



# EMPLOYMENT TRIBUNALS

Claimant: Mr J Dobbs

Respondent: Tesco Stores Limited

**Heard at:** London South Employment Tribunal by video

On: 5 June 2023

**Before:** Employment Judge L Burge

## Appearances

For the Claimant: Mr Livingston, Counsel

For the Respondent: Ms Ahmad, Counsel

## PRELIMINARY HEARING JUDGMENT

It is the Judgment of the Tribunal that:

1. The Claimant's complaints of direct disability discrimination, a failure to make reasonable adjustments and indirect discrimination insofar as they relate to matters prior to 2018 were brought outside of the applicable time limits and it is not just and equitable to extend time;
2. The Claimant's complaints of direct disability discrimination, a failure to make reasonable adjustments and indirect discrimination insofar as they relate to matters after 13 March 2018 were brought outside of the applicable time limits but it is just and equitable to extend time; and
3. The Claimant's complaint of harassment was brought in time and continues.

# REASONS

## The hearing

1. A three hour public hearing took place by video to determine whether or not the Claimant had entered his claim on time. The Claimant gave witness evidence and both representatives provided oral submissions. Mr Livingston provided a skeleton and Ms Ahmad provided a chronology.
2. The Claimant's complaints can be summarised as follows:
  - a. Direct disability discrimination (s.13 EqA) for failing/refusing to transfer the Claimant to another role.
  - b. Failure to make reasonable adjustments (ss 20 and 21 EqA) based on the PCP of a requirement that the Claimant undertake physical tasks such as bending, stretching, carrying loads, using stairs, the Respondent failing in its duty to make adjustments by not:
    - i. Adjusting the Claimant's role;
    - ii. Transferring the Claimant to another store/role
    - iii. Retaining contract cleaners when they were discontinued in August 2020
  - c. Indirect discrimination (s.19 EqA) based on the following PCPs
    - i. a requirement that the Claimant undertake physical tasks such as bending, stretching, carrying loads, using stairs;
    - ii. a requirement that the Claimant work double shifts or work on his days off to cover absence.
  - d. Harassment (s.26 EqA) in relation to the conduct of Mr Watson in the pre-grievance appeal meeting on 23 March 2021.
3. The parties agreed that the alleged harassment is in time and so continues.

## Findings of fact

4. The following facts have been found in relation to the issue of time limits, they are not intended to bind the future Tribunal when deciding the final hearing.
5. The Claimant worked for the Respondent for over 36 years.
6. On 27.06.2014 the Claimant emailed Karen Pankhurst and asked for an Occupational Health report in relation to his condition of Ankylosing Spondylitis.
7. On 08.08.2014 an Occupational Health report was prepared. The report recommended adjustments including: no sitting on the floor, no falling from the knee below, no heavy lifting including pushing or pulling cages and arranging for other staff to deal with deliveries. It also suggested restricting hours as increased

exposure could increase symptoms and consideration of other roles within the Respondent, taking into account the Claimant's physical restrictions.

8. The Claimant's condition began to worsen. On 13.03.18 he wrote to his Area Manager that the issues with recruitment, staff absence and breaks affected his role and his medical condition.
9. A meeting took place with the Claimant and his Area Manager on 22.03.18 where the Claimant's health condition and a move within the Respondent was discussed.
10. On 07.08.2018 an Occupational Health report was prepared. The report recommended that the Claimant avoid regular strenuous physical tasks including, prolonged heavy manual handling and lifting activities, kneeling, and crouching movements, prolonged standing and sitting postures and low/high shelf filling duties. Pausing, stretching not working above contracted hours and a move to an alternative role or duties were also suggested. On 11.09.2018 a Health Risk Assessment was completed.
11. In September 2018 the Claimant applied for a Lead role in Eastbourne Tesco Extra but was unsuccessful at interview.
12. On 30.10.18 the Claimant met with Mr Turner to discuss the implications of payroll budget difficulties and concerns. A move to a different Express store that had a slightly more generous payroll budget was thought could help as there would be more staff to cover hours and duties so in November 2018 the Claimant was transferred to Meads Express Store.
13. On 25.01.2019 a meeting took place to discuss the Occupational Health report. The Claimant said that the move had worked really well in many aspects but his knees were not good and he repeatedly had to go up and down the stairs.
14. In February or March 2019 the payroll budget was cut which meant the Claimant had to lose hours from the staffing structure.
15. In March 2020 the coronavirus pandemic hit and the Claimant started shielding due to being clinically vulnerable.
16. The Claimant's condition further deteriorated. On 28.07.2020 a meeting took place with the Claimant to discuss his return to work.
17. On 14.08.20 the Claimant became aware that another Express Store Manager had been moved to take up the role of Lead Fresh Food at Eastbourne Extra store.
18. On 14.08.2020 the Claimant and Respondent exchange emails relating to people moves/transfers and on 24.08.2020 the Claimant returned to work on a phased return basis.

19. The Tribunal accepts the Claimant's evidence that on 21.10.2020 he googled for employment solicitors, had a 10 or 20 minute free advice session, he was not informed about time limits but was told to enter a grievance.
20. On 21.10.2020 the Claimant raised a grievance relating to a failure to make adjustments.
21. On 05.11.2020 the Claimant commenced a period of absence due to shielding. The Claimant did not return to work after this date.
22. On 05.11.2020, 24.11.2020 and 03.12.2020 the Claimant attended appointments with Occupational Health. In evidence to the Tribunal, that is accepted, the Claimant said that by 03.12.2020 his condition had so significantly deteriorated there were no reasonable adjustments that could have been made at that point to enable him to return to work.
23. On 21.12.2020 the Claimant attended the grievance meeting and provided a lengthy statement setting out the adjustments that the Respondent had failed to carry out.
24. On 06.01.2021 and 25.01.2021 the Claimant attended further grievance meetings.
25. On 10.02.2021 the Claimant attended the grievance outcome meeting and a letter with the outcome rejecting the grievance was provided to him on the same day.
26. On 15.02.2021 the Claimant submitted a lengthy grievance appeal form saying that reasonable adjustments had not been carried out.
27. On 25.03.2021 the Claimant attended the appeal pre-hearing and on 10.04.2021 he attended the appeal hearing. On 23.04.2021 the Claimant attended the grievance appeal outcome meeting where his appeal was rejected.
28. The Tribunal accepts the Claimant's evidence that during the grievance process he was also dealing with the ill health early retirement process and his mother's terminal illness. Together with concerns around vulnerability to covid and his poor health state he was both physically and mentally exhausted during this period.
29. On 23.04.2021 the Claimant contacted ACAS and on 26.05.2021 the ACAS Early Conciliation Certificate was issued.
30. The Claimant submitted his claim on 25.06.2021.

## **Relevant law**

1. S. 123 Equality Act ("EqA") provides:

*“(1) 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.*

*...*

*(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.”*

2. Section 140B sets out the extension of time limits to facilitate conciliation before bringing a claim:

*“(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).*

*(2) In this section—*

*(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

*(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

*(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

*(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

*(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.”*

3. In *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96 the Court of Appeal confirmed that in deciding the question of conduct extending over a period:

*“The focus should be on the substance of the complaints ... was there an ongoing situation or a continuing state of affairs in which officers ... were treated less favourably. The question is whether that is “an act extending over a period” as distinct from a succession of unconnected or isolated specific acts”.*

4. In considering whether separate incidents form part of an act extending over a period, “one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents” (*Aziz v FDA* 2010 EWCA Civ 304, CA).

5. There is a “very broad general discretion” conferred on tribunals to decide whether it is just and equitable to extend time *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 per Underhill LJ at [37]. The “best approach” is for the Tribunal to “assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular ... ‘the length of, and the reasons for, the delay’” (paragraph 37).
6. In *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132, the EAT has held that, when considering whether it was just and equitable to extend the time limit for presenting discrimination complaints, or to grant an application to amend to add a further out of time discrimination complaint, the tribunal was entitled to weigh in the balance its assessment that the merits of the proposed complaints were weak.
7. In the EAT in *Secretary of State for Justice v Johnson* 2022 EAT 1 the EAT decided that an employment tribunal had erred in extending time for a harassment claim as it had failed to identify the specific conduct constituting harassment and when it ceased and it had failed to consider the prejudice to the employer in allowing the claim to proceed when it concerned events that had happened several years before.
8. In circumstances in which an employee alleges that they are ignorant of the time limits to bring a claim, it will be necessary for the Tribunal to consider whether that ignorance was reasonable. In *Concentrix GVC Intelligent Contact Ltd v Obi* [2022] EAT 149 the EAT held that not providing a reason for the delay was not determinative but that the Tribunal had erred when it confined its consideration of whether any prejudice had been caused to the employer to the fact that the overall claim was only one day out of time where there had been a series of complaints by the employee and so had failed to take account of its specific finding in respect of prejudice caused by an earlier claim of racial harassment.
9. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the claimant brought a claim of failure to make a reasonable adjustment based on a failure to redeploy her to another role. The Court of Appeal said that not all time limits are fixed by reference to the date on which a cause of action accrued. In the case of reasonable adjustments under s.29 EqA, the duty arises as soon as the employer is able to take steps which it is reasonable for it to take to avoid the relevant disadvantage. However, the Court of Appeal observed that this early date might unfairly prejudice a claimant who may have reasonably believed that the employer was taking steps to address the disadvantage, when in fact the employer was doing nothing. Accordingly, for the purposes of the time limit, the period within which the employer might reasonably have been expected to comply had to be determined in the light of what the claimant reasonably knew.
10. In *Kerr v Fife Council* EATS 0022/20 the Employment Appeal Tribunal held that the employment tribunal erred in its approach to the claimant’s reasonable adjustments claim based on her employer’s refusal to reclassify the reason for her ill health-related absence, so that her pay would not be adversely affected. The tribunal wrongly concluded that, by continuing to pay K on an un-reclassified

