



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr J Fierzbik

v

**Respondent**

Imperial College Healthcare NHS  
Trust

## PRELIMINARY HEARING

**Region:** London Central

**On:** 30 June 2023

**Before:** Employment Judge Baty

**Appearances**

**For the Claimant:** Represented himself

**For the Respondent:** Ms J Whiteley (solicitor advocate)

## JUDGMENT

1. The claimant's complaint of unfair dismissal was presented out of time and it was reasonably practicable to have presented it in time. The tribunal does not therefore have jurisdiction to hear that complaint and it is therefore struck out.
2. The claimant's complaints of disability discrimination were presented out of time. Except in relation to the complaint of discrimination arising from disability in relation to the claimant's dismissal, it is not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear the claimant's complaints of disability discrimination (with the exception of the complaint of discrimination arising from disability in relation to the claimant's dismissal) and they are therefore struck out.
3. The claimant's complaint of discrimination arising from disability in relation to the claimant's dismissal was presented out of time. It is just and equitable to extend time. The tribunal does therefore have jurisdiction to hear that complaint, which will proceed to a final hearing.

# REASONS

## Background

1. By two claim forms (2210570/2022 and 2210586/2022), the first of which was presented on 27 November 2022 and the second on 28 November 2022, the claimant brought complaints of unfair dismissal and unspecified complaints of disability discrimination. The respondent defended the complaints.

## Earlier preliminary hearing of 17 April 2023

2. At an earlier preliminary hearing for case management purposes on 17 April 2023, also before me, the claims, which overlapped to a substantial degree and related to substantially the same events, were consolidated.

3. At that preliminary hearing, which lasted 90 minutes, we spent a reasonable amount of time running through the issues and, whilst we were able to identify and agree the issues relating to the unfair dismissal claim and the dismissal related disability discrimination complaint (which the claimant confirmed was a complaint of discrimination arising from disability), we were unable to identify any remaining issues which there may have been. I explained a lot of the background about how disability discrimination complaints operated. I also explained that, just because there may have been an element of the process with which the claimant disagreed, that did not necessarily form the basis of a disability discrimination complaint.

4. The claimant said that there were three elements to do with the respondent's handling of the process which he might have an issue with. I tried to explore with the claimant what these were or at least to get an idea of what these were but he was unable to do this and said that it would be much better if he could set them out in writing. We therefore agreed various orders to enable this to be done, and which clearly set out exactly what information the claimant should provide in order to ensure clarity of any further allegations/complaints (if any). The claimant was in his own time to consider these three issues and, in the light of the discussion we had, to take a view as to whether or not they did form the basis of a disability discrimination complaints (and what sort of disability discrimination complaints). It was therefore envisaged that it was possible that the claimant would confirm that there were in fact no further complaints or up to the three further complaints which he referenced.

5. I also highlighted to the claimant that, if the further complaints were not in the claim forms, they would require an amendment to the claim form to enable them to proceed and gave some information about the type of factors the tribunal would take into account when considering whether or not to grant an amendment to the claim.

6. The issues relating to the unfair dismissal complaint and (with the exception of the nature of the justification defence) to the dismissal-related discrimination arising from disability complaint were then agreed between the parties and me and were set out in my record of that preliminary hearing which was sent to the parties.

7. I also agreed with the parties that there would need to be a further preliminary hearing for case management purposes and listed a two hour hearing on 30 June 2023 accordingly.

8. As noted, much of the 17 April 2023 preliminary hearing was spent trying to get to the bottom of what the claimant's factual allegations were. Neither party raised the issue of time limits at the hearing. However, after the hearing, I noted that there may be issues in relation to time limits. In my record of the hearing, I therefore set out the following:

**17. Time/limitation issues**

17.1. Although this was not discussed at the hearing and was not raised by either party, there may be an issue as to whether or not the tribunal has jurisdiction to hear even the complaints relating to the dismissal, the issues of which were agreed.

17.2. It appears from the pleadings to be an agreed fact that the claimant's dismissal took effect on 11 July 2022. He commenced ACAS early conciliation on 10 October 2022, which completed on 25 October 2022. As already noted, the first claim was presented on 27 November 2022 and the second claim on 28 November 2022. Applying the three month tribunal time limit which applies in relation to both the unfair dismissal and discrimination arising from disability complaints (as extended by the rules in relation to ACAS early conciliation), it appears that, because even the earlier first claim, which was presented on [27 November] 2022, was presented a month and two days after the end of ACAS early conciliation, that the complaints relating to the dismissal are prime facie out of time.

