



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr I Wall

**Respondent:** Mon Motors Limited

**Heard at:** Cardiff via CVP **On:** 2 November 2021

**Before:** Employment Judge 2021

**Representation:**

Claimant: In person

Respondent: Mr I Jones, Solicitor

**JUDGMENT** having been sent to the parties on 2 November 2021 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

1. The Claimant presented a claim on 4 March 2021. He brought claims of constructive unfair dismissal and discrimination on the grounds of sexual orientation. The Claimant had complied with the ACAS Early Conciliation process; date of receipt of notification ("Day A") was 23 February and the date on which the certificate was issued ("Day B") was 2 March 2021.
2. The ET3 response asserted that both claims were out of time and the respondent requested a preliminary hearing to consider this jurisdictional point. This preliminary hearing was listed accordingly.
3. I had before me a bundle of documents of 78 pages. I had a witness statement and heard oral evidence from the claimant. The claimant also

relied upon a written statement from a former colleague Mr G Russell-Williams. For the respondent I heard from a Mr Craig Walters, former Head of Business and claimant's former line manager and Mr Dean Stonehouse, current Head of Business. Both submitted written witness statements.

**Findings of fact**

4. The Claimant was obliged to give one month's written notice to his employer under the terms of his contract of employment. The Claimant resigned from his employment on 6 November 2020 by letter. In his letter he stated that "in accordance with the period of notice I would request to leave as soon as possible."
5. The Claimant accepted that the last day of his employment was 16 November 2020. Under cross examination the Claimant told the Tribunal that his notice period was brought forward and he had not asked for this. Had his notice period been kept as per his contract that would have taken him to 3 December 2020. The Claimant had accrued 19 days holiday at the time of his resignation. According to Mr Stonehouse the Claimant asked to go as soon as possible and after discussions with HR it was agreed to release him as of 16 November 2020.
6. I find that given the Claimant had requested to leave as soon as possible, that there was an agreement his employment would terminate on 16 November 2020. In any event, this was the date on his P45 and he also agreed this was the date his employment ended on the ET1. This means that the primary limitation date was 15 February 2021.
7. The Claimant had experienced, prior to his resignation, a period of stress at work which had affected his mental health. He had been signed off by his GP from 28 August 2020, the Fit Notes were before me in the bundle. The Claimant was signed off with stress at work. The Claimant chose not to take medication to manage his mental health issues and had tried to struggle through. The last Fit Note before me was 28 days from 5 October 2020.
8. Shortly before the Claimant's last day he returned his car to his employer and told his managers that he had an interview for a new role. I accepted the Claimant's evidence when he stated that he had been putting on a brave face during that interaction with his employers.
9. Following the Claimant's resignation he went through an interview process and secured a new job with an Estate Agency, starting in January 2021. The Claimant had a manager who was sympathetic to his mental health issues, but at that time the Claimant was fit to be working. He was working from home and this helped him with his symptoms. He underwent a period

of training, dealt with customers on the phone and online and was able to fulfil these activities without any issues.