basis, the employer had acted in a way that was inconsistent with the requested adjustment and that this was the date at which time began to run. Further, any assessment of whether an act was inconsistent with the making of the desired adjustment should be assessed from the claimant's point of view, having regard to the facts known, or which ought reasonably to have been known, by the claimant at the relevant time.

## **Conclusions**

11. Mr Livingston argued that this was a case where s.123(4)(b) EqA applied as this was a continuing act. He said that the period should be 2014 – 3 December 2020 when the Claimant was no longer able to work at all. Ms Ahmad argued that s.123(4)(a) applies and the date that limitation begins is the date that the Claimant was told he could not be transferred - 28 July 2020. She said that if not, and s.4(d) (b) applies, then the last possible date is 5 November as this is the date that the Claimant goes off sick and so no reasonable adjustments are possible from that date.

### **2014 - 2017 complaints**

12. There was very little evidence on the alleged acts of discrimination/failure to make reasonable adjustments occurring between 2014 – 2018. The Claimant gave oral evidence that he would have occasional conversations about it but no detail was provided. The Claimant has not shown that there was a continuing act between 2014 – 2017.
13. *Kumari* allows the Tribunal to consider the likely prospects of a claim when deciding whether it is just and equitable to extend time for any acts/omissions. There would be significant forensic difficulties for the Respondent to defend these complaints given the time that has elapsed and the inadequate particularisation of what the complaints actually are from that period. It is therefore not just nor equitable to extend time in relation to any complaint that occurred 2014 -2017.

### **13 March 2018 – 3 December 2020 complaints**

14. From 13 March 2018 the Claimant and Respondent discuss via Occupational Health and management conversations the physical difficulties the Claimant has and the requirement for a move within the Respondent to alleviate these difficulties. The Claimant does move roles in November 2018 but there are still issues with stairs. Issues with staffing persist and this has an impact on how the Claimant has to perform his role. There is repeated Occupational Health and Management input. There is a gap in evidence from when the Claimant starts at the Meads Store until his return from shielding in August 2020. He was not asking for a move or reduced duties over that period. However the onus is not on the Claimant to repeatedly ask or complain. The Respondent knew that the Claimant needed adjustments and a move and that overwork and reduced staffing would affect his condition but they continued not to provide those adjustments. The Tribunal concludes that the Claimant reasonably believed at the time, from 13 March 2018, that this was a continuing state of affairs. This was an alleged failure by the Respondent to do something which ultimately expired on 3 December

2020 when the Claimant no longer reasonably expected that the Respondent ought to do it.

15. The Claimant then had three months to put in his claim, plus the ACAS Early Conciliation period. However, as the Claimant did not contact ACAS until 23 April 2021, he is afforded no ACAS EC extension and he had to submit his claim by 2 March 2021. He did not do so until 25 June 2021 and so he is out of time by 3 months and 23 days.

**Just and equitable extension**

16. In October 2021 the Claimant had only received 10-20 mins free legal advice from solicitors who had not told him about time limits and had told him to enter a grievance. He had entered a grievance that set out his complaints at length but the internal processes were delayed. The grievance had been entered on 21 October 2020, yet the outcome was not provided until 10 February 2021. The Claimant acted promptly, he appealed on 15 February and the appeal outcome was on 19 April 2021. He contacted ACAS on 23 April 2021.
31. Also at this time, the Claimant was dealing with the ill health early retirement process and his mother's terminal illness. Together with concerns around vulnerability to covid and his poor health state he was both physically and mentally exhausted during this period. The Tribunal concludes his ignorance as to time limits was reasonable.
32. Ms Ahmad submitted that three of the Respondent's witnesses had left and so the Respondent would be prejudiced. She did not know how many witnesses there were remaining. However, no submission was made that the three were not contactable, nor that they were unwilling to attend, nor that there were no others who could not give relevant evidence.
33. While the period in question runs from 13 March 2018, and this is likely to cause some forensic difficulty, what is being complained about remains constant – the Claimant's deteriorating health, the physical difficulties he has with aspects of his job and alternative roles. These issues were raised and investigated by the Respondent in the grievance and appeal process. Documentation exists.
34. The Tribunal concludes that it is just and equitable for time to be extended in relation to the Claimant's claims of direct disability discrimination, a failure to make reasonable adjustments and indirect discrimination.

EJ L Burge

6 June 2023

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