EMPLOYMENT TRIBUNALS

Claimant: Ms Bokhari

Respondent: Easyjet Airline Co Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: by CVP and telephone **On:** 9 September 2021

Before: Employment Judge Tuck QC (sitting alone)

Appearances
For the claimant: In Person
For the respondent: Mr O'Dempsey, Counsel

JUDGMENT

1. The claimant's claim for discrimination because of religion and belief is out of time. It is not just and equitable to extend the time limit.
2. The claimant's claims of unlawful deductions from wages were presented out of time; it was reasonably practicable to have presented those complaints in time.
3. The claimant's claim of disability discrimination was presented out of time. It is just and equitable to extend the time limit. The claim of disability discrimination will proceed to a full merits hearing.
4. A Preliminary Hearing to determine the issues will be held on 1 November 2021.

The claim

(1) The claimant was employed by the respondent, latterly as a System Support Administrator in their Safety Data Team, between 3 September 2018 and 7 April 2020. She had a period of service via an agency prior to this. By a claim form presented on 9 October 2020, following a period of early conciliation from 10 August 2020 until 10 September 2020, the claimant brought complaints of unfair disability discrimination, discrimination because of religion or belief and for "other payments".

Issues for Preliminary Hearing

(2) In a notice dated 28 March 2021, EJ Alliott directed today's Preliminary Hearing to determine the following issues:

i. Was it not reasonable practicable for the complaint of unauthorized deduction of wages to be presented within the primary time limit? If not, was it presented within such further period as the tribunal considers reasonable?

ii. Should time for the discrimination complaints be extended on a just and equitable basis?

(3) Provision was also made to consider whether any of the claimant's claims should be struck out as having no reasonable prospect of success, but no application on this basis was pursued.

Today's hearing

(4) Today's hearing could not commence until 1015am due to a power cut in the area in which I was working. I connected to CVP at 10.15am, and having received only the Respondent's preliminary hearing bundle, was sent by email (by Mr O'Dempsey) the claimant's witness statement and documents. The claimant gave oral evidence and was cross examined. At the conclusion of the evidence, I suffered a further power cut, and with the consent of all parties, heard concluding submissions via a telephone conference line. I am grateful to the parties for their patience and assistance.

What are the claims?

(5) The claims in this case have not yet been clarified. Today's hearing proceeded on the following basis:

(i) The claimant makes complaints of deductions from her wages during the period of her employment.

(ii) The claimant's complaint of discrimination because of religion and belief relates to an interview she had in March 2017 for a receptionist role, and whether she would be able to wear a hijab due to the company uniform policy.

(iii) The claimant's complaint of disability discrimination has not been clarified, but is understood to include a complaint of a discriminatory constructive dismissal, such that the final date from which any discrimination could be complained of is her effective date of termination – 7 April 2020.

Findings of Fact

(6) The claimant worked for the respondent via an agency from December 2016. In March 2017 she applied for a permanent role directly employed, as a receptionist. She alleges discrimination because of her religion as she says she was asked "uncomfortable questions about wearing the uniform" and was made to feel that her wearing the hijab would be "a problem". In her ET1 the claimant said that after this she worked in the respondent's legal team and did not think easyjet was a racist company. The claimant

confirmed in cross examination that while she saw the consequences of not getting this role as having been long felt, she saw the incident relating to her interview for the receptionist post as a one off act which had taken place in 2017 and not been repeated since.

(7) The claimant said that in June 2018 she was offered a position in the Safety Data Team which she was accepted, returning her signed contract on 24 August 2018. It seems that this contract erroneously provided that her employment was full time, 40 hours per week, whereas in fact she was working 20 hours per week. The consequence of this was that the claimant was overpaid – and when she raised this with the respondent HR department, they simply confirmed her pay corresponded to her contract. This error became apparent in March / April 2019 when the claimant was taking annual leave. Repayment was sought by as she was leaving the country, she sought the assistance – at the suggestion of HR – of "a union member" who helped ensure she would not suffer any deduction from wages until her return to the UK. A repayment plan was agreed, and the amounts to be repaid varied from time to time. At the time of the claimant's termination of employment over £7000 of overpayments made to the claimant were still outstanding.

