



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Hennessy

**Respondent:** Delfino Logic Limited

**Heard at: London South (remotely by CVP)**

**On: 20 June 2023**

**Before:**  
**Employment Judge Heath**

## **Representation**

Claimant: In person

Respondent: Mr C McLoughlin (solicitor)

# RESERVED JUDGMENT

1. The following claims are out of time, the tribunal finds that it was reasonably practicable to have brought the claims on time, the tribunal has no jurisdiction to consider them and they are dismissed:
  - a. Unfair dismissal;
  - b. Unlawful deduction from wages;
  - c. Holiday pay.
2. The following claims are out of time, the tribunal does not find that it is just and equitable to extend time, the tribunal has no jurisdiction to consider them and they are dismissed:
  - a. Disability discrimination (however claimed).

# REASONS

## **Introduction and issues**

1. This was a preliminary hearing to determine whether the claimant's claims have been presented within the prescribed time limits, and if not, whether or not:

- a. In the case of the unfair dismissal, deductions from wages and holiday pay claims, it was reasonably practicable for the claim to be presented in time, and if not whether it was presented within a reasonable time thereafter.
  - b. In the case of disability discrimination claims whether it was just and equitable to extend time.
2. There is a claim for a redundancy payment which, the respondent accepts, was presented within the 6 month time limit set out in section 164 Employment Rights Act 1996 (“ERA”).
3. Additionally, a strike out warning was issued on 14 June 2023 in relation to the claimant failing actively to pursue his claim, and failing to comply with tribunal orders. Both parties agreed that I should consider this issue also.

## **Procedure**

4. The claimant presented an ET1 on 16 December 2021 complaining of unfair dismissal, disability discrimination, non-payment of redundancy payment, holiday pay and other payments. He had commenced ACAS Early Conciliation on 14 September 2021 and received his certificate on 30 September 2021.
5. Both the ET1 and the ET3 referred to the claim being presented out of time, and on 29 July 2022 the tribunal listed the matter for a preliminary hearing on 17 January 2023 to consider whether the tribunal has jurisdiction to consider the claims. In the alternative, whether the claims should be struck out or subject to deposit orders purely on the question of time limits. The matter could not go ahead on 17 January 2023 and was postponed to today.
6. On 29 July 2022 the tribunal also listed a final hearing, 30, 31 January and 1 February 2024. It also issued suggested Case Management Orders (“CMOs”) which included the claimant providing a Schedule of Loss by 7 February 2023, disclosure by 7 March 2023, agreed bundle by 11 April 2023 and exchange of witness statements by 9 May 2023.
7. On 13 February 2023 the respondent’s solicitors asked the claimant for his overdue Schedule of Loss. On 6 March 2023, when he still had not provided the Schedule of Loss, the respondent’s solicitors applied to the tribunal to enquire of the claimant what his intentions were, as he seemed not to be actively pursuing his claim. In the alternative, they applied the tribunal to vary the CMOs by extending the deadlines by six weeks.
8. On 29 March 2023 EJ Burge gave the claimant 14 days to provide his schedule of loss. She also varied the CMOs by extending the deadlines by six weeks. That same day the claimant wrote to the tribunal saying that he would submit his Schedule of Loss within the next 14 days.
9. On 1 June 2023 the tribunal wrote to ask the respondents to confirm whether the claimant had complied with the earlier directions. On 2 June 2023, the respondent’s solicitors confirmed that the claimant had not complied with the directions and had not contacted them since he copied

them in on his email of 29 March 2023.

10. On 14 June 2023 EJ Wright issued a strike out warning because of the claimant's failure actively to pursue the claim, and his failure to comply with tribunal orders. He was given until 16 June 2023 to give his reasons in writing or request a hearing.
11. On 15 June 2023 the claimant emailed the tribunal with a number of attachments, and raising a number of points about fraudulent activity by the respondent, a private healthcare provider and NatWest bank.
12. The hearing started late because of some technical difficulties. There was no bundle or witness statement. I established with both the parties their joint understanding that this was a hearing to consider the issue of the claimant's claim potentially being out of time and whether to extend time, and to consider the strike out warning. I discussed with parties the best way forward. It was agreed that the claimant would give evidence on oath, and that the tribunal would determine the issues on time limits and strike out warning. It was clear that what was being focused on was the delay in presenting the complaint, and that the tribunal was not being asked to consider, for example, whether there was a continuing act of discrimination.
13. The claimant gave evidence on oath, and was asked questions by both myself and Mr McLoughlin. Mr McLoughlin had mentioned at the start of the hearing that he wished to make reference to a webpage ( [https://www.whatdotheyknow.com/user/mark\\_hennessy\\_2](https://www.whatdotheyknow.com/user/mark_hennessy_2) ) which contained details of Freedom of Information requests pursued by the claimant, and he questioned him on these. Both parties summed up very briefly. It had reached the allotted time for the hearing when submissions were concluded, I reserved this decision. During the hearing the claimant emailed to the tribunal clerk a report from Dr Pretorius dated 2 February 2022, and a report from Dr Kumar dated 23 November 2021. He also emailed his schedule of loss, which he had not sent to the tribunal or the respondent before this point.
14. During the hearing I asked the claimant if he believed that any aspect of the hearing might present difficulties for him as a person with a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD"). He said, effectively, that he may stray from the point in some of his answers and might need to be brought back to the point. He did not suggest any other adjustments. I made it clear to the claimant that he should alert me any difficulties he encountered during the hearing so that I could consider making adjustments. The claimant did not subsequently raise any difficulties, though he did need to be brought back to the point on some of his answers.

