



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D N Flannigan

**Respondent:** Ossur UK Limited

**HELD AT:** Manchester

**ON:** 8 October 2021

**BEFORE:** Employment Judge B Hodgson (sitting alone)

## REPRESENTATION

**Claimant:** Mr H Hanley, stepfather

**Respondent:** Ms A Shortman, Solicitor

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

## REASONS

### Background and Issues

1. In her ET1 Claim Form, the claimant indicated she was pursuing claims of unfair dismissal and race discrimination (Box 8.1). The basis of the claim was set out at Box 8.2 but did not expand upon the claim of race discrimination. There is also within the ET1 Claim Form (albeit at Box 9.2 and not indicated as being one of the claims being made at Box 8.1) reference to a possible sex discrimination claim

2. By letter from the Employment Tribunal dated 26 February 2021, the claimant was asked to provide details of the basis of her claim of race discrimination. The claimant replied with such details by letter dated 10 March 2021, indicating also that a claim of sex discrimination was being pursued. The letter includes reference to the claim that the claimant had been bullied by both her manager and her supervisor "over a long period of time" by reason of her sex and race
3. The respondent, in their ET3 Response, denied all claims but also raised the issue of jurisdiction, submitting that the claims had been presented out of time and should accordingly be dismissed. Further application was made by the respondent for Strike Out or, in the alternative, a Deposit Order
4. By letter from the Tribunal dated 28 April 2021, the matter was listed for this Open Preliminary Hearing to determine
  - a whether the claimant's claim of unfair dismissal is out of time and if so whether time should be extended
  - b whether the claimant's claims of discrimination (protected characteristic of race) are out of time and if so whether time should be extended
5. Subject to the Tribunal's findings in respect of the jurisdiction issue, the Tribunal would go on to consider the strike out/deposit order application then to make further case management orders, if necessary or appropriate
6. The issue of jurisdiction was accordingly firstly considered at this Preliminary Hearing. If and to the extent that a claim of sex discrimination is also intended to be pursued, the issue of jurisdiction in respect of that claim would stand or fall with that of the claim of race discrimination

### Facts

7. Both parties had prepared a bundle of documents for reference at the hearing with significant overlap. Reference to documentation within these Reasons is to the pages as numbered within the respondent's bundle except where otherwise noted
8. The claimant had prepared a witness statement (Document 5 of the claimant's bundle). This statement however, described as "Background to Claim", summarised events leading up to the claimant's resignation rather than the issue of jurisdiction. The claimant had however set out her position on the issue of jurisdiction at Box 4.2 of the Agenda she had prepared (see Document 4 page 3 of the claimant's bundle). This was accepted by the Tribunal as the claimant's evidence in chief but she was given the opportunity also to expand upon the content when giving her evidence orally
9. The claimant gave oral evidence on her own behalf and did not call any additional witnesses. The respondent did not call any witnesses

10. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the jurisdiction issue - on the balance of probabilities, having considered all of the evidence before it both oral and documentary
11. It is an agreed fact between the parties that the claimant resigned from her employment with the respondent on 12 November 2020 with immediate effect, that accordingly being the effective date of termination. She had been employed by the respondent since 21 July 2014
12. It was further agreed that the final date therefore for presenting claims of unfair dismissal and of discrimination, being three months from the termination date, is – subject to any extension as a consequence of the ACAS Early Conciliation provisions - 11 February 2021
13. There had been a horrific incident resulting in the death of a family member of the claimant in or about July 2020. The incident led to criminal proceedings which ultimately were not concluded until early February 2021
14. In or about November 2020, the client was diagnosed as potentially suffering a serious physical medical condition with investigations in this regard ongoing
15. The claimant obtained new employment on 16 November 2020 which she continues to hold. Notwithstanding the above two issues, the claimant has not taken any time off from her new employment since it began
16. The claimant gave evidence as to the events leading up to the presentation of the ET Claim Form which were not materially challenged on behalf of the respondent. She was assisted throughout by her step-father who also represented her at this hearing
17. The claimant had decided in or about December 2020 to issue Tribunal proceedings. She and her step-father investigated the steps necessary to do so on the internet although she could not recall specifically which sites she had explored. They did however include the ACAS website
18. Some two weeks or so prior to the expiry of the time for presenting her claims, she was reminded by her step-father of the approaching time limit. No action to present the claim was however taken by them until 11 February 2021
19. By email timed at 22.32 on 11 February 2021, the claimant purported to present her ET1 Claim Form. This email was addressed to HMCTSforms@justice.gov.uk and also to manchester@justice.gov.uk. The latter address is not a valid email address. The former replied the following day at 12.28 to indicate that they cannot accept service of an ET1 Claim Form at this address (see Document 1 of the claimant's bundle)
20. The claimant's evidence up to this point was not challenged by the respondent and is accepted by the Tribunal

