**Case No. 2305508/2021**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Y Chabibi

**Respondents:** Ernest Bevin College (1)

London Borough of Wandsworth (2)

**Heard at:** London South (By CVP) **On:** 20 September 2022

**Before:** Employment Judge Self

**Appearances**

For the Claimant: In Person

For the Respondent: Ms D Gilbert - Counsel

# JUDGMENT

1. The Claimant failed to bring his claim within the statutory time limit set out at Section 111 of the Employment Rights Act 1996 when it was reasonably practicable for him to do so. Accordingly, the Tribunal has no jurisdiction to consider the Claimant's Claim of Unfair Dismissal and that Claim is dismissed.

2. Upon it being just and equitable to do so, time is extended so as to give the Tribunal jurisdiction to consider the claim of an alleged Age Discriminatory dismissal pursuant to the Equality Act 2010.

3. Upon the Tribunal considering that the Age Discrimination claim has little reasonable prospect of success and upon consideration of the Claimant's means the Tribunal requires the Claimant to pay a Deposit of £500 as a condition of continuing to advance that Claim. Full details of the Deposit order are detailed below.

# WRITTEN REASONS

**(As Requested by the Claimant on 20 September 2022)**

1. The Claimant lodged a Claim at the Tribunal asserting that he was unfairly dismissed and that his dismissal was also an act of Age Discrimination. There is an issue about precisely when the dismissal was. The Claimant has asserted 20 May 2021 and the Respondent has asserted 27 May 2021. It seems to me that the correct date is 27 May 2021 as that is the date that the Respondent's decision to dismiss the Claimant was communicated to him. I accept, therefore the Respondent's assessment of the date of dismissal and I note, in any event that works in favour of the Claimant as it gives him a later date from which he would be able to lodge a Claim.

2. The Claimant was a maths teacher at Ernest Bevin College and had been working there was over fifteen years. The school is in the London Borough of Wandsworth. There is no agreement as to who the correct Respondent is at the current time and that issue will need to be resolved at any final hearing although the parties have been encouraged to try and reach an agreement on that issue sooner rather than later. The same solicitor represents both.

3. The Claim was filed late and that is agreed by both parties. The date of dismissal and the sole act of discrimination was on 27 May 2021. ACAS Early Conciliation was entered into between 16 August 2021 and 27 September 2021 and so the last day for filing an in-time Claim would be 27 October 2021. As the Claimant filed the Claim on 14 November 2021 it is agreed by all that the Claim has been lodged eighteen days late.

4. The issue before me, therefore, is whether or not, taking into account the relevant statutory tests time should be extended so as to allow the unfair dismissal claim and/or the age discrimination claim to be heard.

**5. Unfair Dismissal Law**

Section 111 of the Employment Rights Act 1996 reads as follows:

***(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.***

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

6. The issue for consideration at this hearing is whether I am satisfied that it was not reasonably practicable for the complaint to have been presented before the end of the three-month period. If I am satisfied I must them consider whether the Claim has been brought within a reasonable further period.

7. The onus of proving that presentation in time was not reasonably practicable rests on the Claimant. ***'That imposes a duty upon him to show precisely why it was that he did not present his complaint'*** (**Porter v Bandridge Ltd 1978 ICR 943, CA**).

**8.** Judicial attempts to establish a clear, general and useful definition of 'reasonably practicable' have not been particularly successful. However, in **Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA**, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser EAT 0165/07** explained it in the following words: **'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.**

9. Although cases will turn on their own facts there are certain categories of facts that have over time provided a potential route to demonstrating it was not reasonably practicable to lodge a claim in time and I will use any relevant law when discussing the Claimant's specific reasoning later in these Reasons.

**Equality Act 2010 Law**

10. Section 123 of the Equality Act 2010, so far as is relevant 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.***

11. **Section 123 EqA** does not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons.

12. The Court of Appeal considered just and equitable extensions in **Department of Constitutional Affairs v Jones 2008 IRLR 128, CA**, and emphasised that the factors referred to by the EAT in **British Coal Corporation v Keeble and ors** are a 'valuable reminder' of what may be taken into account but their relevance depends on the facts of the individual cases and Tribunals do not need to consider all the factors in each and every case. In **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA**, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

13. The relevance of the factors set out in **British Coal Corporation v Keeble and ors** (above) was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**. With regard to the Keeble factors, the Court pointed out that the EAT in that case did no more than suggest that a comparison with S.33 might help 'illuminate' the task of the Tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. In the Court's view, it is not healthy for the Keeble factors to be taken as the starting point for tribunals' approach to 'just and equitable' extensions, as they regularly were. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in Keeble – the length of, and the reasons for, the delay.

