



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr James Gribbin

**Respondent:** Tesco Stores Limited

**Heard at:** Manchester Employment Tribunal

**On:** 04 February 2022

**Before:** Employment Judge Mark Butler

## Representation

Claimant: In person

Respondent: Mr S Proffitt (of Counsel)

# OPEN PRELIMINARY HEARING (JUDGMENT)

The judgment of the tribunal is as follows:

1. The Tribunal does not have jurisdiction to hear the complaint of unfair dismissal. The claim is dismissed.
2. The Tribunal does not have jurisdiction to hear any of the claims brought under the Equality Act 2010. These claims are all dismissed.
3. For the avoidance of doubt, the claimant's claims are all brought out of time, the tribunal does not have jurisdiction to hear them and they are dismissed in their entirety.

# REASONS

## BACKGROUND AND ISSUES

1. The claimant presented his claim to the tribunal on 30 July 2021. He had been employed by the respondent as a Customer Services Assistant. He was dismissed on 22 April 2020.

2. This hearing was listed as an Open Preliminary Hearing to determine the following:
  - a. In respect of the unfair dismissal claim, whether it was reasonably practicable for the Claimant to present the claim within 3 months and if it was not, was it presented within such further period that was reasonable.
  - b. In respect of the discrimination claims, whether it would be just and equitable to extend time.
3. It was confirmed at the beginning of hearing that this was the purpose of the hearing. However, one matter that complicated this hearing was that there had not yet been a preliminary hearing to consider the specific allegations brought by the claimant, there was no list of issues, nor was the claim entirely clear on the face of the claim form. It was agreed with the parties that the first part of the hearing would be used to discuss the final acts that made up each of the claims made by the claimant, which would then be used to consider the time issue point. This gave the claimant the benefit of the doubt in that the most favourable dates of alleged acts were used when determining the issue of time limits, and were the acts that were least out of time.

#### EVIDENCE

4. In advance of the hearing, I had sight of a bundle of documents that ran to some 157 electronic pages.
5. The claimant attached a document to his claim form to explain why an extension of time should be granted, and he also prepared and sent to the respondent a witness statement setting out everything that he wanted to say about why the tribunal should extend time to hear his claims.
6. The claimant was cross-examined on this written evidence.

#### THE ISSUES

7. The claims being brought by the claimant are not entirely clear on the face of the claim form. And the claimant was struggling to give specific details of the claims that he was bringing, in particular with dates. He explained that due to the way that he thinks, he links things to events and does not recall dates easily.
8. Following some discussion with both parties, it was decided that for the purposes of determining whether the tribunal had jurisdiction to hear his claims, either in part or in full, then the date of the last act of each group of claim would be adopted, and the issue of time would be determined using these dates. This gave the claimant the benefit of the doubt, to a degree, as through considering groups of claims through the lens of acts that took place most recent in time meant that the time factor would weight less heavily.
9. With that recorded above in mind, the claimant explained the following:
  - a. He was bringing 5 categories of complaint:
    - i. The first was unfair dismissal. The claimant's effective date of termination was 22 April 2020.
    - ii. The second category was disability discrimination. The claimant explained that the dismissal was the last act of disability

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discrimination which formed part of his claim. Giving the claimant the benefit of the doubt, this was taken to include the conclusion of the claimant's appeal against dismissal. The claimant's appeal against his dismissal was concluded through his appeal being rejected by the respondent on 10 June 2020.

- iii. The third category concerned sex and/or sexual orientation discrimination by Mr Imran. This was a few weeks before the claimant went off sick, from which he never returned to work. The claimant went on sick leave during August 2019. The claimant placed the final act in such treatment around 02 August 2019.
- iv. The fourth category concerned treatment of him by management following having complained about Mr Imran. Although not particularized, this is likely to be victimisation. The claimant again placed the last act in this category as being a couple of weeks before he went off sick. Again this was put at 02 August 2019.
- v. The fifth category concerned the decision reached by Mr Marberley, in not upholding the claimant's post-dismissal allegations. It is unclear whether this was being pursued as a victimisation complaint or a form of sex and/or sexual orientation discrimination. However, for the purposes of today, the claimant accepted that he was subjected to this alleged detriment on 21 January 2021.

## SUBMISSIONS

10. Mr Proffitt made oral submissions on behalf of the respondent, and the claimant also made closing submissions. I have taken those submissions into account in reaching my decision.
11. I have also taken account of the submissions made by Mr Proffitt in his skeleton argument, as well as the legal principles contained therein.