## **The law**

### Time limits - unfair dismissal

15. The time limit for bringing an unfair dismissal complaint is set out in section 111 of the Employment Rights Act ("ERA"), the relevant provisions of which are as follows:

*s. 111(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)*

16. Section 207B ERA provides:

*(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).*

*(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 a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

17. The test of practicability means what could have been done not what would have been reasonable. Reasonably practicable does not mean “reasonable” or “physically possible” but is analagous to “reasonably feasible” (see *Palmer and Or v Southend-on-Sea BC* 1984 ICR 372, CA). The burden of proof is on the claimant to show that it was not reasonably practicable to present the claim in time *Consignia v Sealy* [2002] IRLR 624.

18. In *Walls Meat Co v Khan* [1978] IRLR 499 it was stated “*The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant [...]*”.

#### Time limits - unauthorised deductions from wages

19. The time limit for an unauthorised deduction from wages claim is three months beginning with “*the date of payment of wages from which the deduction was made*” (section 23(2) ERA). Time can be extended on applying the same reasonably practicable test as for unfair dismissal.

Time limits - holiday pay

20. The time limit for bringing a claim for unpaid annual leave is three months from when “*the payment should have been made*” (Reg. 30(2)(a) a Working Time Regulations 1998 “WTR”). Again, the test to extend time is a reasonably practicable one.

Time limits - disability discrimination

21. Section 123 Equality Act 2010 (“EA”) 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.*

22. The burden is upon the claimant to persuade the tribunal that it is just and equitable to extend time, and there is no presumption that the tribunal should extend time (*Robertson v Bexley Community Centre* [2003] IRLR 434).
23. The Court of Appeal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050 observed that the wording of section 120(1)(b) “*such other period as the employment tribunal thinks just and equitable*” gives the Tribunal a wide discretion in considering whether to extend time. Leggatt LJ said that “*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reason for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claims while matters were fresh).*”
24. Tribunals are encouraged 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’*” (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 22).
25. Reviewing the authorities, the learned editors of *Harvey’s* set out a non-exhaustive list of factors that may prove helpful in assessing individual case:
- a. the presence or absence of any prejudice to the respondent if the claim is allowed to proceed
  - b. the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;
  - c. the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;

- d. the conduct of the claimant over the same period
- e. the length of time by which the application is out of time;
- f. the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of the claim;
- g. the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

### Strike out

26. Rule 37 of the ET Rules provides:-

*At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

...

*(c) for non compliance with any of these Rules or with an order of the Tribunal;*

*(d) that it has not been actively pursued.*

27. Striking out the claim must be a proportionate response, and part of that is the tribunal assessing whether there is a “*less drastic means to the end for which the strike-out power exists*” (*Blockbuster Entertainment v James* [2006] IRLR 630). A repeated failure, or one over an extended period of time “*may give rise to a view that if further indulgence is granted, the same will simply happen again. Tribunals must be cautious to avoid that*” (*Harris v Academies Enterprise Trust* [2015] IRLR 208). The tribunal must have regard to, notwithstanding the default, whether a fair trial is still possible.

## **The facts**

28. The claimant was employed by the respondent as a hotel manager from 21 August 2017. It is common ground between the parties that the claimant was dismissed by the respondent on 30 June 2021, with the respondent giving the reason as redundancy.

29. The claimant says sums were owing to him on the termination of his contract. He says he was due a redundancy payment, holiday pay and some wages. The respondent says that a director of the company, who was also a good friend of the claimant, had lent him money to him to enter into a programme of residential rehabilitation. The respondent says it was entitled to recoup these sums from his final pay packet, effectively extinguishing all sums due to him.

30. The claimant agreed that the sums should have been paid to him on termination of his contract of employment, 30 June 2021. Time starts to run for the holiday pay and wages claims on this date.

