, page 64, paragraphs D to F.
39. In the case of Walls Meat Company Limited v Khan [1978] IRLR499, it was held that it would not be reasonably practicable if there was “some impediment which reasonably prevents, or interferes with, or inhibits, such performance” namely the presentation of a complaint. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable”, Brandon LJ, page 502 paragraph 44.

40. In the case of Riley v Tesco Stores Limited [1980] IRLR103, the claimant was dismissed for either alleged theft from, or receiving property belonging to the respondent. On the day of her dismissal, she visited a Citizens Advice Bureau “CAB” where a claim form was completed claiming unfair dismissal. Six days later she was charged by the police. She alleged that subsequently she was told by the CAB that she could not present her claim until the criminal proceedings were completed. Ten months later she was acquitted of the charge against her. Within eight days of her acquittal she presented her claim to an Employment Tribunal. She argued before the ET that her failure to make a complaint in time was because of incorrect advice by given by the CAB. The ET rejected that argument and relied on the fact that she engaged the services of the CAB as “skilled advisers” and acted on their advice. This was upheld by the Employment Appeal Tribunal. On appeal to the Court of Appeal, Waller LJ held that:

“What is the position if, knowing of your right, you ask another to take the necessary action? In my opinion, you cannot then be in a better position than if you had retained the power to act yourself. If you have retained a skilled adviser and he does not take steps in time, you cannot hide behind his failure. There may be circumstances, of course, where there are special reasons why his failure can be explained as reasonable.”

41. In London International College Limited v Sen [1993] IRLR333, the Court of Appeal held, on the facts, that a claimant had been entitled to rely on incorrect advice from a tribunal employee when presenting a late claim, with the effect that it had not been reasonably practicable to have presented it within time. What was important was to establish the substantial cause of the delay. The tribunal found that the advice from a member of the Tribunal staff had followed very shortly after the advice from the solicitor that the substantial cause of the lateness was what was said by the member of staff, rather than by the solicitor. The tribunal had jurisdiction to hear the claim although it was one day out of time.
42. In the case of Palmer v Southend-on-Sea Borough Council [1984] ICR 372, it was held that the test of “reasonably practicable” means “Was it reasonably feasible” to present the complaint within three months?
43. In Northamptonshire County Council v Entwistle [2010] IRLR 740, a case under the Employment Act 2002 (Dispute Resolution) Regulations 2004, in which the claimant’s solicitor relied on the three months statutory time limit within which to present an unfair dismissal claim, as starting from the outcome of an internal appeal and not from the date of dismissal. The claim was presented two weeks out of time. The ET allowed it to proceed as it was presented within a reasonable time notwithstanding the solicitor’s error. The EAT allowed the employer’s appeal. It held that the claimant’s solicitor had been negligent in not correcting the employer’s misleading appeal outcome letter in relation to the time within which the claimant should present his claim to an ET. It distinguished Sen from the facts in that case.

## Conclusion

44. The claimant is unable to take advantage of the extension of time provisions because she notified ACAS after the expiration of the primary three months' time limit.

### Reasonable practicability

45. In relation to her wrongful dismissal and unauthorised deduction from wages claims, the test to be applied is whether it was not reasonably practicable for her to have presented those two claims in time? The approach is for me to consider whether it was reasonably feasible for the claims to have been presented within the three months? I go back to the findings of fact. This is from the evidence given by the claimant. In June 2019, she visited and was assisted by an advisor at the Rickmansworth CAB either twice or three times. He drafted the June 2019 letter that was sent to the respondent on her behalf. She had sent to the respondent an earlier communication proposing terms for a resolution. She was advised to contact ACAS as the first step before considering issuing proceedings before an Employment Tribunal. I find that during her conversations with the advisor, she was advised of the time limits within which she must present her claims. However, she wanted to resolve matters based either on the payment of monies owed to her, or that she should be allowed to return to work. Presenting a claim form before an Employment Tribunal was a secondary consideration.
46. It was, bearing in mind the advice given to her by the advice worker at the CAB, reasonably feasible for her to have presented her claims before 14 July 2019, Palmer. By then there had not been a resolution of her issues with the respondent and the expiration date was fast approaching. She should have followed the advice given by CAB and present her claim in good time. She should not have waited for a resolution when the respondent had not given her an indication that it was prepared to settle. She knew that time started to run from the date of her dismissal, Northamptonshire County Council v Entwistle. Accordingly, and regrettably, I have come to the conclusion that the unauthorised deduction from wages and wrongful dismissal claims were presented out of time and do not extend time. Therefore, those two claims are struck out as the tribunal does not have jurisdiction to hear and determine them.

