# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Tracey Davies

**Respondent:** Marks and Spencer plc

**Heard at:** **Cardiff ET** **On:** **18th March 2022**

**Before:** Employment Judge J Bromige

**Representation**

Claimant: Mr Ryan Edwards (the Claimant's Son)
Respondent: Ms Bianca Balmelli (Counsel)

# JUDGMENT

1. The Claimant's application to amend her claim, dated 7th February and 2nd March 2022, is refused.

2. The Claimant's claims as set out in her ET1 dated 31st July 2021 are dismissed under Rule 27 of the Employment Tribunal Rules of Procedure (as subsequently amended up to 6th October 2021) because the Tribunal has no jurisdiction to consider the claims.

---

# REASONS

3. This is the judgment of the Employment Tribunal in Case Number: 1601051/2021, Miss Tracy Davies v Marks and Spencer plc, held remotely at Cardiff ET on 18th March 2022.

4. The Claimant was represented by her son, Mr Ryan Edwards, and the Respondent by Ms Bianca Balmelli (Counsel).

5. The case was listed before me for a 3 hour preliminary hearing to determine whether the Claimant's claim of unfair dismissal under s.94 and s.98 Employment Rights Act 1996 ("ERA 1996") had been presented out of time, and if so, whether it had been presented in such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable. It was agreed that the ET1 was presented 917 days

after expiry of limitation for the unfair dismissal claim

6. A further issue arose in that the Claimant was also applying to amend her ET1 to include an allegation of disability discrimination under the Equality Act 2010 ("EqA 2010"). I will set out a full chronology of the proceedings, including the scope of the amendment application below.

## Procedure

7. The case was listed via CVP, with both parties connecting via respective devices allowing them to be both seen and heard by the Tribunal, and vice versa. However, it became apparent very early on in the hearing that the Claimant was having difficulties with her internet, with both the camera and audio freezing intermittently, meaning that the Claimant and her Representative were struggling to follow proceedings or hear what I was saying.

8. Ms Balmelli indicated that she did not have any difficulty in the Claimant attending via telephone, and, further that she would have no difficulty in cross-examining the Claimant by telephone either. I allowed a short adjournment at 1015hrs for the Claimant to try and fix her internet issues, but after resuming at 1030hrs, the problem was still ongoing, and so I granted a short further adjournment to allow the Claimant and her Representative to dial in by telephone.

9. Fortunately the Claimant was able to reconnect via laptop so we could see both her and her representative, and at the same time, dial in via telephone to provide audio. I was satisfied that the Claimant was able to fully participate in the hearing across these mediums, and so the hearing proceeded without any further adjournments.

## Chronology

10. On 27th October 2018, the Claimant's employment with the Respondent terminated.

11. On 31st July 2021, the Claimant submitted an ET1, identifying that her effective date of termination ("EDT") was 27th October 2018 and claiming that she was unfairly dismissed.

12. On 26th September 2021, EJ Ryan wrote to the Claimant indicating that the claim may be out of time, and seeking clarification of the EDT. If the EDT was correct, then the Claimant *"would have to establish in due course that it was not reasonably practicable for you to present a claim in time"*.

13. On 2nd October 2021 the Claimant confirmed her EDT was 2nd October 2021, and then on 4th October 2021 the Respondent filed an ET3. The ET3 focused on the time issue, and requested that the claim be struck out.

14. On 5th November 2021, EJ Jenkins considered the case under Rule 27(1) of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") and ordered that *"that claim will stand dismissed on 19th November 2021 without further order, unless before that date the claimant has explained in writing why the claim should not be dismissed"*.

15. The Claimant's representative responded on 8th November 2021 (not copying in the Respondent) and stated:

    *I am required to explain why this claim has only now been filed, and can easily demonstrate the multiple factors as to why so (and have already partially done so in the original claim form), particularly as the Respondent's only defence is that the claim has been brought after the 3 months deadline (my mother was, until recently, not aware that she is entitled to pursue a claim against* [the Respondent] *let alone that there is a time limit), which will also be their only 'viable' defence if the claim is allowed to go forward.*

16. EJ Brace considered the letter and considered that it did not comply with the order of EJ Jenkins. On 15th November 2021, she directed that the Claimant must explain in writing why the claim should not be dismissed.