17.3. This is a matter which will need to be considered at the next preliminary hearing (although, for the avoidance of doubt, that preliminary hearing is currently listed for case management purposes only and any application to convert it to a strikeout hearing in relation to these jurisdictional time limit points would need to be made well in advance of that hearing if the tribunal were to consider whether to convert that hearing to a hearing which considered a full strikeout application).

Developments after the 17 April 2023 preliminary hearing

9. The claimant duly sought to comply with the orders. However, rather than setting out up to 3 further complaints, he set out a table containing 13 further allegations. These appeared for the most part to relate to the process over the years leading up to his dismissal. The allegations were extensive; they were not clear; they were said to be a whole variety of types of disability discrimination complaint (and other complaints such as "bullying" for which the tribunal did not have jurisdiction) and in many cases without any particular logic as to why that complaint was chosen or how that complaint was structured, let alone any suggestion as to why the matters the claimant was complaining about were because of his disability. They were in a form which was not capable of being properly responded to.

10. This resulted in further requests for particulars from the respondent and further attempts to set out a list of issues. On these, the claimant made further comments. The documentation increased and increased and without any further clarity as to the nature of the proposed complaints.

11. It was not clear if any of the 13 complaints were referenced in the claim forms, let alone pleaded, and, as Ms Whitely submitted at this hearing, they would need amendments to the claims in order to be introduced.

12. The claimant's schedule did set out dates next to the allegations. However, as they all related to events leading up to the claimant's dismissal, they would all have been presented out of time even if they have been set out in the original claim forms

(and of course, if they required an amendment, the date on which they would have been deemed to be presented would have been the date the amendment was granted (in other words 30 June 2023 had we in due course got round to considering these amendments) rather than the date the original claims were presented (27 and 28 November 2022 respectively) (see Galilee v The Commissioner of Police of the Metropolis [2018] ICR 634, which I referred parties to at this hearing); they would therefore have been presented considerably out of time.

13. The respondent duly applied to convert the 30 June 2023 preliminary hearing for case management into a preliminary hearing in public to consider jurisdictional issues in relation to time limits. I decided to convert the 30 June 2023 accordingly and increased its listing time to one day. The notice of hearing in relation to this was sent to the parties on 7 June 2023. It stated:

“Employment Judge Baty has directed that there will be a Preliminary Hearing to determine the following issue:

1. Whether the claimant’s unfair dismissal complaint should be struck out on the basis that the tribunal does not have jurisdiction to hear it as it was presented out of time. In particular, was it presented in time; if not, was it reasonably practicable to have presented it in time; if not, was it presented within such further period as was reasonable?

2. Whether the claimant’s disability discrimination complaints should be struck out on the basis that the tribunal does not have jurisdiction to hear them as they were presented out of time. In particular, were they presented in time; if not, is it just and equitable to extend time?

3. If the tribunal is unable to make the above determinations, should any of the complaints be struck out on the basis that they have no reasonable prospect of success in the light of these jurisdictional issues (time issues) or, in the alternative, should the tribunal order that the claimant pay a deposit as a condition to continuing these complaints on the basis that they have little reasonable prospect of success in the light of these jurisdictional issues (time issues)?”

Case management orders may be made at the conclusion of the preliminary hearing.”

14. In the meantime, the claimant had supplied his medical records and an impact statement to the respondent. By letter of 14 June 2023, the respondent duly conceded that the claimant was a disabled person at all material times by reason of anxiety/anxiety attacks; however it did not concede that the respondent had at the material times the requisite knowledge that the claimant’s anxiety/anxiety attacks amounted to a disability.

## **Documents**

15. By an email of 20 June 2023, the claimant sent various documents to the tribunal in relation to this hearing (all of which the respondent included in the 347 page bundle that was then provided for this hearing). In those documents, the claimant amongst other things addressed time-limit issues and the reasons why he said that he did not submit his claims on time.

16. After the bundle was submitted, the claimant sent some further email correspondence to the tribunal and the respondent on 26 June 2023. This was forwarded to me and was before me at the hearing.

## **Management of the hearing**

### Adjustments

17. I had already explored what adjustments might be necessary for the claimant at the previous preliminary hearing and he reiterated that the position was the same. Essentially, he would need breaks when he requested them (he requested one break during the hearing, which was duly accommodated). He also said that, if he felt that a panic attack was about to happen, he would let us know; I explained that, if that was the case, he should say as soon as he felt that one might occur and the hearing could of course take a break at that point. As it was, nothing of that nature occurred and the hearing ran very smoothly.