14. It is clear that tribunals can take a wide range of matters into account when determining whether it is just and equitable on the facts to allow a claim to proceed out of time.

**The Claimant's Position**

15. The Claimant put forward four reasons as to why time should be extended in relation to both heads of claim:
    a) Matters relating to the Respondent's conduct of the internal appeal;
    b) Matters relating to his ill health;
    c) Matters relating to his representative;
    d) The fact that the Respondent had asked for an extension of time to lodge their Response which had been granted.

16. Logically for the Claimant to succeed in extending time for his unfair dismissal claim those factors will individually or collectively have rendered it not reasonably practicable to lodge his claim within the three months. I will consider each representation in turn.

**The Internal Appeal**

17. Within the internal process it was agreed that the Respondent would seek to deal with appeals within 10 days of an appeal being made but there was a waiver provision that could be used to extend time. It seems to me that a ten-day time limit where a panel of governors has to be convened is more a triumph of hope over expectation.

18. The Claimant was informed in the dismissal correspondence that he was entitled to appeal and any appeal needed to be received by 15 June 2021. An important point in my considerations is that the Claimant was represented by his Trade Union throughout the internal process and was continuing to take advice from them / had the ability to take advice from them throughout the whole time period under consideration at this hearing.

19. It is noteworthy both in respect of the internal appeal issue and in other issues that the Claimant and his TU Rep were able to draft a comprehensive, clear and structured appeal by 12 June 2021 well within the time limit given. On 16 June 2021 the Head sent an email to the Claimant indicating that she was putting an appeal panel together. On 13 July 2021 the Head wrote again stating that due to the commitments of those who might serve on the panel it would not be possible to deal with the hearing before the end of the summer term and that they would be able to do so on a date after 16 August 2021 and that the Claimant should send in his dates of availability so a date could be fixed. The Claimant never did and no appeal was ever held.

20. The Claimant told me that when he received the letter of 13 July 2021 that as "***they (the Respondent) had failed to follow policy I did not respond to the email and I decided to launch ACAS Early Conciliation instead***." It is clear from the Claimant's evidence that for the reasons stated he exercised a choice

not to further his claim internally but to pursue it externally and that is a choice he was entitled to make.

21. At that point, therefore, the internal appeal stopped being a feature that impacted upon the Claimant and he would have had one month after the end of early Conciliation to bring his Claim. The Claimant may have a point about the delay of the appeal being longer than one would accept is normal or acceptable but it does not affect his ability to lodge a claim in time because he still had a substantial period, whilst represented, to lodge a claim and the internal appeal cannot assist him as to why he failed to do so from the issuing of the certificate on 27 September 2021 and 27 October 2021 which was the last date for lodging the Claim.

**Ill Health**

22. Ill health can be a ground for demonstrating that it was not reasonably practicable to lodge a claim within the three-month period. There needs to be a causal link between the ill health and the failure to lodge the Claim in time. On occasion a Claimant will come to the Tribunal with medical evidence that will support that contention. There is no such medical evidence in this claim. Indeed, not only is there no specific medical evidence maintaining that position but the Claimant has not lodged any medical evidence at all in support of his position.

23. Clearly medical evidence would provide the Claimant with the best opportunity to demonstrate that it was not reasonably practicable to lodge a Claim in time but I acknowledge that its absence is not determinative of the issue. The Claimant told me that he was in great distress having been dismissed for theft after a long period at the school. The Claimant denies that he stole anything. He showed me sleeping tablets that he had with him and the impression I got from him was that he was taking these at the material time. Having said that save for a general assertion that he had mental health difficulties the Claimant provided no evidence of any precise diagnosis and how it affected his day-to-day activities and most importantly why it was of such magnitude that it rendered it not practicable to lodge his claim in time.

24. I have no doubt that the Claimant was suffering on account of the shock of his career imploding in the way that it did. I note however that he was quite able with the assistance of his representative to write a clear and cogent appeal which of itself could have been the foundation of a Particulars of Claim and that he was also able to take the decision not to continue internally but to go via ACAS and that he was able to go through and engage in the Early Conciliation process. I form the view that if the Claimant could undertake those tasks there is no reason why he could not have lodged his claim

notwithstanding any mental health issues he was having. Even if he was unable to do so (and I find that he was) he had a representative whom he could have sought assistance from to undertake that task.