(8) The claimant said that in June 2019 her mental health started to deteriorate. I have seen part of a letter from AXA, the respondent's occupational health advisors who conducted an assessment on 25 June 2019. They noted that she had been signed off since 10 May 2019 due to stress and was not fit to return to work. At that time while the OH providers expressed the opinion she had a physical or mental impairment affecting her ability to undertake daily activities, the condition was anticipated to improve within 12 months of onset.

(9) The claimant said that she had home visits from the Respondent in around August / September 2019, and tried to return to work in October 2019. Whilst she had access to support from the "union member" (she herself was not a member of any union), she said she found it hard to trust anyone.

(10) She was absent again due to sickness in November / December 2019 and told me she was overpaid for a "third time" during this period, including being paid a bonus which she ought not to have been as she still owed a significant sum previously received as overpayments.

(11) The claimant attended a meeting on 28 February 2020, and considers she suffered discrimination because of her disability. She said she felt that she was "being pushed out because I wasn't good enough", and that she had no choice but to leave. There were discussions about her overpayments being "written off" if she resigned but she says that the respondent refused to confirm this in writing to her. The claimant told me that she wanted to be helped to return to work but was told there were "2 options, and we think you should call it a day".

(12) The claimant was provided with 16 counselling session s via the respondent's EAP, which she started on 2 March 2020. A letter from the Respondent dated 6 March 2020 noted that the claiamtn reported that her mediation had been increased at that time from 50mgs to 100mgs – the claimant thinks this refers to the daily does of Sertraline, the antidepressant she had been prescribed.

(13) The claimant said in evidence that when she started talking through what had happened to her during therapy, she considered that "it wasn't right" and that she had suffered discrimination. She also said she thought the February 2020 meeting was discriminatory at the time.

(14) By an email dated 10 March 2020 the claimant resigned, giving notice such that her last day of employment was 7 April 2020. She remained off sick during her notice period.

(15) After her employment ended the claimant said that she had a very difficult domestic situation. The claimant was living, along with her daughter, with her parents and she told me it "started to get very domestic". She had debt from a hire car which had been repossessed, and her father was very concerned that easyjet had 'his' address as the place the claimant lived, and questioned by the respondent had not confirmed in writing that they would not pursue the overpayments she had received via court action. The claimant said that there were numerous arguments at home, and she was suffering from verbal and emotional abuse. She describes her inability to help pay for the cost of the house as being very stressful, and said that between January and June 2020, she would frequently stay with friends or her cousin if her daughter was with her father. She said her health was deteriorating and she was "almost suicidal". She has been prescribed anti-depressant medication since around August 2019, and the dosage has increased over time (it was recently reduced only because the side effects were having a negative impact).

(16) The claimant said that by June 2020 the situation was intolerable and she telephoned women's aid. She moved into a women's refuge. She describes that as being very traumatic, with "police cars and ambulances coming at all hours of the day and night". I understand she was in the refuge for approximately three months.

(17) During closing submissions, (but not in her evidence) the claimant said that she had told ACAS she got a final payment from the respondent on 29 May 2020, and then received advice that the time limit to bring a claim would run from that date. She therefore thought her claim was within time.

Law

(18) A claim of unlawful deductions from wages must be presented within 3 months of the final deduction, unless that is not reasonably practicable, in which case it may be considered if it has been presented within such further period as is reasonable. This is provided for in section 23 of the Employment

Rights Act 1996 ("ERA"). The three month period will be extended in accordance with section 207B ERA when compulsory early conciliation has been entered into; section 207B(4) provides that if a time limit would expire during the conciliation period, it will instead expire one month after the end of the conciliation period.