### Conduct of hearing

18. At the start of the hearing, I explained how the hearing would progress and that the first matter to deal with was the strike out application and that, depending on the outcome of that, there may be a need for further case management and the listing of the matter for a final hearing in due course.

19. I also, for the claimant's benefit, went into a lot of detail explaining the legal principles in relation to time limits and extensions of time, how they differed for the unfair dismissal complaint and the disability discrimination complaints and what the relevant tests were.

20. I gave the claimant the opportunity to explain the relevance of the email chains which he had sent in on 26 June 2023, which he did. I said that, although it was the respondent's application, it would be helpful if the claimant did this first, so that both I and the respondent knew before each party made their submissions if there were any other reasons which the claimant was giving in relation to why he did not put his claims in on time beyond those he had already set out in his correspondence of 20 June 2023. As the claimant went through them, he appeared to be suggesting that because there was some post dismissal correspondence between the respondent and him up to 26 July 2022, he may have wrongly assumed that time ran from 26 July 2022 rather than the dismissal date of 11 July 2022. However, when he in due course made his submissions, he appeared to indicate that he was not claiming that.

21. After that, each party was given the opportunity to make submissions on the application, with Ms Whiteley going first and then, after a break, the claimant.

22. I then adjourned for half an hour to consider my decision. When we returned, I gave the parties my decision orally at the hearing.

23. I asked the parties whether they would like written reasons for my decision, having first explained to them two of the implications of this (namely, that the written reasons would be needed if there was any appeal and that, if the reasons were requested, they would go online on the tribunals website, which could be searched).

24. The claimant requested written reasons at the hearing and these reasons have duly been produced.

## **The Law**

25. The legal principles involved are set out below.

### **Unfair dismissal**

26. The Employment Rights Act 1996 (“ERA”) provides at section 111(2) in relation to a complaint of unfair dismissal, “... an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal: (a) within 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”.

27. That time-limit is adjusted in relation to periods of ACAS early conciliation.

### **Discrimination (Equality Act 2010)**

28. The Equality Act 2010 (the “Act”) provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. (Again, that time-limit is adjusted in relation to periods of ACAS early conciliation.)

29. The Act further provides that conduct extending over a period is to be treated as done at the end of the period and that a failure to do something is to be treated as occurring when the person in question decided on it.

30. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA. The tribunal takes into account anything which it judges to be relevant and may form and consider a fairly rough idea of whether the claim appears weak or strong, see TJ Hutchison v Westward Television [1977] IRLR 69 EAT. This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint.

## **Conclusions on the issues**

### **Complaints all out of time**

31. There was no dispute that the complaints had all been brought out of time.

32. The latest complaint in time terms was in relation to the claimant’s dismissal. It was agreed that the claimant’s dismissal took effect on 11 July 2022. (The claimant had been given six weeks’ notice of termination of employment by letter of 31 May 2022, but the date from which time runs for the purposes of the dismissal complaints is the date of dismissal itself, 11 July 2022).

33. The claimant then commenced ACAS early conciliation on 10 October 2022. The date is significant because it was the last date on which he could have commenced ACAS early conciliation (three months minus a day since the date of his dismissal) and still retain the ability to bring his dismissal complaints in time.

34. ACAS early conciliation completed on 25 October 2022, at which point ACAS issued its certificate. That meant that, for a complaint relating to the dismissal to be in time, it would have to be brought within a month of that date, in other words by no later than 25 November 2022.

35. The first claim was brought on 27 November 2022 and the second claim on 28 November 2022. The complaints relating to the dismissal were therefore brought out of time, as were any complaints which related to matters earlier than the dismissal.

36. The dismissal complaints in the claim form were, therefore, presented two days out of time.

37. As already noted, because they required an amendment, the 13 allegations in the claimant's recent schedule would not only have been out of time even if they had been contained in the claim forms (because they related to matters prior to the dismissal) but were even further out time because, not being pleaded in the claim forms, they required an amendment, which could (if given) have been given no earlier than 30 June 2023 (the date of this hearing); they were therefore considerably out of time.

38. I therefore went on to consider whether to exercise the discretions set out in the relevant statutes in relation to extending time.

### Unfair dismissal

39. The first question which I have to address is whether it was reasonably practicable for the claimant to have presented his unfair dismissal complaint within the time limit.