10. In April / May 2021 the claimant left this role and again went through a recruitment process to start a new role with a company called MotoNovo Finance. The claimant had struggled to hold down these roles due to his mental health at that time. He then left that job and is currently in another role with HMRC which he began in September 2021.
11. The Claimant's witness statement stated that the reason he delayed making the claim was he was not in the right frame of mind due to ongoing stress and anxiety and he could not face up to life in general and wanted the world to end. He only managed to submit the claim when he felt well enough to do so and did so as quickly as he could.
12. The Claimant accepted under cross examination that he did not contemplate bringing a claim until he was given a telephone number for ACAS by his father on or around 23 February 2021. When he subsequently contacted ACAS on 23 February he was told he was out of time and that he should make a claim as soon as possible. He did so on 4 March 2021 which the Claimant said was the first occasion that he felt able to do so given his ongoing mental health problems he was experiencing as well as a bereavement that he had suffered on 8 February 2021 when his grandmother had passed away following a long period in hospital.
13. The Claimant did not undertake any research as to how to bring a claim to the Employment Tribunal including no research on time limits or the procedure involved.
14. The claim form itself did not present any particulars of discrimination other than an incident that took place on 21 February 2013. Mr Waters admitted to arranging for the supply and placing large capital letter stickers on the Claimant's company car which read "Ieuan is gay". I saw a photograph of the stickers on the car within the bundle. At that time Mr Waters was the claimant's line manager. Mr Waters told the Tribunal that he intended this to be a joke as the Claimant was known within the company to be heterosexual and to have a girlfriend and that no one thought the Claimant was actually gay. He told the Tribunal that when the claimant returned to work he [Mr Waters] together with other staff "had a laugh" with the claimant about it and "he did not seem to be upset at all and appeared to take it as the joke it was always intended to be".
15. I accepted the Claimant's evidence as to why he did not take this further at the time. The Claimant was 22 years old at the time of the incident, he was hurt and very embarrassed and he did not know how or to whom he should complain. The Claimant also told the Tribunal that he feared that he would

be withheld commercial leads if he complained and as he was on a minimum basic salary of £8,000 this would have had financial consequences for the Claimant.

16. It should be noted that the Claimant had alleged that the stickers had been placed by Mr Stonehouse, who denied the allegations. I find, given Mr Water's admission, that the stickers were not placed by Mr Stonehouse but by Mr Waters.

## **The Law**

17. I took some time to explain to the Claimant as a litigant in person, there are two tests that I must apply when considering whether his claims had been presented in time.

S111 Employment Rights Act 1996 provides:

### **111 Complaints to employment tribunal**

**(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 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.**

18. The burden of proof is on the Claimant to show it was not reasonably practicable to have presented the claim in time. The Tribunal must go on to consider whether the further time in which the complaint was presented was reasonable. These are questions of fact for the Tribunal (*Palmer v Southend-on-Sea Borough Council* [1984] IRLR 119).

19. Ignorance by the Claimant of the right or procedure to bring a claim will not be grounds for an extension unless the ignorance was reasonable in the circumstances (*Wall's Meat Co Ltd v Khan* [1979] ICR 52, C.A.).

20. The unfair dismissal claim is a test of reasonable practicability so this is a two stage test and the burden of proof is on the Claimant to show that it was not reasonably practicable to have presented the claim in time and if I find that was the case, was the claim presented in such further period of time as I think to be reasonable.

21. The test for the discrimination claim is set out in Section 123 of the Equality Act 2010. This provides:

S123 EQA 2010 provides:

**123 Time limits**

(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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

22. The key date as to when time starts to run is the date of the act (**Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24**).

23. In **British Coal Corporation v Keeble and others [1997] IRLR 336** the EAT suggested the following should assist Tribunals when considering the exercise of discretion. The relevance will depend on the facts of the case. The Tribunal should consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

(a) the length of and reasons for the delay;

- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued had cooperated with any requests for information;
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and
- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

24. 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 (per Lord Justice Auld in **Bexley Community Centre (Trading as Leisure Link) v Francis Robertson [2003] EWCA Civ 576**).

25. The Claimant referred me to the case of **Norbert Dentressangle Logistics Ltd v Mr Graham Hutton UKEATS/0011/13**. In this case, the EAT upheld the Tribunal decision that it was not reasonably practicable for a Claimant to begin proceedings within 3 months of his dismissal, despite the fact he had entered into detailed email correspondence and pursued a grievance in respect of related matters during that time, because it was prepared to accept his evidence that he simply became unable to function properly and could not bring himself to do it. In that case, the Claimant had given evidence about his inability to leave the house except to go to buy food and that he was refusing to answer telephone calls. He was ignoring incoming mail and later, he was unable to deal with the outstanding electricity bill.