21. The claimant's evidence was that her step-father then hand delivered the ET1 Claim Form, hard copy, to the Manchester Employment Tribunal office on 12 February. The claimant had not at that stage engaged with the ACAS Early Conciliation process. The claimant's understanding from her step-father is that the Claim Form was physically accepted by the Tribunal
22. Without an ACAS Early Conciliation reference number, an ET1 Claim Form is not valid. The clear assumption to make is that this omission was pointed out to the claimant (or specifically her step-father who had purported to present the document)
23. The reason for drawing this assumption is that the claimant (or her step-father on her behalf) subsequently contacted ACAS on that day (12 February) and an Early Conciliation Certificate was subsequently issued on 18 February (page 1)
24. A further ET1 Claim Form was subsequently presented to the Tribunal which is annotated as presented on 21 February 2021 (pages 2 – 4k). The claimant's evidence is that the form was in fact personally delivered to the Manchester Tribunal by her step-father on 19 February, this being a Friday. The Tribunal accepts this evidence for present purposes given the dates in question and that the Tribunal would not be physically open to the public on the Sunday
25. The copies of the ET1 as presented to the Tribunal at this Preliminary Hearing are a cause for concern. The ET1 Claim Form as ultimately accepted by the Tribunal is referred to above. Within the claimant's bundle (document 3), there is a further version of an ET1 Claim Form which contains typographical differences from the Form accepted by the Tribunal and which the claimant believes was the Form attempted to be submitted on 11 February. This cannot however be correct as it sets out the ACAS reference number which can only have been added at the earliest on 18 February. Although the true status of this document remains uncertain therefore, it does not materially impact on the jurisdiction issue

### Law

26. Section 111 of the Employment Rights Act 1996 states:
  - (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 has been 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*

*(2A) section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection 2(a)*

27. Section 123 of the Equality Act 2010 states:

*(1) Subject to section 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*

28. As referenced within those two sections, there is provision in both the Employment Rights Act 1996 (section 207B) and the Equality Act 2010 (section 140B) for the time frames to be extended to allow for the process of early conciliation but only if the original contact is made with ACAS prior to the expiry of the primary time limit

29. The burden of proof rests with the claimant

30. The Tribunal is mindful of the guidance given by Lord Justice Underhill in ***Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23*** The Tribunal noted the "checklist" set out in the case of ***British Coal Corporation v Keeble [1997] IRLR 336*** but needs to assess all the factors in the particular case which it considers relevant

### Submissions

31. Ms Shortman made oral submissions on behalf of the respondent, summarised as follows

31.1. a decision had been taken by the claimant to issue proceedings in December 2020

31.2. she and her family had been online researching the requirements in this regard

31.3. she had been reminded by her step-father some two weeks prior to their expiry of the relevant time limits

31.4. she was aware of the three month time limit and that she did not have an ACAS Early Conciliation Certificate