31. I established with the claimant, on looking at his ET1, that the disability discrimination he claims is:

- a. The director ignoring the claimant's repeated references to his ADHD after he mentioned he thought he had on diagnosed ADHD in October 2020;
  - b. His dismissal.
32. The last act of discrimination occurred on 30 June 2021. This is the start of the three month period for the purposes of section 123 EA.
33. So, in respect of all claims, the date from which the three month time period runs is 30 June 2021.
34. The claimant is an intelligent man with a university degree in Business Studies. He candidly accepts that he was well aware of the time limit for bringing his claims on the tribunal, as they were on websites that he consulted when considering bringing his claims. The two medical reports make clear that the claimant meets the criteria for the diagnosis of ADHD (combined type), and this condition has had an impact on his education, employment, emotions, family, finances, friendships and leisure. The reports and the respondent's Response also make clear that the claimant has had difficulties with substance misuse which led to a spell of residential rehabilitation in June 2020 which is at the centre of the dispute about the loan which was recouped from the claimant's final pay.
35. The lack of a bundle of any witness statements made it a little difficult to make findings on certain issues, but the evidence of the claimant is that he was in dispute with the private healthcare provider which provided his residential rehabilitation, the respondent, and NatWest bank. As I understood his evidence, he says these three organisations colluded to defraud the claimant of money and cover it up. He said that an invalid and unenforceable contract relating to the loan provided by the respondent to the claimant to pay for the residential rehabilitation was drawn up. He said that NatWest was complicit in the use of false documents and that for the past two years he had been pursuing the healthcare provider and NatWest.
36. It is clear on the evidence that the claimant has from the summer of 2021 vigorously pursued both of these organisations, seeking justice as he sees it. He has made a complaint about NatWest to the Financial Ombudsman Service and has complained about the healthcare provider to the Information Commissioner's Office ("ICO"). From the [whatdotheyknow](#) webpage it is clear that these complaints have escalated to complaints and Freedom of Information requests about the ICO.
37. The claimant was asked how it was that he could pursue his complaints about these organisations so energetically at a time when he was unable to present his ET1. His evidence was that his dispute with the respondent felt so much more personal to him. The director of the respondent was his employer, his friend and his advocate. He felt that she was the only person he had on his side at a difficult time, and that she "switched sides". He felt that it was easier to focus on the healthcare provider and NatWest as he did not know them and they did not know him. He said "*it was less painful to throw myself at strangers than to pursue someone I just wanted the truth from*".
38. Additionally, the claimant said that he was not coping well at this point in

time. He had sought help from the GP and was described antidepressant in what he described were “dark weeks”. He said that he had never been as financially worse off in his life and did not have a support network. He felt suicidal at times and did not want “*to start something I would not finish*”. He said that he had “ADHD paralysis” but that “*technically it was practicable [to present the claim on time], but it would have killed me*”.

39. The claimant was asked what spurred him to present his claim in December 2021. He said that he did not want to imagine anyone else going through the same thing as he did with the respondent. He was also feeling stronger and did not want it on his conscience.
40. At the time of the hearing, the claimant agreed that he had not provided a Schedule of Loss. He said there were aspects of it he could not prove and he felt preoccupied with what he felt the respondent had taken from him than what he had lost. He said there was no case law in respect of what he was claiming, and no space on the form for it. He agreed that “technically” he had no excuse for not complying with the tribunal orders. However, he felt he faced a psychological barrier. He believed that the respondent’s Response de-personalised him by raising scandalous matters not relevant to the issues in the case.
41. The claimant agreed that he had been pursuing his issues with the private health provider and NatWest during 2023. He said he recognised that he had a three-year limitation period with the private health provider and he could “park” these other issues in order to focus on tribunal litigation. He said that it would be appropriate for some kind of unless ordered to be imposed to ensure that he complies with orders in the future.

## Conclusions

### Time limits

42. Time starts to run in all claims from 30 June 2021. For the purposes of section 207B Day A is 14 September 2021 and Day B is September 2021. The extension is therefore one under section 207B(4) and is to 30 October 2021.

### Extension of time – the not reasonably practicable test

43. The claimant’s case in his ET1 section 15 is “*I did try to submit this form within the allocated time frame but when I got to the part where I had to submit details I really had a breakdown and couldn’t bring myself to put it in writing and I needed the time to come to terms with it and be strong enough to deal with it*”.
44. His evidence to the tribunal was that his ADHD and his depression prevented him from putting his claim in on time. He admits that, on the face of it, it was “technically” practicable to bring the claimant time, the reality, psychologically, was that he was unable to do it.
45. What the claimant says is understandable. It is difficult for many people to face up to doing difficult things. When poor mental health and a condition like ADHD are added to the mix this compounds the difficulties.