### Conclusions

26. The claimant's effective date of termination was 16 November 2020 giving a primary limitation date of 15 February 2021 for the unfair dismissal claim. In respect of the discrimination claim this was significantly out of time. The incident took place on 21 February 2013. The primary limitation date was therefore 20 May 2013. He contacted ACAS on 23 February 2020 and issued a claim on 4 March 2020.

### Unfair dismissal claim

27. The relevant period to consider when deciding whether it was reasonably practicable is between 16 November 2020 and 4 March 2020. I accept the Claimant's evidence that he was experiencing mental health issues before he resigned from his employment and for a period thereafter. However, I also accept Mr Jones's submissions that there is no medical evidence

before me that would support me being able to reach a conclusion that the Claimant was incapacitated to the extent it would not have been reasonably practicable for him to have brought his claim within the required time limits. He was not taking or prescribed any medication and I had no evidence he continued to seek help from his GP after the expiry of the last fit note on 2 November 2020. In particular the Claimant was able to go through a recruitment procedure and work full time training in a new role.

28. I have also taken into account the bereavement suffered by the Claimant at that time. Whilst this was understandably a distressing time for the Claimant again I have no evidence before me to support a conclusion that he was incapacitated to the extent it would not have been reasonably practicable for him to have brought his claim within the required time limits.
29. The Claimant did not at any point contemplate bringing a claim until he was provided with contact details for ACAS by his father, at some time on or before 23 February 2020. He did no research or make any enquiries in how or when to bring a claim. In my judgment, this cannot amount to reasonable ignorance of the right to bring a claim or ignorance of time delays.
30. In my judgment, the facts in **Norbert Dentressangle Logistics Ltd v Mr Graham Hutton** can and should be distinguished on the facts of this particular case. In that case the Judge accepted the Claimant's evidence (there was no medical evidence in that case) that the Claimant was not functioning at all and he had been unable to leave the house except to buy food and also refused to answer the telephone or deal with any post. This differs from what the Claimant was plainly able to do during the relevant period.
31. On the basis of the evidence before me I have decided that it was reasonably practicable to have presented the claim in time and as the Claimant failed to do so, there is no jurisdiction to hear the claim.

#### Discrimination claim

32. Turning now to the discrimination claim. I set out in my order dated 2 November 2021 my reasons for refusing the application to amend. I am therefore dealing only with the incident on 21 February 2013 in considering whether it would be just and equitable to extend time.
33. I have given this very careful consideration it being an unusual case in that Mr Waters has admitted to applying the stickers to the claimant's vehicle. I was therefore concerned with the balance of prejudice given that admission.

34. If I refuse to extend time, the Claimant will be denied the right to bring a claim in which it is admitted that an employee of the respondent, his line manager at the time, applied those stickers to his car. Those facts are admitted. I do not hesitate to conclude there is a prima facie case established by the Claimant of harassment related to sexual orientation of a potentially very serious and distressing nature.
35. I asked Mr Jones to address the balance of prejudice in light of Mr Water's admission. Mr Jones submitted that the prejudice on the Respondent was the very significant delay in between the incident and bringing the claim. These events took place in 2013. A discrimination claim of this nature involves not just the act itself but other legal issues such as vicarious liability and injury to feelings all of which would now need evidential enquiry some eight years later. There can be no doubt that the cogency of the evidence (apart from the fact of the incident itself) with such a significant passage of time will be affected. For example, there were differing accounts about the impact of the incident on the Claimant which would all now need to be tested.
36. In my Judgment I find I must agree with Mr Jones that such is the delay that the balance of prejudice must lie with the Respondent.
37. The Claimant's explanation for the delay was that he was young and did not know who to complain to. Whilst that may have been the case at the time, this does not explain the significant delay and time that has passed. Extending time should be the exception rather than the rule and in my judgment there has not been a reasonable or sufficient explanation as to the delay.
38. For these reasons, it is not just and equitable to extend time.

---

Employment Judge S Moore  
Dated: 11 January 2022

REASONS SENT TO THE PARTIES ON 17 January 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche