



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Dylan Bhalsod

**Respondent:** Tesco Stores Limited

**Heard at:** London South by way of CVP      **On:** 5 January 2023

**Before:** Employment Judge Wright

## Appearances

For the claimant: Mr Kish Bhalsod, Lay Representative

For the respondent: Mr Sam Way, Counsel

## Introduction

1. At the Preliminary Hearing on 5 January 2023, I allowed the respondent's application to strike out the claim for ordinary unfair dismissal but refused the respondent's application to strike out the claim for disability discrimination which was brought out of time.
2. The respondent has requested written reasons for my decision.

## WRITTEN REASONS

3. The questions I need to determine are:
  - 3.1 does the claimant have qualifying service to bring an unfair dismissal claim.
  - 3.2 has the claimant brought his discrimination claim within the statutory time limit?
  - 3.3 if not, would it be just an equitable for time to be extended for the discrimination claim?

### Brief Background

4. The claimant was employed by the respondent between 30 July 2021 until his dismissal on 22 October 2021. The claimant claims to have a disability, specifically mobility problems with his arms. He says that this affected his performance when

compared to an able-bodied colleague. He says that his disability was the reason for his dismissal. He brings a claim for discrimination on the grounds of disability and ordinary unfair dismissal.

5. The respondent's case is simply that the claim is out of time. The response has not set out which of the permitted reasons they say that they dismissed the claimant for.
6. In relation to any ordinary unfair dismissal claim, the claimant is plainly short on qualifying service, having been employed for less than two years. And therefore, in any event, any claim for ordinary unfair dismissal must be dismissed. As such I do not address the extension of time point for the ordinary unfair dismissal.
7. The discrimination claim, alleges a number of discriminatory actions culminating in the dismissal, which is also claimed to be a discriminatory action. The relevant date, taken to be the final act in this chain, the dismissal, would be the 22nd of October 2021, meaning that the claim needed to be brought by the 21st of January 2022.
8. The claimant did not start early conciliation until the sixth of March 2022 which was about a month and a half late. The proceedings were issued after a short conciliation period on the 14th of March 2022. On the face of it, the claim is indeed out of time.
9. I have to consider if it is just an equitable in all the circumstances to allow the claim to proceed. I am reminded of the decision in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576 where the Court of Appeal emphasised that there is no presumption that the tribunal should extend time and that it is for the claimant to show that there is a reason to do so.
10. I am also guided by the factors set out by *British Coal Corporation v Keeble* [1997] IRLR 336 EAT. I remind myself that this is not a checklist for me to go through, but it is a useful guide and some of the factors that they suggest, which I consider would be:
  - 10.1 the length and reasons for the delay;
  - 10.2 the extent to which cogency of the evidence is likely to be affected by the delay;

- 10.3 The extent that the respondent has cooperated with any request for information;
  - 10.4 the promptness with which the claimant acted once he knew that there was a possibility of taking action; and
  - 10.5 steps taken to obtain professional advice.
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11. I'm told that the reasons for the delay appear to be twofold. First of all, the claimant began grievance procedures within a short period of time of his dismissal. The respondent dealt with this in line with their grievance policy.
  
  12. There was an informal hearing in November 2021, before it was escalated to the formal procedure, which was dealt with in January 2022.
  
  13. The Claimant then brought an appeal against the decision on 16 March 2022 meaning that he began the appeals process within the grievance procedure after beginning early conciliation and issuing proceedings.
  
  14. The claimant alleges that the respondent is responsible for excessive delay caused by dragging out the grievance procedure. I don't accept that. I accept Mr. Way's submissions that five months to complete the three steps, particularly over the Christmas and New Year period is not an unreasonable length of time.
  
  15. I'm also told that the claimant had been undergoing treatment for a trial drug which obviously had had an impact on him. Additionally in December 2021 his father, who has been representing him and appears to have been acting as his principal advisor, caught COVID which made him ill for several weeks. He tested negative on the 24th of December 2021.
  
  16. In January 2021 the claimant's father then fell seriously ill with an autoimmune condition where he was hospitalised for 12 to 13 days and off work for four and a half months, and he is still suffering to an extent with that.
  
  17. The claimant's mother was at home during this time but was not really aware of the details of the case as his father had been dealing with it and so she would not have been able to assist him.

18. I note that the grievance meeting was in January when the claimant's father was still ill. The claimant did attend and represented himself there.
19. Mr Way draws my attention to the fact that the claimant was offered his job back in November and that he declined that offer. The claimant informs me that this was because as far as he was concerned the relationship had broken down beyond repair at this point. The key point though is that having decided the working relationship was over it should have been clear that proceeding legal proceedings may well be necessary.
20. If we were to take 17 November (the date of the meeting) as being the relevant date, hypothetically, then proceedings would have been needed to be started by the 16th of February. Therefore, even if I were to take that hypothetical date as being the date when the claimant was aware that legal proceedings would be necessary, it still took more than three months to begin.
21. I note that following a grievance procedure does not automatically extend the time to bring a claim but it is a factor I can consider. I also take into account the claimant's disability, his reliance on his father for advice, his father's illness and the fact that the claimant is young and this was his first job out of school. However, weighing that in the balance I find that the claimant did not act promptly. He was aware that legal proceedings were inevitable at the point he refused the reinstatement offer. Lack of promptness is not fatal to the claim, but is a strong factor against the extension of time.
22. Again I remind myself that the factors in *British Coal* do not create a checklist, something confirmed by the Court of Appeal in *London Borough of Southwark v Afolabi* [2003] ILRL 220.
23. Therefore, I am free to consider other issues that are relevant. I note that the bundle contains a screenshot showing an extract of the outcome of the appeal hearing.
24. Mr. Mills who was, for want of a better term, the investigating officer says "*I do however disagree with Gus' findings and will be upholding your allegation in respect to discriminatory behaviour by Shankari Vishnuwarthan. While the*

*motives behind the discrimination is unclear, Dylan's contract was not extended along with one other temporary member of staff, while five temporary members of staff on the same department were kept on, with no selection criteria completed, no performance reviews completed, no absence reviews completed, and no new availability forms completed. It therefore is, as there is no supporting paperwork, how Shankari Vishnuwarthan could have made a decision on which staff to extend versus let go without taking Dylan's disability into account."*

25. I find that there is sufficient evidence there for a tribunal to reasonably determine that there's a prima facie case of discrimination. I emphasise that this is not a determinative finding, simply an acknowledgment that such a decision, on the current evidence, would be open to the Tribunal at the final hearing.
26. In determining whether it would be just an equitable in all the circumstances to allow the claimant to bring the claim out of time I have to weigh up what appears to be a slightly excessive delay with an apparent admission by the respondent that some discriminatory action took place.
27. I find that this is a very finely balanced decision. But taking everything into consideration, I find that this just falls over the line to allow the claim for discrimination to proceed to a full hearing.
28. I do note that the that fact that the reinstatement offer was refused may well be a question for mitigation should the claim be successful, but I find that there's sufficient evidence here to allow me to say that it would be just an equitable for the claim to proceed to a final hearing.
29. The claimant had been engaging with the respondent throughout this period through the grievance procedure. I find that any question of evidence being affected by this delay would be minimal. The Respondent was, at no point, led to believe that the complaint was no longer being pursued in some form or other. Therefore, I will be allowing the claim to proceed.

Employment Judge Wright

Dated: 26 January 2023