### Just and equitable

47. In relation to the disability discrimination claims, although these claims have not been clarified, I do accept that the claimant intends to pursue various claims of disability discrimination against the respondent.
48. The issue here in relation to out of time point is, is it just and equitable extend time because her discrimination claims were presented outside of the primary three months limitation period? I do have regard to section 123(1) Equality Act 2010 and take into account in considering whether it is



just and equitable to extend time, a number of relevant factors, Robertson v Bexley Community Centre, and Abertawebro Morgannwg University Health Board v Morgan. Firstly, the extent and reason for the delay. I accept that from 14 July to 4 September 2019 is a period of around seven weeks. What was the reason for the delay? As I have already found and concluded, the claimant wanted either to be paid or for the respondent to allow her to return to work. This was in the face of having been told about the time limits and the need to notify ACAS.

49. What about the cogency of the evidence if I was to allow the discrimination claims to proceed to a full merits hearing? I take the view that the cogency of the evidence remains unaffected. The respondent would not be required to engage in pursuing new evidence to rebut or to challenge the claims, nor is the issue of failing memories relevant in this context. It would, however, need to amend its response once the claims have been identified and the issues clarified.
50. I also take into account whether there was any fault on the part of the respondent that might have caused or contributed to the delay and I have come to the conclusion that the respondent's conduct of these proceedings could not be faulted and was of the highest professional standards.
51. What about the legal advice given to the claimant? I do consider the role of the Citizen's Advice Bureau and the assistance and correct advice the Bureau gave her. There was a discussion about what her potential claims were; time limits; and about contacting ACAS. She failed to follow the advice in good time.
52. I also considered whether her disability had adversely impacted on her ability to prosecute her claims to a tribunal. Was it an effective impediment in her doing so?, Walls Meat Company Limited v Khan. As I have already stated earlier, I was looking for medical evidence and a medical report that might be of assistance to me in determining whether her bipolar affective disorder effectively impeded her in prosecuting her claims in time. As I have already found, no such report or medical evidence is in the bundle and, objectively, the claimant was able to contact the CAB in her own right and to seek advice and assistance from it, as well as engage in correspondence.
53. What about the prejudice to the respondent? The prejudice to the respondent were I to allow the claim to proceed, is fairly limited in my view. The respondent has already set out its case in the response and would need to amend its response. For the claimant, I acknowledge that that would be the end of her claims against the respondent, therefore, the prejudice to her outweighs the prejudice to the respondent.
54. The exercise is a balancing one. Exercising my discretion on just and equitable grounds in favour of a claimant, is the exception rather than the rule, Robertson v Bexley Community Centre
55. Considering all the factors which I have outlined, I have come to the conclusion, on balance, that it is not just and equitable to extend time in this

case. The claimant was given correct advice and she had adequate time and the presence of mind, to pursue her discrimination claims before the tribunal in time and she failed to do so.

- 56. Accordingly, and again regrettably, I have concluded that I will not apply my discretion on just and equitable grounds. Her discrimination claims are also struck out.
- 57. I did not consider the issue of whether the claimant was, at all material times, a disabled person as that was conceded by Mr Sheppard at the outset of the hearing.

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Employment Judge Bedeau

5 April 2021

Date: .....

Sent to the parties on: ....6 April 2021..  
THY

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For the Tribunal Office