# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Sultan

**Respondent:** Asda Stores Limited

**HELD AT:** Manchester (in person) **ON:** 25th April 2023

**BEFORE:** Employment Judge Anderson

**REPRESENTATION:**

**Claimant:** In Person
**Respondent:** Ms Harty (Counsel)

**JUDGMENT** having been given orally 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

**Introduction**

1. This matter came before me by way of a public preliminary hearing. There had been a previous private preliminary hearing which set down the issues to be determined today.

2. These issues were as follows:

    a. The claimant's amendment application set out in his letter and attached document to the tribunal dated 15 September 2022 and clarified in the Case Management Order,

b. Whether the claimant's complaint of sex discrimination contained in his Claim Form, and any discrimination amendment allowed, were presented in time, and if not whether it would be just and equitable to extend time to allow the claimant's claim to proceed

c. Whether all or any of the claimant's claims should be struck out for having no reasonable prospect of success, or if any claim has some but little reasonable prospect of success if a deposit order should be made.

3. The previous case management order also set out the claims that the Claimant was making in table form. The parties proceeded on the basis of this table, which was agreed.

**Procedural Matters**

4. There was an initial discussion between the parties as to the procedure to be adopted today. The first point was whether the Claimant should be permitted to give evidence. Having heard from the parties, I determined that he should be permitted to give evidence in relation to the amendment and the time point. The Claimant was unrepresented and he may not have covered all that he wanted to cover in his written evidence. This was also a way of ensuring that he had the opportunity to deal with any point that was raised.

5. There was a bundle of documents. It appeared to be an agreed bundle. However, during cross-examination, the Claimant began to refer to other documents which were not in the bundle. I took the Claimant to the case management order which provided for the process of putting documents together and it was immediately apparent that the Claimant had not taken steps to understand his obligations nor had had he engaged fully with disclosure. In light of this, I permitted the Claimant to show me further documents. None of these documents were particularly on point save for the Claimant's medical records. These related to the Claimant having CBT in November 2022 (it was an agreed fact that this was the first session). The GP records covered a partial period and provided some background information but did not disclose any evidence of a sufficient nature so as to impact on the ability to bring a claim.

6. The Claimant had submitted a written application to amend and had also supplied a witness statement. I read each of these documents in full.

## Chronology

7. The dates in this matter were largely agreed. However, I found the following dates to be established on the balance of probabilities.

8. There are the following key dates:

    a. 15th February 2022 – Last pleaded detriment
    b. 25th February 2022 – Claimant's resignation
    c. 23rd May 2022 – Date A – ACAS Contacted
    d. 7th June 2022 – Date B – ACAS Certificate Issued
    e. 7th July 2022 - ET 1 Submitted
    f. 15th September 2022 – Application to amend.

9. The Claimant provided the Tribunal with oral evidence in addition to his witness statement. He was a union member. His union rep sought to put the Claimant in contact with the Union's solicitors Unionline. Unionline informed the Claimant that they would not be taking his case on. This correspondence was not before me, but it would likely be privileged in any event. At some point, the Claimant was told by his union rep that he had to contact ACAS. The Claimants case is that at no time did the union or the solicitors advise him in relation to time limits. However, I note that Date A is the 23rd May 2022, which is close to what would be the deadline if relying upon on an EDT of 25th February 2022. However, the ET 1 did not make a claim of constructive dismissal, an agreed position from the last preliminary hearing.

## Application to Amend

10. The application to amend was in respect of:
    a. Whether to permit the Claimant to add a claim of constructive unfair dismissal.
    b. Whether to permit the Claimant to add a claim of religion or belief discrimination.

11. Having heard from the parties, I treated the above application broadly. That is to say, I treated the application to add constructive dismissal as an application to add a claim under the Employment Rights Act 1996. Given that the matters relied upon by the Claimant as part of the allegation of fundamental breach also related to allegations of direct discrimination, it was arguable that the Claimant was saying that if there was a repudiatory breach resulting in a

dismissal then that was tainted by sex and justiciable under the Equality Act 2010 as well.

12. In terms of the religion or belief claim, I took this to be a claim of direct or indirect discrimination relating to the protected characteristic of religion. In short, the Claimant alleged that until June/July 2021, he was required to work weekends in order to have Fridays off for religious reasons.

13. My starting point was **Selkent Bus Company v Moore [1996] ICR 836, TGWU v Safeway Stores (2007) EAT** as informed by more recent case law relating to time limits. I also relied upon the Presidential Guidance relating to Case Management.