17. The Claimant wrote a hand-written letter which was received by the Tribunal on 18th November 2021. Regrettably this letter was not copied to the Respondent although Ms Balmelli had a chance to consider it at the hearing.

18. On 7th February 2022, the Claimant wrote to the Tribunal (again not copying in the Respondent) attaching an amended ET1 claim form. The only amendment was at §8.1, with the "disability" box now ticked.

19. On 2nd March 2022 EJ Moore directed that the Claimant clarify the scope of the amendment. A response was received on the same day that *"after seeking advice have updated the ET1 on the basis that the unfair dismissal is disability discrimination and have checked the appropriate box"*.

**The scope of the amendment application**

20. In discussion with the Claimant's representative, it was confirmed that the disability relied upon by the Claimant was the *"consequences and impact upon the Claimant arising from her hip operation in March 2018"*. The hip operation is referred to in the ET1, as is fibromyalgia. The Claimant confirmed that she was not relying on fibromyalgia as a disability.

21. The act of discrimination was the Respondent's decision to dismiss the Claimant. It was advanced in two ways. Firstly, that the Claimant had been treated differently to an employee without her disability in being dismissed (i.e. a direct disability discrimination claim under s.13 EqA 2010). Secondly, that she was dismissed because of her sickness absence, i.e. something arising from her disability, so a claim of discrimination arising from disability pursuant to s.15 EqA 2010.

22. In discussion with the parties, it was agreed that the Tribunal would consider the amendment application having heard evidence from the Claimant as to the reason for the delay, and allow the Respondent to cross-examine and make submissions both on the "reasonably practicable" test for the unfair dismissal claim, and the "just and equitable" test for the discrimination amendment.

**Findings of Fact**

23. The Claimant was employed by the Respondent as a Customer Assistant between 19th September 2012 until her dismissal on 27th October 2018. She had previously worked for the Respondent between 1984 – 1996, when she left to work elsewhere. She told me, and I accept, that up until 27th October 2018 she has always been in employment of some sort since she was 15 years old.

24. In March 2018 the Claimant underwent a full hip replacement. The operation was successful, with no complications, although she had to undertake regular physiotherapy, and had the use of crutches. She returned to work for a few weeks in May 2018, but went back off work from 22nd August – 18th October 2018. There is a dispute between the parties as to whether this absence was unauthorised or supported by a sick note.

25. On 27th October 2018 the Claimant was dismissed by a letter for gross misconduct. The Respondent said that she was absent without authorisation and failed to maintain contact with the Respondent between 22nd August – 18th October 2018, including failed to return any telephone calls. The letter informed the Claimant of her right to appeal, which she did not pursue.

26. I accept that the Claimant informed both her son and daughter around this time of the dismissal, and also find that at this time the Claimant suffered a period of low mood as a result of her dismissal which required anti-depressants. I cannot make a finding as to the exact length of her low mood or depression, or the impact of any medication that she says she was prescribed, as there is no medical evidence before the Tribunal, and that the Claimant did not raise this as a potential reason, either in her correspondence with the Tribunal on 8th November 2021, in her letter of 15th November 2021 or in her email of 7th February 2022.

27. I further accept that the Claimant at all material times was unaware or ignorant of her ability to pursue a claim before the Employment Tribunal arising from her dismissal, although I also find from her evidence to me today that upon receipt of the dismissal letter she certainly felt that she had been treated unfairly by the Respondent.

28. At some point in July 2021, the Claimant had a conversation with her neighbour, who asked her if she was still working for the Respondent. The Claimant told her neighbour what had happened, to which her neighbour indicated that she had been treated unfairly and should consider a claim for unfair dismissal.

29. It is unclear how the Claimant came to be informed of ACAS, or the exact nature of the support she received from her son, who was assisting her at the time. However from the ACAS Early Conciliation Certificate, the Claimant contacted ACAS on 19th July 2021, which was the same day as the Certificate was issued.

30. The Claimant issued her ET1 form, completed online, on 31st July 2021, some 12 days after the EC Certificate was sent to her.

31. On 7th February 2022, the Claimant submitted an amended ET1, ticking the "disability" box at §8.1, and confirmed on 2nd March 2022 that this

amendment was done having sought advice. The Claimant was unable to explain exactly what this advice was.

**The Law**

32. For a claim of unfair dismissal, s.111(2) ERA 1996 requires a Claimant to present a claim before the end of the period of three months beginning with the EDT, or 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.

33. In *Dedman* [1974] ICR 53, the Court of Appeal observed (per Scarman LJ)

*…does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance*.

34. In *Walls Meat Co Limited* [1978] IRLR 499, the Court of Appeal held that ignorance or mistaken belief would not be reasonable if it arises from the fault of the complainant in not making such enquires as he should reasonably in all the circumstances have made.

35. If the claimant satisfies the tribunal that it was not reasonably practicable to present his claim in time, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter.

36. In *Cullinane v Balfour Beaty Engineering Services Limited* UKEAT/0537/10/DA, Langstaff P stated:

*The question* [of within a reasonable time thereafter] *is what period – that is, between the expiry of the primary time limit and the eventual presentation of the claim – is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months.*

37. As to the application to amend, I have regard to the principles in *Selkent Bus Co Limited* [1996] ICR 836, namely:

    a. The nature of the amendment
    b. The applicability of time limits
    c. The timing and manner of the application

38. When assessing the applicability of time limits, and the overall issue of limitation, I direct myself that the statutory provision for time limits for EqA 2010 claims and extension of time is distinct from the ERA 1996. s.123 EqA 2010 that the claim must be brought within the period of 3 months starting with the date of the act of discrimination, or such other period as the employment tribunal thinks just and equitable.

39. Further, on the issue of time limits, as per *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634, per HHJ Hand QC at para [68]:

    *Alternatively, for the reasons set out above, I am bound to say that I regard Rawson, Newsquest and Amey Services as wrong on the point that, as a matter of law, out of time points must always be determined prior to or at the same time as an application for permission to amend to add a new cause of action is being considered and I am not prepared to follow them on it. I should make it clear, however, that this does not mean it will be wrong in many cases to decide the matters together. I do not for one moment take issue with the proposition that, in order to exercise properly the discretion as to whether to permit or refuse an amendment, it will be necessary to know whether the new claim is out of time. What I am concerned about is that it may not always be possible to know that until evidence, and sometimes, usually in discrimination cases, a great deal of evidence, has been heard. I will return to this later in this judgment.*

40. In the present case, the Claimant's discrimination claims are not involving a continuing act, but rather a one off act of discrimination, namely dismissal. Applying the judgment in *Galilee*, and reminding myself that the principles in the line of authority of *Rawson* are no longer good law, it is permissible for the Tribunal in this instance to consider the over-arching out of time point alongside the application for permission to amend due to the scope of the proposed discrimination claim. This is particularly so because I have in fact heard evidence from the Claimant on the point (*Galilee* at para [109F].

41. The burden is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. In *Adedeji v University Hospitals Birmingham NHS Foundation* [2021] ICR D5, the Court of Appeal confirmed that the best approach in assessing whether to exercise discretion to extend time is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, the length of and reasons for the delay.

**Conclusions – the Unfair Dismissal Claim**

42. Whilst the Claimant was ignorant of her statutory rights, the Tribunal's judgment is that this ignorance was unreasonable in all the circumstances. The Claimant has been employed for the majority of her life, and it is difficult to conclude that she would not have gained some knowledge of such rights during that period. Furthermore, the Claimant was at least aware of being able to pursue an internal appeal in October 2018, which she did not do. This indicates to the Tribunal that she sought to ignore or move past the fact of her dismissal, even if she did not agree with it, rather than challenge it.