- 31.5. she had then left it until 22.32 on 11 February before attempting to present her claim
  - 31.6. there is uncertainty over when the valid claim form (annotated as received on 21 February) had been presented
  - 31.7. the fact that the claimant had been able to attend work throughout the relevant period indicated that she was fully capable of presenting her claim in time
  - 31.8. the claimant must fail on both tests and the claims be dismissed for lack of jurisdiction
32. Mr Hanley also made oral submissions on behalf of the claimant, summarised as follows
- 32.1. they had made a mistake in the email addresses to which the original claim form had been sent and they had sought to remedy this without delay the next day
  - 32.2. they then had to wait for the ACAS process to be completed before further submitting their claim
  - 32.3. they should be penalised for the fact that the Early Conciliation Certificate was not issued until 18 February
  - 32.4. they had now clarified the claims of sex and race discrimination they were bringing so they could be responded to by the respondent

### Conclusions

33. It is agreed that the effective date of termination of the claimant's employment with the respondent is 12 November 2020
34. The claimant attempted unsuccessfully to present an ET1 Claim Form by e-mail at 22.32 on 11 February 2021. A subsequent attempt was made to hand-deliver the claim form the following day, 12 February. The claimant had not at that stage engaged in the ACAS Early Conciliation process as she was obliged to do prior to presenting her claim. The claim was accordingly rejected
35. That same day the claimant contacted ACAS to commence the Early Conciliation process and a Certificate was subsequently issued on 18 February. An ET1 Claim Form was then physically presented to the Tribunal on 19 February although annotated as received on 21 February
36. The Tribunal accepts for present purposes that all claims under both the Employment Rights Act and the Equality Act were presented on that day (19 February) notwithstanding the further clarification of the discrimination claims subsequently requested by the Tribunal

37. As a matter of fact, the claims have been presented out of time. The issue before the Tribunal is therefore whether or not to extend time, for which there are different provisions for the two types of claim brought
38. The factors the Tribunal takes into account include that the time limits are there for a reason and the starting point is that they should be strictly adhered to. In respect of the discrimination claims, the Tribunal notes the allegation that the discriminatory conduct has occurred over a long period of time. Although not particularised in any detail, this clearly opens up the prospect of evidence having to be called spanning a significant period, the claimant having been employed by the respondent since 2014
39. In terms of general context the Tribunal notes in particular
  - 39.1. The fact that the claimant had carried out her own research into the process of presenting a claim including the time limits and specifically including consideration of the content of the ACAS website
  - 39.2. Notwithstanding the background of her potential medical condition and the extreme difficulties presented to the family arising out of the incident involving a family member, the claimant had been able to attend work without time off continuously from November 2020. There is nothing suggested by the claimant beyond the fact of these circumstances to indicate that they caused or played a material part in the delay in presenting the claim
  - 39.3. The claimant was warned by her step father some two weeks prior to the expiry of the imminent approach of the time limits for bringing her claims. Despite this, she had – almost literally – left it to the last minute to seek to present her claim, giving no leeway in the event of difficulties presenting
  - 39.4. The claimant did not seek and did not receive any legal advice. There is no suggestion that she has been misled or badly advised in any way
40. The Tribunal has taken all those factors into account. Its conclusion is unquestionably that it was reasonably practicable for the claimant in all the circumstances to have presented her claim of unfair dismissal within the statutory time limit
41. The issue for the Tribunal in respect of the discrimination claims is whether or not it is just and equitable to extend time to which the Tribunal has given further consideration in the knowledge that finding against the claimant results in her claims being unable to be pursued. The Tribunal however does so find. No compelling explanation has been put forward on behalf of the claimant for leaving the claim to the very last minute and then not presenting a valid claim until after the expiry of the time limit. The fact that she could attend work throughout the relevant period indicates no physical or mental impediment that would prevent her presenting the claim notwithstanding the background

circumstances. She had sought to acquaint herself with the relevant provisions and it was the two very basic points of the time limit and the requirement to contact ACAS prior to issue which were not complied with

42. In the circumstances all claims fail by reason of lack of jurisdiction

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Employment Judge B Hodgson

Date: 19 April 2022

REASONS SENT TO THE PARTIES ON

21 April 2022

FOR THE TRIBUNAL OFFICE

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