## THE LAW

12. In relation to the claim of unfair dismissal, section 111(2) Employment Rights Act 1996 provides:

“(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.”

13. When considering s.111 of the Employment Rights Act 1996, the burden of proof rests with the claimant at both stages of the test.
14. It is a question of fact in each case whether it was reasonably practicable to present a claim in time. The tribunal needs to ensure that it considers all of the relevant factors when considering this test.

15. Mere ignorance of the right to bring a claim for unfair dismissal does not of itself amount to reasonable impracticability. The question is was the claimant's ignorance reasonable?
16. Where an employee has knowledge of their right to claim unfair dismissal there is an obligation on them to seek information or advice about enforcement of those rights.
17. In relation to the claim of discrimination complaints, section 123 Equality Act 2010 provides:
  - “(1) Subject to sections 140A and 140B, 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.”
18. When considering s.123 of the Equality Act 2010, it is important to note that there is no presumption that time should be extended. And that the burden rests with the claimant to establish that it is just and equitable to do so. The claimant needs to provide a compelling reason as to why the primary time limit should not apply in his case.
19. The tribunal does have broad discretion when considering whether or not it is just and equitable to extend time. And this is much wider than that which applies when considering reasonable practicability in relation to unfair dismissal. However, extensions are the exception to the rule.

### MATERIAL FACTS

20. The claimant has dyslexia and has had this impairment from an early age. The claimant has difficulty spelling and recording his thoughts in writing.
21. The claimant started working for the respondent on 13 October 2012.
22. During this period in question, the claimant had access to the internet through his mobile phone. Although he was not highly competent on IT issues, he was able to send emails and to undertake internet searches on his mobile phone.
23. At some point during 2017, the claimant considered himself to have been subjected to a period of sex and/or sexual orientation discrimination by Mr Imran, which extended back to 2014.
24. During 2017, the claimant raised a grievance about his treatment. The respondent investigated the claimant's allegations. The claimant's grievance was not upheld
25. Still during 2017, the claimant appealed the grievance decision. Again, this decision was not upheld.
26. At around the same time of the 2017 grievance/appeal, the claimant visited the USDAW Trade Union offices and explained the situation to the Union Officer. The Union Officer handed the claimant a copy of an ET1 and told him that he would have to fill it in. He was told that his Trade Union representative would help him. The claimant did not fill the ET1 in in relation to matters that made up his grievance

as he did not think that he would be able to.

27. The claimant was well enough to work throughout 2017, 2018 and the up until August 2019. He was physically and mentally capable during this period.
28. The claimant was diagnosed with anxiety and depression in June 2019. From around this period the claimant would suffer from low moods. At least from 11 July 2019 the claimant was prescribed 30mg Mirtazapine to be taken daily. This was to help the clamant with his mood. This dosage has not changed throughout the period between the claimant's dismissal and presentation of his claim form.
29. In August 2019, the claimant went off sick from work with stress. The claimant never returned to work before his dismissal.
30. In or around August 2019, the claimant was absent form work with sickness.
31. In February 2020, the claimant was subject to a disciplinary investigation. He engaged in this process. During the investigation meeting, which the claimant participated in at home over the phone, the claimant was accompanied by a Trade Union representative, Ms Claire Hanson. Ms Hanson was a legal officer of USDAW.
32. The claimant attended a disciplinary hearing with the respondent on 21 April 2020. This was again held over the telephone. The claimant was again represented by Ms Hanson. At the end of this hearing the clamant was told that he was being dismissed.
33. The claimant was dismissed on 22 April 2020.
34. The claimant appealed his dismissal. Again, he engaged with this process, and he was again assisted by and represented by Ms Hanson. The appeal hearing took place on 10 June 2020. This again took place over the telephone.
35. The claimant's appeal against his dismissal was rejected on 10 June 2020.
36. Mr Imran had no input or involvement with the disciplinary and appeal process.
37. The claimant contracted COVID on 16 October 2020. This made him quite unwell.
38. The claimant wrote to the respondent with a number of post-dismissal allegations on either 23 or 24 October 2020.
39. At some point during December 2020, just before Christmas, the claimant was feeling a bit better, and walked up through town seeking legal advice. Unfortunately, the claimant did not secure legal assistance as he did not have the means to pay for this.
40. The post-dismissal allegations were investigated by Mr Marberley. During the period of investigation, the claimant was in contact with Mr Maberley on a number of occasions. There were at least six occasions between 01 December 2020 and 19 January 2021 when the claimant was in contact with Mr Maberley. This was a mixture of phone calls and email over the claimant's mobile phone.
41. The respondent, having investigated the allegations made by the claimant, on 21 January 2021 wrote to the claimant rejecting the allegations that he raised, on the grounds that there was no evidence to substantiate them. Mr Imaran had no involvement in this investigation or decision.
42. In advance of commencing the claim process, the claimant received some help from a local Advice Centre. The claimant was aware of the Advice Centre as he

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had been assisted by it in the past, when claiming Personal Independence Payment ('PIP'). The advisor there helped the claimant with his claim, and told him to make an application to extend time.