43. Furthermore, the Claimant has been assisted throughout these proceedings

by her son, who was aware of the dismissal in October 2018, and so would have been a further source of information and potential research into the possibility of bringing a claim.

44. Whilst I accept that the Claimant has suffered some emotional impact as a result of her dismissal, including being prescribed at one point, anti-depressant medication, in the absence of such medical evidence, I cannot accept that the Claimant's medical condition presented her from investigating the potential of a claim for a period of near 30 months. The order of EJ Jenkins from November 2021, and EJ Ryan in September 2019 was clear that the Claimant needed to establish evidence, that is present evidence, which she has failed to do.

45. Therefore the judgment of the Tribunal is that it was reasonably practicable for the Claimant to have presented her claim within time, or, if I am wrong on that point, certainly at a time earlier than the 917 days that it took her after the expiry of the three month time limit.

46. In the alternative, if I am wrong as to the reasonableness of the Claimant's ignorance, by 19th July 2021 she was fully aware of both her ability to bring a claim and the need to bring a claim as soon as possible. The 19th July 2021 was a Monday and I am satisfied that she could have presented the ET1, in the format that she did, within 48hrs, so by 21st July 2021.

47. Accordingly the Claimant has presented her claim for unfair dismissal out of time, and the Tribunal has no jurisdiction to hear the claim.

**Conclusions – the amendment application**

48. Turning to the amendment application, the main factor I consider under *Selkent* is the applicability of time limits and the timing of the application. Dealing with the timing of the application first, it seems to me that the Claimant could have brought this claim at the time of issuing her ET1. She has not been able to satisfactorily explain why she did not, especially since she referred to her sickness absence and linked that to her dismissal at §8.2 of the ET1.

49. When considering those matters, I also reject the contention that this could be described as a re-labelling exercise as opposed to introducing a new cause of action. Whilst a factual matrix existed on the pleadings, the Claimant had taken the decision not to pursue a disability discrimination claim arising from the same facts. In my judgment, the claims as presented now are a new cause of action, in that they are based upon a different Act of Parliament, require the Tribunal to consider evidence around disability status, and alter the basis on which compensation can be claimed. The unfair dismissal claim in its current format is limited by s.124(1) and (1ZA) ERA 1996, whilst compensation for a s.39 EqA 2010 dismissal is uncapped.

50. However the most significant factor in determining the application is the time limit point. As I have already found, the Claimant has not been able to properly explain why she did not bring this claim in July 2021, and furthermore, I do not accept her overall ignorance as to her statutory rights as reasonable in the circumstances. The Claimant was aware of her right of appeal, was left with an understandable sense of injustice, but chose not

to do anything for a further two and a half years from the expiry of the three month time limit in January 2019.

51. Therefore, stepping back and analysing the discrimination claim as a whole, both as an application to amend and under s.123 EqA 2010, I refuse the application. Both the factor of the timing and nature of the application, and the applicability of time limits, are factors which fall against the Claimant.

52. However, I go on to consider that even if the discrimination claims had been presented in the original ET1, then I would have refused to extend time under s.123(1)(b) EqA 2010 as, taking into account all the matters set out above, the Claimant has not persuaded the Tribunal that it would be just and equitable to extend time. Whilst I accept the reason for the delay was due to the Claimant being ignorant of her right to bring a claim, I do not find that her difficulties with her mental health prevented her from understanding or researching the position sooner. Taking into account the length of the delay, it would not be just and equitable to expect the Respondent from answering such a claim some 31 months after the expiry of the three month time lmit.

53. Therefore the judgment of the Tribunal is that permission to amend the Claimant's claim is refused, and the claims contained in her originating ET1 dated 31st July 2021 are dismissed under rule 27 of the ET Rules.

Employment Judge **J Bromige**

Date: **27th March 2022**

JUDGMENT & REASONS SENT TO THE PARTIES ON 28 March 2022

FOR THE TRIBUNAL OFFICE Mr N Roche