46. I not from the reports that, while they were directed towards the diagnosis or otherwise of ADHD, each of them had a section headed Psychiatric History and one of them had a Mental State Examination. However, while the reports mention the substance misuse issues “from mid-2018 to mid-2020”, neither mentions any mental health difficulties in the relevant period I am considering.
47. I have also looked closely at each report to see if either could illuminate in the relevant period. Dr Kumar’s report refers to the claimant leaving non-urgent tasks for last-minute and struggling to do complicated tasks. It refers to the claimant being disorganised and late for appointments. Dr Pretorius’ report refers to the claimant’s procrastination and struggling at work.
48. The claimant has not produced any other medical evidence to substantiate a medical barrier to his presenting his claim on time. I accept his evidence at face value that the period following his dismissal was a low point for him and that he was prescribed antidepressants. However, there is no additional evidence to substantiate the severity of symptoms or the effectiveness of the medication in alleviating them.
49. What I cannot ignore is that any mental health problems or features of ADHD did not prevent the claimant from energetically pursuing his grievances with the private health provider and NatWest. Again, I can accept, in principle, that it might be easier to pursue more faceless organisations than a former employer, the fact is the claimant’s medical conditions did not prevent him from seeking redress for wrongs. He was well aware of the time limits in the tribunal and he channeled his energy pursuing other organisations.
50. In the circumstances, I find that it was reasonably practicable for the claimant to present his claim within the time limit.
51. Had I concluded that it was not reasonably practicable for the claimant to have presented his claim on time, I would then have had to consider whether he brought his claim within a reasonable period thereafter. He was 1 ½ months out of time. This is a significant period in the context of a three month time limit (subject to the early conciliation extension). I would have found in the alternative that the claimant had not presented his claim within a reasonable period thereafter.

Extension of time – just and equitable

52. The length of the delay in bringing the claim was around 1 ½ months.
53. I have set out above the reasons for the delay, in short, the claimant did not feel himself psychologically able to bring the claim. However, what must be balanced against this is the fact that he was able diligently to pursue his grievances against other organisations at a time when he could have been presenting his claim to the tribunal.
54. As set out above, there is no question of ignorance of the time limits. Although he was unrepresented, the claimant is an intelligent man who knew of the tribunal time limits.
55. In terms of the claimant’s health, I repeat the points made in the previous section under the reasonably practicable test. His pursuit of the private

health provider and NatWest does not indicate that he had medical conditions that would have put significant barriers in the way of his presenting a claim on time.

56. In terms of prejudice, while it is unlikely that the delay of a month and a half would have made a significant difference in terms of fading memories and loss of documents etc., there is the prejudice, in terms of cost and effort, the respondent will suffer in having to defend an out of time claim. The claimant says that there is a detailed WhatsApp chain that details the issues. That said, part of his claim is that the respondent ignored him when he mentioned his ADHD which extended over a period of time. It is likely that there will be some issues of recall here. The claimant, of course, will be prejudiced in not having a claim under the EA if time is not extended. Taking all of these matters into consideration, I find that the question of prejudice, all told, adds little either way as one of the factors in my discretion to extend.
57. There are no particular factors to consider in the conduct of the parties from the date of dismissal to the date of the application, beyond the claimant's pursuit of third parties.
58. I considered whether there would be any overlap between the discrimination claims and the redundancy pay claim which is in time. In some cases there is something to be said for it being just and equitable to extend time when there will be claims going forward in any event. Here, however, there is not such an overlap, and the tribunal would be considering substantially different evidence.
59. Weighing all the matters in the balance I conclude that the claimant has not established that it is just and equitable to extend time.

### Strike out

60. The tribunal will be considering the claim for a redundancy payment that is in time.
61. The claimant produced his List of Issue for the first time today, over four months late. Orders to disclose documents, provide copies and produce the bundle have not been complied with, even given the extension by six weeks ordered by Employment Judge Burge on 29 March 2023. During this period the claimant has been challenging his energy into pursuing other organisations.
62. This has been a finely balanced decision, but on balance I conclude that it would not be in the interests of justice to strike out the claimant's redundancy pay claim. I consider that the issues involved in this claim will be narrower than the full suite of complaints he originally presented, and with discipline and cooperation the parties should be in a position to prepare for trial. A fair trial is therefore still possible.
63. I gave serious thought as to whether to make an unless order, but decided that this would not be in the interests of justice. The claimant has indicated that he will focus on this claim, and I will take him at his word. He must recognise that if he does not hit further deadlines, then it will be open to the respondent to seek unless orders or to strike out his claim.

64. I therefore do not strike out the claim for a redundancy payment.

## **Other matters**

65. The overall consequence of my decision is that none of the claims will be proceeding, apart from the claimant's claim for a redundancy payment. The parties are encouraged to focus on the value of this claim, which is likely to be akin to the claim for a basic award in the claimant's schedule of loss.

66. There are some case management issues which arise from my decision which I will address in a separate document.

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Employment Judge **Heath**

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Date: 21 June 2023