- 43. The claimant made contact with ACAS for the purpose of Early Conciliation on 05 July 2021. The ACAS Early Conciliation Certificate was issued on 16 July 2021.
- 44. The claimant presented his claim form on 30 July 2021. The claimant completed this himself. The claimant used his mobile phone to help him with his spelling before completing the form.
- 45. As part of presenting his claim, the claimant attached a document in which he applied for an extension of time. The format used was as follows:

To the employment tribunal

between James gibbin Claimant

Tesco Extra Respondent

Request for extension of time

OPF E&W  
30 JUL 2021

- 46. The claimant received further assistance from the legal advice centre when preparing his witness statement for today.

**CONCLUSIONS**

(i) Unfair dismissal

- 47. I first turn to consider the unfair dismissal complaint. The effective date of termination was 22 April 2020 and therefore the primary time three month time limit expired on 21 July 2020. The claimant did not commence ACAS Early Conciliation until 05 July 2021, and with this being outside of the primary time limit, he did not benefit from an extension of time. The claim form was not validly presented until 30 July 2021. It has therefore been presented significantly out of time. In fact, the claim has been presented over one year out of time, with respect the unfair dismissal complaint.
- 48. The claimant has produced no good reason as to why during the primary time limit he was not able to notify ACAS of his intention to bring a claim or indeed present an ET1.
- 49. The burden rests on the claimant to furnish the tribunal with a satisfactory reason as to why a claim was not presented in time. The claimant's position rests on his health being too poor to allow him to complete the claim form. This includes due to him suffering from arthritis, having angina, possibly gout, and anxiety and low mood. However, there is nothing to support that these were so severe so as to prevent the claimant from commencing a claim in time.
- 50. I have no reason to doubt that the claimant suffered from low mood. And that he

had good days and bad days. And I have no reason to doubt that the claimant focused on other things, rather than completing a claim form during his good days, a reason which the claimant presented to the tribunal. However, there simply is no evidence that supports a finding that his conditions were such that it was not reasonably practicable to bring his unfair dismissal claim within the requisite time limit.

51. The claimant throughout the dismissal process, and earlier, had access to assistance and advice from his trade union representatives. And further, had an understanding of how to bring a claim (that being through filling out a claim form), having previously been told by a Trade Union officer at USDAW. He had knowledge of , and made use of free legal advice centres, again a source of guidance that the claimant was aware he had access to throughout the period in question. Further, the claimant had access to the internet throughout this period on his mobile phone. And even giving some leeway for his lack of knowledge on IT matters, it would have been feasible for him to undertake some very basic research following his dismissal as to his rights, and time limits for bringing such a claim.
52. The claimant was able to engage in making an appeal and to attend at an appeal hearing on 10 June 2020. Being able to make an appeal and engage in that process, including attending a hearing (albeit by telephone) suggests that the claimant's health at this point was not such a level that he would have difficulty presenting a claim form. And given that no evidence has been produced to suggest that following the appeal outcome the claimant's health deteriorated, I conclude that at the date on which the time limit for bringing an unfair dismissal claim expired he must have continued to be as well as he was during that appeal process. He would therefore would have been well enough to be able to commence a claim in time. As such, I conclude that it was reasonably practicable for the claimant to present his claim within the primary time limit. His claim was brought out of time, and the tribunal does not have jurisdiction to hear his unfair dismissal claim.
53. Even if I am wrong on my primary conclusion above, the claimant must have been well enough to present a claim form as at 24 October 2020, when he raised post-termination allegations, and engaged in an investigation process. He produced a written document where he raised a number of issues he had about the treatment of him by Mr Imran (and engaged in correspondence and discussions with the investigator up until the decision was made). The claimant has produced no evidence as to why he could not present his claim between 24 October 2020 and 30 July 2021. So even if I was wrong on my primary conclusion, a reasonable period thereafter the expiration of the primary time limit would have concluded on or around 24 October 2020. And presenting a claim some 9 months after this would not be bringing his claim within a reasonable period after the expiry of initial 3 month time limit. This would have also resulting in his claim being rejected for lack of jurisdiction.
54. In short, the claimant relies on his health as the reason why it was not reasonably practicable for him to bring his unfair dismissal claim in time, and as to why he waited until 30 July 2021 to present his claim form. However, the claimant has not satisfied this tribunal that his ill-health was such that it was not reasonably practicable to bring his claim in time, and further, there was no evidence that explained why he did not bring his claim by 24 October 2020, at the latest. This was against the background where the claimant knew of the sources of advice available to him, had access to those sources, knew how to commence proceedings in the Employment Tribunal since 2017, was able to articulate his concerns in writing and had the equipment available to him to undertake the necessary research.
55. I am satisfied therefore that the Employment Tribunal does not have jurisdiction to