14. Ultimately, it is a balance of prejudice test in which proper regard has to be paid to the issue of time limits.

15. The parties were agreed that none of these claims were in the original ET 1. Furthermore, they were agreed that this was not a relabelling case.

16. There is a starting prejudice to the Respondent in that if either or both applications were granted, it would be put to the additional cost of redrafting the ET 3. This is a prejudice in relation to both applications, but it is far from determinative.

17. Staring with the claim relating to religion or belief, this fell into the category of a new claim. It was also a new jurisdiction to the pleaded claim. It also fell into the category of there being new facts and a new area of factual enquiry for the Tribunal to embark upon. In short, these are amongst the harder, but not impossible types of amendment application to embark upon.

18. The most important fact was the Claimant's position that this practice stopped with a new manager and that this occurred in June/July 2021.

19. On this basis, the majority of factors were against amendment. It would extend the hearing length, require the Respondent to deal with a claim that would be out of time on the original ET 1. It was entirely separate to the pleaded allegations and was not part of an act extending over a period.

20. It would be prejudicial to the Respondent to have to call evidence relating to events leading up to June/July 2021 in relation to an ET 1 that was submitted in July 2022 and an amendment sought in September 2022.

21. Furthermore, there was limited, if any evidence as to why this claim was not contained in the ET 1 or brought sooner. Beyond the fact that the Claimant was a litigant in person, there was no real barrier to this claim being made.

22. I therefore refused this application to amend.

23. In respect of constructive dismissal, again I do not believe that I have any real explanation as to why this claim was not contained within the ET 1 beyond the fact and self-evident point that the Claimant was representing himself.

24. The Claimant knew of the fact of his resignation. He did not pursue this as a claim. To some extent, there must have been some thought process or decision behind this. The lack of a clear explanation as to why it is not claimed in the ET 1 is relevant.

25. I accept that the resignation is referenced in the ET1. This matter comes before me on the basis that it was previously agreed that no claim of constructive dismissal has been made in the ET1. i.e. the Claimant has agreed that he did not intend to bring a claim for constructive dismissal in the ET 1.

26. The Claimants application to amend was made in September 2022. A claim relating to dismissal is a new claim. There are some overlapping facts with the extant sex discrimination claims in that some of the matters relied upon to establish the fundamental breach in the amendment application overlap which is some potential limit on the range of new factual enquiry required.

27. The resignation itself being mentioned in the ET 1 doesn't mean this is automatically 're-labelling'. In the ET 1, the Claimant references resigning because of pressure, it is different and distinct from the basis on which the amendment is now put. The misreporting of his covid status is distinct to what is alleged to be a situation of direct sex discrimination going back many years.

28. There would inevitably be some additional factual enquiry. The time between the historical matters and the resignation, save for one point is significant. It would be asking the Tribunal to embark on the analysis of years of events, which the Tribunal may not have jurisdiction to consider under the Equality Act.

29. The Respondent is prejudiced by the fact that this claim is brought outside the initial time limit and that the original ET 1 is out of time. Under the ERA the test is one of reasonable practicability.

30. Even under the more liberal Equality Act approach to time limits, the claim is still out of time as per the amendment date. There is the lack of a clear explanation for the absence of the claim from the claim form. I am also satisfied that this claim would take the case off on an additional factual tangent than is contained in the original ET 1.

31. I therefore refused the amendment as it relates to constructive dismissal, whether framed under the ERA or as a direct sex claim under the Equality Act 2010.

**Application to Dismiss the Claims as Out of time**

32. As required by s.123 Equality Act 2010, it is necessary to consider:
    a. What claims are in time
    b. What claims amount to an act extending over a period, defined as a 'continuing state of discriminatory affairs' (c.f. **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**).
    c. In respect of any claims that are out of time, whether it is just and equitable to extend time.

33. At the outset, it is right to note the caution that must be expressed in dealing with a time point in a discrimination case. These cases are inherently fact sensitive and Judges must tread carefully.

34. I would note that notwithstanding the fact that another Judge has permitted this matter to proceed to a public preliminary hearing, it is open to me to decide that this is not an appropriate forum for deciding the point and to say that this matter can only be properly determined at a full hearing.

35. In addition to the other cases cited elsewhere, I had regard to the other authorities including **Adedeji v University Hospitals NHS Trust [2021] EWCA Civ 21** as to the permissible factors to take into account and **Robertson v Bexley Community Centre [2003] IRLR 434.**

36. The just and equitable test is broader test than other time limits, entitling me to take into account a broad range of factor and can be described as more liberal in that respect.