25. I also note that the Claimant re entered teaching at another school in September and so over the material period the claimant must have applied for and obtained another job which he attended on a daily basis from September onwards. He has provided no evidence that his health affected that position as a teacher.

26. I find that there is nothing before me that would suggest that the Claimant's mental health was such that it rendered it impracticable to lodge a claim within the statutory time limit, especially taking into account the Claimant's evidence that he was represented / assisted at all material times by his Trade Union.

**Representation**

27. The Claimant was a member of the Workers of England Union. In his Case Management Agenda Form the Claimant stated as follows:

***"In addition to this my rep was so busy dealing with high volume of NHS cases in meeting and in court during the pandemic that he has forgotten to advise me of the right time to make the claim".***

28. During the course of the hearing the Claimant made it clear on a number of occasions that the Claimant himself was aware that there was a statutory time limit but was waiting either for his representative to tell him when he had to lodge a claim or for the representative to do it himself. It appears that it was always the Claimant who was going to lodge the Claim Form and he knew that there was a time limit to do so but that his representative failed to inform him / or he did not ask when the Claim should have been lodged and so the Claimant did not do so. Subsequently the Claimant contacted his Trade Union representative who told him he was out of time but to lodge a Claim in any event. The Claimant then did that.

29. It seems to me clear that this is the real reason why the Claim was not lodged in time. There is no evidence before me that any of this came about because of the Claimant's ill health and certainly no link to the internal appeal.

30. Any substantial fault on the part of the claimant's adviser that has led to the late submission of his or her claim may be a relevant factor when determining whether it was reasonably practicable for the claimant to present the claim within the prescribed time limit. In the majority of cases, an adviser's incorrect advice about the time limits, or other fault leading to the late submission of a

claim, will bind the claimant and a tribunal will be unlikely to find that it was not reasonably practicable to have presented the claim in time. However, much will depend on the circumstances and the type of adviser involved.

31. If a claimant engages solicitors to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA:**

    ***"If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out.*** **His remedy is against them."**

    This rule is commonly referred to as the 'Dedman principle'.

32. In **Wall's Meat Co Ltd v Khan 1979 ICR 52, CA**, Lord Justice Brandon clarified the Dedman principle, explaining that ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the complainant or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.

33. Trade union representatives also count as 'advisers' in this context and, if they are helping a claimant with his or her case, they are generally assumed to know the relevant time limits and to appreciate the necessity of presenting claims in time. In this particular Claim I am satisfied that the TU representative did know the time limits because he advised he claimant that he was out of time when the claimant finally approached him.

34. Often where a claimant relies on the advice of a trade union representative and, as a result, his or her claim is time-barred, the claimant's remedy lies in a claim of negligence against the union, which owes a duty in tort to use ordinary skill and care in advising and/or acting for a member in an employment dispute.

35. In **Langley v GMB and ors 2021 IRLR 309**, QBD, the High Court provided guidance on the duty of care owed by a trade union to its members when advising and acting in employment disputes. The duty is to exercise reasonable skill and care in the provision of practical industrial relations and employment advice. It requires the reasonable knowledge and experience expected of a trade union in both individual and collective negotiations, and includes having a general understanding of employment, HR, and industrial relations issues; being reasonably well informed about employment law in

general terms; having a reasonable level of skill and expertise in persuasion and negotiation; and being able to provide strategic and tactical advice on how to resolve a situation in the best interests of its members.

36. I am unable to pin down, and nor is it my role to do so, precisely where the fault lies for not lodging the Claim in time. I am quite satisfied that an employee who is aware that there is a time limit for lodging claims who is represented / being assisted by a Trade Union representative who must be taken to be fully aware of when this claim should have been lodged are unable to demonstrate that it was not reasonably practicable to lodge the claim in time. I have not been given any reason as to why the Claimant simply did not ask the question (if he did not have the information) as to when his claim should be lodged.

37. Going back to Lady Smith quoted at paragraph 8 above I find that not only was it possible to have lodged the Claim in but on the facts of the case as found, it was reasonable to expect that which was possible to have been done by the Claimant in combination with his Trade Union representative.

**Extension of time for the Response**

38. The Judicial decision to permit the Respondent more time to lodge their Response took place well after the period when the Claim should have been lodged and so cannot have had any impact upon the reasonable practicability of lodging the Claim on time.

**Conclusion on Unfair Dismissal Claim**

39. Having considered the evidence and taking each point raised by the Claimant individually and again as a composite whole, I am quite satisfied that it would have been reasonably practicable for the claim to have been lodged within the statutory time limit and I have no hesitation in concluding that the Tribunal does not have jurisdiction to hear that claim.