hear the claim of unfair dismissal and it is dismissed.

(ii) Equality Act 2010 claims

56. The second set of claims I am grouping together as the Equality Act claims. There is a different test applied when considering whether to extend time for claims brought under the Equality Act 2010 when compared to unfair dismissal complaints. The claims brought by the claimant all have a 3 month primary time limit, but where claims are brought outside of this primary time limit, the Employment Tribunal may extend time and accept jurisdiction over a claim where it is just and equitable to do so. This involves considering the reason for the delay, alongside all of the relevant factors and balancing the prejudice accordingly.

57. In respect of the relevant time limits, the following would apply:

- a. The disability discrimination complaints, ending with the appeal decision, have a final act date of 10 June 2020. The primary time limit therefore expired on 09 September 2020.
- b. Any claims for sex and/or sexual orientation discrimination concerning the conduct of Mr Imran has a final act date of 02 August 2019. The primary time limit therefore expired on 01 November 2019.
- c. Any potential victimisation claim concerning the conduct of management has a final act date of 02 August 2019. The primary time limit therefore expired on 01 November 2019.
- d. Any claims concerning Mr Maberley has a final act of 21 January 2021. The primary time limit therefore expired on 20 April 2021.

58. However, similar to the conclusions above when concluding with respect the unfair dismissal claim, there is no compelling reason advanced by the claimant as to why time should be extended. The claimant relies on the same reason as that recorded above, namely his ill-health. And therefore all the conclusions expressed above when considering whether to extend time to accept jurisdiction over the claimant's unfair dismissal complaint equally apply here, and will not be repeated.

59. I take into account the guidance of Auld LJ in **Robertson v. Bexley Community Centre t/a Leisure Link [2003] IRLR 434** as follows:

"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

60. The claimant has not presented a convincing reason to extend time on a just and equitable basis.

61. I am also satisfied that if I allowed this claim to proceed, there would be prejudice to the respondent that outweighs the prejudice caused to the claimant.

- a. In terms of prejudice to the claimant, he would not be able to bring his claims and have them determined. However, this is present in all cases presented late by a claimant. No further prejudice was submitted by the



claimant, nor was I able to identify anything else.

- b. In terms of prejudice to the respondent, I take account the following:
- i. b. and c. above are significantly out of time, with the matters complained of being almost 21 months out of time. a. occurred almost 11 months out of time. Whilst d. is some 3 months out time. These matters, for the most will rely heavily on witness statements. Memories evidently fade over time, and allowing claims to be pursued quite significantly out of time on matters that witnesses may have difficulty recalling will be prejudicial to the respondent. This could include matters going back to 2013.
  - ii. None of the claims are in time, so the respondent would be facing a claim that it considered was not being brought.
  - iii. The respondent would have the need to call a significant number of witnesses due to the scope of the allegations made. Although, I appreciate that this could be mitigated through costs if needed.

62. Most significant in my view, when considering the balance of prejudice, is the need to hear oral evidence from respondent witnesses who would not have turned their mind to these matters until a claim for was presented. Given the period of time that has passed in relation to each of these matters, this weighs heavily against extending time to accept jurisdiction over the claim.

63. No good reason has been put forward to justify an extension of time on the grounds that it is just and equitable to do so. And further, the balance of prejudice weighs against doing so. In those circumstances, the Employment Tribunal does not have jurisdiction to hear the discrimination complaints, which are all dismissed.

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Employment Judge Mark Butler

Date: 10 February 2022

JUDGMENT SENT TO THE PARTIES ON

17 February 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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