37. Looking at the previous hearing and the Case Management Order produced, I establish the dates as agreed between the parties.

38. In looking at whether there is a continuing state of discriminatory affairs, I must try and understand the link between the events relied upon.

39. The gap between the 24th December 2020 and 15th February 2022 is significant. It is over a year. The acts are different. Whilst these points are not automatically determinative, they do in my view lend themselves to the conclusion that this is not an act extending over a period.

40. There is no exact period which means that an act cannot extend over a period, but a period in excess of a year is a noteworthy amount of time to which I attach particular weight and I am unable to link these events. The same can be said of the 20th December 2020 event. Before that is then an event from September 2019. These are not acts extending over a period.

41. It is because the dates between events in this matter are so stark that I consider it is possible and indeed appropriate to determine the question of an act extending over a period as a preliminary issue. I accept that this is unusual. If the situation had been more nuanced, similar events, closer in time for example, then I would have left the matter open for a final hearing.

42. I must therefore consider a just and equitable extension in respect of each claim.

43. In respect of all of the claims up to 24th December 2020 it is not just and equitable to extend time. An extension between 24th December 2020 and 7th July 2022 would be an extraordinary amount of time, even more so in respect of each individual claim. There would be clear prejudice to the Respondent in terms of allowing such a claim to proceed and the full hearing would be required to focus significantly on historical matters. It must also be borne in mind that the primary time limit is three months and any extension of time needs to be seen in the context of the time allowed for the primary time limit. Nothing is dealt with as an absolute, but the factors here lend themselves to one result.

44. That leaves the complaint regarding events on the 15th February 2022. Because the ACAS Date A is outside the primary time limit, there is no benefit from the extension of time provisions in the ACAS EC regime.

45. In effect, the Claimant would be seeking an extension of time between 14th May 2022 and 7th July 2022.

46. This is more difficult. The extension sought is more modest. There is however, no automatic right to an extension and even in the more liberal regime, I must weigh matters up. The Claimant bears the burden of proof on this point.

47. There is less prejudice to the Respondent than there would be in extending time from December 2020 to July 2022 for example.

48. I also accept that where a representative has made an error, this is potentially relevant to a just and equitable extension: **Chohan v Derby Law Centre [2004] IRLR 685**. The Claimant considers that he has been ill-served by his union and/or their solicitors. However, I am unable to find that this has been established on the facts. Without clearer evidence, it is not more likely than not that advisers have made a wholesale failure to advise the Claimant in relation to time limits. No documents were placed before me in this respect. Ultimately, once the case was not taken on, the Claimant was responsible for progressing the matter to the ET and including his claims within the claim form. It was his decision to not make a claim in relation to his resignation which results in a different point from which time runs.

49. In relation to the Claimant's health, I find that he commenced CBT in November 2022 and that he may have had some ill health prior to that as well. Nothing has been evidenced that in any way suggests an impediment to making a claim to the Tribunal. Indeed, if that were suggested then it would need to address why it was possible to go through the ACAS process and put a claim in on the 7th July, but those steps were not possible weeks earlier. This is not the cause of why the claim is late and nothing on this point advances the just and equitable case much further.

50. The Respondent referred me to **Kumari v Manchester Mental Health NHS Trust [2022] EAT 132** and in particular para 63.

*"The tribunal is therefore not necessarily always obliged, when considering just and equitable extension of time, to abjure any consideration of the merits at all, and effectively to place the onus on the respondent, if time is extended, thereafter to apply for strike-out or deposit orders if it so wishes. It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform."*

51. The above is applicable to the present case. Whatever unease there is regarding looking at the merits in this matter, it is inescapable that on the face of it the claim relating to the 15th February 2022 is a poor claim. If I were to grant a just and equitable extension of time, the next stage would be to consider the Respondents application for a deposit order. This claim would fall within the definition of having little reasonable prospect of success. Beyond the bare assertion of direct sex discrimination, there is no prima facie evidence of direct sex discrimination. Notwithstanding all of the caution that must go alongside dealing with discrimination claims on a preliminary basis, acknowledging that discrimination need not be overt, can be subconscious and must be scrutinised, there still needs to be a basis for the claim and how it relates to the protected characteristics.

52. I would therefore dismiss this claim as out of time as well.

53. In these circumstances, the Tribunal does not have jurisdiction to consider the complaints of direct discrimination and they are hereby dismissed.

Employment Judge Anderson
Date 25th April 2023

REASONS SENT TO THE PARTIES ON
28 April 2023

FOR THE TRIBUNAL OFFICE