40. The claimant put forward various explanations as to why he did not put his claims in time. I consider each below.

### *Health*

41. It is accepted that the claimant has anxiety/anxiety attacks. Furthermore, the claimant said that he thought that these were particularly problematic in the period of October and November 2022, which was the period during which the time limit expired. One of the documents which he referred us to was a fit note from his GP. Although this was dated 3 December 2022, it stated that he was not fit for work over the period from 18 November 2022 until 16 January 2023. The reason given in the fit note was "anxiety, panic attacks". Similarly, the claimant referred us to a DWP notification dated 18 November 2022 (the same date as the commencement of the period when he was not fit for work as set out in the fit note) stating that the claimant had a health condition that restricted his ability to work or look for work.

42. However, notwithstanding this, the claimant was in fact able to put in the first claim form (on 27 November 2022), which is a lengthy document which must have required a reasonable amount of work to produce. Furthermore, he was able to amend it and resubmit it (as the second claim form) on 28 November 2022. Those two dates were right in the middle of the period in which he said he was suffering particularly from anxiety and anxiety attacks. It is evident that his health conditions did not prevent him from doing this. Similarly, he was able to commence ACAS early conciliation on 10 October 2022, notwithstanding any health conditions he may have been suffering from. I do not, therefore, consider, whatever the impact of his health conditions may have been, that they prevented him from submitting a claim during that period on or before 25 November 2022.

*Parents*

43. Secondly, the claimant said that his parents moving in September/October 2022 was very difficult for him and that affected his ability to deal with matters such as submitting claim forms. Whilst I do not doubt that his parents moving may have been difficult for him, it manifestly did not, for the reasons set out in the paragraph above, prevent him from putting in claim forms. Furthermore, he contacted ACAS on 10 October 2022, right in the middle of the period when he says he was affected by his parents moving. I do not therefore consider that this prevented him from putting his claim in in time.

*Not knowing when time ran from*

44. As indicated earlier, I had initially thought from the remarks which the claimant made about the email correspondence from July 2022 which he submitted to the tribunal on 26 June 2023, that he was suggesting that he thought that, in relation to the dismissal claims, time ran from 26 July 2022 because of the existence of these internal communications in the period between the actual dismissal on 11 July 2022 and 26 July 2022. He was not entirely clear, but in his submissions I did not consider that he was making this assertion.

45. Even if he had been, I would not have accepted it. The claimant was very aware of time limits and, as he admitted, googled time limits and consulted the Citizens Advice Bureau website about them. As noted, the fact that he commenced ACAS early conciliation on 10 October 2022 is telling; that is the last day by which he had to do that without losing the ability to submit his claim on time and I consider that that is indicative that he knew fully that time ran from the dismissal on 11 July 2022, which is why he contacted ACAS when he did. I do not, therefore, consider that there was any mistake on his part about when time ran from; he knew that it ran from 11 July 2022.

*Mistake regarding time limits*

46. The final reason given by the claimant as to why he submitted his claims late was that he thought that, rather than having one month from the end of ACAS early conciliation to submit his claim, he had six weeks. He says as much at the top of the attachment to his second claim, submitted on 28 November 2022:

"I would like to take this opportunity to apologise for a mistake I made by submitting incorrect document on 27/11/2022. I am resubmitting the claim due to administrative error made with document attached 27/11/2022. I believed I had 6 weeks from ACAS certificate date to make the claim. Having been unwell



past week and discovered on gov.uk website that it is in fact 4 weeks, or a calendar month, I rushed to upload the claim before midnight.

I hope you will understand and allow me to resubmit appropriate document.”

47. I accept, therefore, that the real reason why he didn't submit his claim earlier was because he mistakenly thought that he had six weeks to do so.

48. Having said that, the claimant is an intelligent individual; he was, as he admitted, able to Google matters about time limits and to check the Citizens Advice Bureau website (which he says he misunderstood) although he obviously realised his error when he subsequently consulted the gov.uk website as referred to in the second claim. Furthermore, the claimant was a member of the RCN and had had advice from the RCN during his employment. Although he said that, since his dismissal, the RCN had regarded his case as closed, he fully accepted that if he had contacted the RCN for advice about time limits, they would have given him that advice on time limits; he accepted that he could have contacted them but he did not do so. Therefore, whilst I accept that he did make a mistake here, he could and should have got it right; notwithstanding that he is a litigant in person, he had all the resources and abilities to do so.

49. It was, therefore, clearly reasonably practicable for him to have submitted his claim within the time limit. Therefore, as he did not do so, the tribunal does not have jurisdiction to hear his unfair dismissal complaint and that complaint is struck out.

#### Discrimination complaints

50. As none of the complaints were brought in time, there is no in time complaint of discrimination to which out of time complaints of discrimination could be attached as being “conduct extending over a period” such that they would be deemed to be in time.

51. The only issue, therefore, is to consider whether to extend time in relation to any of these complaints on the basis that it is just and equitable to do so. Because it may be just and equitable to extend time in relation to one complaint does not mean that it is similarly just and equitable to extend time in relation to other complaints.

52. I remind myself that, whilst this is the exercise of a wide general discretion, the burden is on the claimant to show that it would be just and equitable to extend time.

53. As set out in the conclusions in relation to unfair dismissal above, I found that the reason that the claimant did not put his claim form in prior to the 25 November 2022 deadline was because of a mistake he made about when that deadline expired.

#### *Discrimination arising from disability complaint relating to the dismissal*

54. Making such a mistake is certainly capable of being a reason as to why it may be just and equitable to extend time.

55. In relation to the discrimination arising from disability complaint relating to dismissal, which is set out in the claim forms, the first claim was presented only two days out of time, so it was a very small delay. That delay is unlikely to prejudice the respondent greatly (save for the obvious prejudice of having to defend the claim if time

was extended); whereas the prejudice to the claimant would clearly be far greater if he lost the ability to bring this complaint as a result of submitting it two days late.

56. Furthermore, the complaint, as identified at the last case management hearing, is clear, with the issues agreed; the respondent knows exactly what it has to respond to and the tribunal knows exactly what it has to determine. It is impossible for me to judge at this stage without hearing evidence whether it is likely to succeed or not; however, I note that, by its nature, the claimant is likely to be able to prove the first two parts of the test: it is agreed that he was dismissed and dismissal is highly likely to be considered unfavourable treatment; and, as it is the respondent's case that the claimant was dismissed as a result of his long period of absence, it may be easy to prove that this was as a consequence of his anxiety/anxiety attacks. The case is likely to be predominantly about knowledge and justification.

57. For these reasons, therefore, I consider that it is just and equitable to extend time in relation to this complaint. The tribunal does therefore have jurisdiction to hear this complaint.

*The other 13 proposed disability discrimination complaints*

58. By contrast, the other 13 proposed disability discrimination complaints are not merely two days late. They were not set out in the original claim forms. Rather, they have been formulated at a much later stage and, even if an amendment was granted to permit them to be added, that would be as of 30 June 2023; they are therefore at least 10 months out of time.

59. There is no suggestion that the claimant was not aware of any of these allegations at the time of those allegations; by contrast, as they predominantly relate to the process adopted by the respondent in relation to him, he was almost inevitably aware of them at the time.

60. Furthermore, the claimant has been given a great deal of help and assistance (at the previous preliminary hearing) to try and formulate and clarify his complaints; he could not do that at that hearing; he requested to do it in writing; as noted, the documentation I have seen in the bundle evidences expanding allegations (13 rather than the three which he originally referred to at the first preliminary hearing) in an unclear form; they have generated more and more correspondence and further requests for particulars from the respondent. Even if I allowed time to be extended in relation to these complaints, I am not confident that I would be able (over the course of the rest of this hearing or at all) to obtain from the claimant agreement on exactly what these complaints are in clear language such that they are in a form capable of being responded to; I say that based on my experience of the claimant at the previous hearing and in writing since then.

61. These complaints have clearly cost extra time and effort on the part of the respondent even up to this point; there will be huge prejudice to the respondent in trying to clarify these complaints properly let alone in trying to defend them. It is not clear why they are said to be the types of disability discrimination complaint which the schedule maintains that they are.

62. Furthermore, for these reasons, if it is difficult to work out even what the complaint is, it is likely that such complaints would fail anyway. I consider, therefore, that there would be little prejudice to the claimant if he were not able to bring these complaints, particularly as he already has his clear discrimination arising from disability complaint relating to his dismissal. By contrast, the prejudice to the respondent in allowing these complaints to proceed would be enormous.

63. For these reasons, I do not consider it would be just and equitable to extend time in relation to these complaints. The tribunal does not therefore have jurisdiction to hear them and they are struck out.

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Employment Judge Baty

Dated: 30<sup>th</sup> June 2023

Judgment and Reasons sent to the parties on:

03/07/2023

For the Tribunal Office