(19) What it is "reasonably practicable" for a claimant to do is a question of fact (*Wall's Mean v Khan* [1979] ICR 52), and there is a duty on the claimant to show why she could not present her claim within time (*Porter v Bandridge* (1978) ICR 943). Even if there is medical evidence of an impediment, it remains for the claimant to show why they could not bring the claim within time (*Chouafi v London United Busways* [2006] EWCA Civ 689).

(20) Mr O'Dempsey referred me to *Schultz v Esso Petroleum* [1999] IRLR 488, CA. In that case the CA confirmed that "reasonably practicable" means more than reasonably capable physically of being done, and the best approach is to ask whether it was reasonably feasible to present the complaint within the relevant three months. The injection of the qualification of "reasonableness" also requires a tribunal to consider the surrounding circumstances of a case.

(21) For claims of disability discrimination the relevant time limit is set out in section 123 of the Equality Act 2010 ("EqA"). Complaints must be presented to an employment tribunal within three months from the date of the act to which the complaint relates, or within such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as being done at the end of that period, and a failure to do something should be considered done when something inconsistent occurs or on the expiry of the period in which a person might reasonably have been expected to do something. Section 140B EqA, like section 207B ERA, provides for an extension of time when compulsory early conciliation has been entered into. Section 140B(4) provides that if a time limit would expire during the conciliation period, it will instead expire one month after the end of the conciliation period.

(22) As to the approach to asking whether it is just and equitable to extend the limitation period, as the Court of Appeal set out in *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 at paragraph 26, the burden is on the complainant who is seeking the exercise of the discretion in her favour. Lord Justice Sedley summarised it thus:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal in the EAT is a well known example) policy has led to a consistently sparing use of the power. This has not happened and ought not to happen in relation to the power to enlarge the time for bringing ET proceedings."

(23) The tribunal takes into account anything which it judges to be relevant; this is the exercise of a wide general discretion and may include the date from which the claimant first became aware of the right to present a complaint.

The existence of other timeously presented claims will be relevant because it will mean on the one hand that the claimant is not entirely unable to assert her rights and on the other that the very facts upon which she seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues.

(24) In *British Coal Corpn v Keeble* [1997] IRLR 336 it was suggested that a comparison with the factors listed in s33 of the Limitation Act 1980 might assist tribunals in considering their discretion to extend time. This lists the following matters to be taken into account:

- The length of and reasons for the delay
- The extent which the evidence is likely to be less cogent
- Whether the respondent's conduct contributed to the delay
- The duration of any relevant disability, that is something which deprived the claimant of the mental capacity required in law
- The extent to which the claimant acted promptly once she knew that act or omission might be capable of giving rise to a claim; and
- Steps taken to receive relevant expert advice.

(25) The Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5 held that *Keeble* "did not more than suggest that a comparison with the requirements of section 33 of the limitation act might help illuminate the task of the tribunal by setting out potentially relevant matters. It is not to be understood as a checklist or framework for the decision. The ET has a very broad general discretion. The approach to be taken is "to assess all the factors in the particular case which it considered relevant to whether it was just and equitable to extend time, including in particular the length of, and the reasons for, the delay."

Submissions

(26) As set out above, by agreement, closing submissions were taken by use of a telephone conference meeting.

(27) Mr O'Dempsey, having directed me to the *Schultz* and *Adedeji* authorities referred to above, made the following submissions. In relation to 2017 there had been a single incident and no satisfactory explanation for the very lengthy delay has been provided. He said that documents relating to this recruitment exercise had been destroyed – although added that relevant employees remained in employment. More generally Mr O'Dempsey emphasised that the claimant agreed in her evidence that she could have obtained medical records to substantiate her ill health but had not done so. He accepted that her going to live in a women's refuge was a significant

event, but said it was "not so overwhelming as to prevent her from dealing with a claim".