**Conclusion on Age Discrimination Claim**

40. The Claimant clarified for me today that the only act of Age Discrimination that he was relying upon was his dismissal. In broad terms he asserts that upon the advent of a new Head at the school and because there was a need to cut costs there has been a purge so as to rid the school of the older staff and the Claimant asserted that this was particularly so in the Over 50s which is the age group he has placed himself in for the purposes of the Age claim.

41. The Respondent's position is that the Claimant was dismissed for gross misconduct relating to theft of a lap top. It is correct to say that the Claimant was suspended and went through a disciplinary hearing dealing with that issue

and the letter of dismissal is very clear that that is the reason for dismissal but the Claimant asserts that had he not been within the targeted group then his explanation regarding the laptop would have been accepted and he would not have been dismissed.

42. During the course of the hearing, I was taken to a list of staff, over a one-year period, who were recruited by the new Head and those who left the school in the same period. Whilst it is right to say that a number of staff over the age of 50 were made redundant, there was also a number of staff who left who were under the age of 50 and, perhaps more tellingly, a number of staff over the age of 50 who were recruited. The Claimant criticises that list in terms of the time period it covers and other matters but I have assessed the Claimant's case as one for which there would appear to be a number of difficulties in getting to the point where there is a prima facie case of Age Discrimination on what I have seen and been told.

43. The Claimant's case on just and equitable was effectively based on the same grounds as reasonable practicability. My conclusion there was that the failure to get the claim in time was due to the conduct and failings of the Claimant and his representative for which, on what I have heard, both must take some responsibility.

44. I note that whilst the Claim is out of time by two and a half weeks that is a short period compared to the length of time that it will take for the Claim to come to a hearing. If I do not allow time to be extended then the Claimant will lose the opportunity to bring a Claim that he dearly wishes to bring, but it is a claim that I have assessed as weak. If I do allow time to be extended the Respondent will have to defend a claim which they otherwise would not have to defend with the attendant cost and time required to do so.

45. The Respondent has not set out any additional prejudice which would be occasioned to them apart from that set out in the preceding paragraph. The comings and goings of staff from the school and their ages and experience will be a matter of documentary record as will the disciplinary process. There will be a clear foundation upon which the Respondent can place their defence and I have not been alerted to any issues the Respondent has with the non-availability of witnesses.

46. I have found whether to extend time for the Age claim a very finely balanced decision but have finally come down in favour of extending time. My view is that this Claim has little reasonable prospects of success but form the view that of itself would normally found a deposit to be paid as opposed to a strike - out. Whilst the merit of a claim is something I can take into account I need to be careful that it does not provide a route to a back-door strike out when the appropriate order would be a deposit order.

47. I consider that the absence of any real prejudice to the Respondent apart from having to defend the Claim (and what that brings) persuades me that this discrimination claim, in its limited and relatively narrow form (a directly discriminatory dismissal only), should have its time extended. Whilst the failures by the Claimant's representative are insufficient to permit the unfair dismissal claim to come through I do not consider that it is a factor which weighs in the Claimant's favour so far as just and equitable are concerned. Whilst the Claimant could have been more proactive in seeking information as to when the Claim could have been lodged and, in my view, was fully able to lodge a claim himself I do take into account the fact that he could have expected his representative to have assisted him by providing timely guidance.

48. Accordingly, I do consider that it would be just and equitable for time to be extended and for the Age Discrimination to be further considered.

49. Having said that I have determined listening to the representations of the parties that the Age Discrimination Claim is a weak one for the reasons set out at paragraphs 40-42 of this Judgment and consider that it is appropriate for a Deposit Order to be made pursuant to Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. I heard evidence of the Claimant's means and the Deposit will be set at £500 in relation to the alleged discriminatory dismissal.

Employment Judge Self

13 October 2022

**NOTE ACCOMPANYING DEPOSIT ORDER**
**Employment Tribunals Rules of Procedure 2013**

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

**What happens if you do not pay the deposit?**

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

**When to pay the deposit?**

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

**What happens to the deposit?**

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

**How to pay the deposit?**

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

**Enquiries**

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3033. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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**DEPOSIT ORDER**

**To:** **HMCTS Finance Support Centre**
**Temple Quay House**
**2 The Square**
**Bristol**
**BS1 6DG**

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

**Please write the Case Number on the back of the cheque or postal order**