(28) Ms Bokhari said that the refuge was overwhelming, and that during her time staying there, presenting a complaint was the last thing on her mind. She said that talking therapy had led her to think about her treatment and to challenge it. She also said that she could "let go of the hijab and overpayments", but that she had previously had security by this job and felt she was pushed out when she should have been supported.

Conclusions on issues.

(29) The discrimination because of religion and belief alleged took place in 2017 and the claimant accepted that it was a one off incident. The claim is very significantly out of time, and the claimant could have researched it over the years that followed. She did not do so despite seeing claims about the wearing of hijabs in the press. There would be considerable prejudice to the Respondent in defending such an old claim, not least because whilst witnesses remain in employment they could not refer to any documents to refresh their memories. I am not satisfied it is just and equitable to extend the time limit by such a very lengthy period.

(30) The claims of disability discrimination and unlawful deductions from wages, taking the claimant's case at its highest, could have been continuing until her effective date of termination; 7 April 2020. The primary limitation period expired on 6 July 2020; the month of ACAS conciliation does not assist in extending the period as it was after the expiry of the primary limitation period. The claims presented on 9 October 2020 are therefore 3 months and 3 days outside the primary limitation period. I bear in mind that they are therefore presented after double the primary limitation period.

(31) I accept the claimant's evidence that in the period from 7 April 2020 until at least the end of August 2020, she was suffering considerable difficulties in her domestic arrangements. Her home situation between April and June 2020 was sufficiently traumatic that she sought assistance from a women's aid group, and move into a refuge with her young child in June 2020. She was there for around three months. Throughout this period she was also being prescribed mediation for her depression, and I infer from the diagnosis of fibromyalgia in November 2000 and her evidence that this took around two years to diagnose, likely also suffering from the impact of that condition.

(32) By August 2020 the claimant was able to approach ACAS and start the conciliation period. She was able to do this despite her ongoing ill health.

(33) I am satisfied that it even if it was not reasonably practicable for the Claimant to have brought her unlawful deductions from wages claim whilst she was in a domestically abusive environment or a refuge, it was reasonably practicable for her to have presented it in August 2020. It was her misunderstanding of the law (thinking that 'time ran' from 25 May 2020 when she received a final payment) which led to delays between then and 9

October 2020, not her inability to deal with the practicalities of making a claim.

(34) I have reached a different conclusion in relation to the claim for disability discrimination. This is out of time by at least the same period of 3 months and three days. I say "at least", because there may well be issues between the parties as to whether there was a 'course of conduct' or 'act extending over a period' in relation to matters pre dating the effective date of termination. However, looking at the situation on the whole I do consider that it is just and equitable to extend the time period.

(i) While I accept that her mental ill health, and her inability to process what had happened to her until she had undergone talking therapy would have had an impact on her ability to present her complaint, if this were the only factor I would not have considered that a sufficient explanation for her delay. I reach this conclusion in light of her evidence that she considered her meeting at the end of February 2020 to have been discriminatory at that time.

(ii) It was however the claimant's domestic situation which severely hampered her ability to present her complaint within time. This is in my judgment a very cogent explanation for the delay.

(iii) I also take into account that the Claimant approached ACAS on 10 August 2020, so the respondent was on notice from that date – which was just a month after the end of the primary limitation period – of a claim. The respondent has been able to adduce a coherent response in its ET3 and there is no evidence that it will suffer prejudice from having to defend an out of time claim. On the other hand, the claimant would be precluded from being able to set out her complaints of discrimination.

(35) Having regard to all the circumstances and significant prejudice which would fall to the claimant if she lost all right to be heard, compared to the lack of prejudice to the respondent by the late presentation of the claim, I consider it just and equitable to extend the limitation period to 9 October 2020 when the ET1 was presented.

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Employment Judge Tuck QC

9 September 2021

Sent to the parties on:

04/10/2021

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For the Tribunal: