EMPLOYMENT TRIBUNALS

Claimant: Karen Tuffney

Respondent: South Central Ambulance Service NHS Foundation Trust

Heard at: Southampton (video hearing) **On:** 03 August 2023

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Catherine Casseley, of Counsel

JUDGMENT

1. It was reasonably practicable for the Claimant to present her claim for unfair dismissal within the time limit and it is struck out.

2. It is not just and equitable to permit the Claimant's discrimination claim, submitted outside the time limit, to proceed and it is struck out.

REASONS

Purpose of hearing

1. The Case Management Order calling this hearing stated that it was either an application to strike out or a preliminary hearing to decide whether to extend time for the claims, it being clear that they were presented outside the three-month time limit. It seemed to me that this was better set out as a preliminary hearing to decide that issue. This does not affect the way the hearing was conducted. I set out the issue for the Claimant, who then gave evidence. Both parties made submissions, and I gave an ex tempore judgment. Full reasons are required, as after I delivered that judgment the Respondent said that a written costs application would follow, and the judgment might be relevant to that application.

Law

2. A claim for unfair dismissal must be presented within 3 months of the effective date of termination[1], extended in a variety of ways by the requirement to obtain an Early Conciliation Certificate from Acas before filing a claim. What the extension is depends on when the notification is given by the Claimant and when the certificate is issued[2]. If not so filed, time may be extended for such further time as is reasonable, but only if it was not reasonably practicable for the claim to have been filed in time.

3. General guidance for the parties about the approach of the Tribunal in such cases (not all will be applicable) is:

   The test for extending time has two limbs to it, both of which must be satisfied before the Tribunal will extend time:

   • first the Claimant must satisfy the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of the three-month primary time limit;

   • if the Claimant clears that first hurdle, she must also show that the time which elapsed after the expiry of the three-month time limit before the claim was in fact presented was itself a 'reasonable' period.

4. Hence, even if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the three-month time limit, if the period of time which elapsed after the expiry of the time limit was longer than was 'reasonable' in the circumstances of the case, no extension of time will be granted.

5. As regards the first limb of the test, it is quite difficult to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time. A Tribunal will tend to focus on the 'practical' hurdles faced by the Claimant, rather than any subjective difficulties such as a lack of knowledge of the law, an ongoing relationship with the employer or the fact that criminal proceedings are still pending. The principles which tend to apply are:

   • section 111(2)(b) ERA should be given a liberal construction in favour of the employee

   • it is not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit

   • however, a Claimant will not be able to successfully argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal, if he has consulted a skilled adviser, even if that adviser was negligent and failed to advise him correctly

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[1] Employment Rights Act 1996 S 111 Complaints to employment tribunal.
(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
(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.

[2] S207B of the Employment Rights Act 1996.

• there may be exceptional circumstances where that principle may not apply, namely where the adviser's failure to give the correct advice about time limits is itself reasonable, for example, where both the Claimant and the adviser have been misled by the employer as to some material factual matter such as the date of dismissal

• where a claimant has consulted skilled advisers, such as solicitors, the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as they should reasonably in all the circumstances have given him

• the question of reasonable practicability is one of fact for the Tribunal, and should be decided by close attention to the particular circumstances of the particular case

• a Claimant can rely on failure to act in reliance on advice from, for example, Tribunal employees or government officials. In DHL Supply Chain Ltd v Fazackerley [2018] UKEAT 0019_18_1004 the EAT held that the Employment Tribunal did not err in finding that it was not reasonably practicable for the claimant to have brought proceedings in time when he relied on incomplete advice from Acas that he should exhaust an internal appeal process first before considering starting a Tribunal claim

• it is not reasonably practicable to bring a claim if a Claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a Tribunal will expect them to present the claim as soon as reasonably practicable, rather than allowing three months to run from the date of discovery

• if a Claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a Tribunal is likely not to extend time. If the Claimant has some idea that they could bring a claim but does not take legal advice, a Tribunal is even less likely to extend time

• if a letter is posted by first class post, it is reasonable to assume that it will be delivered two days later (excluding Sundays and Bank Holidays). If it is not, a Tribunal is likely to extend time. However, the onus is on the Claimant to ensure that it does arrive in time: he must take all reasonable steps to check. Claimants' representatives should therefore always make a note of when they would expect to receive a response from the Tribunal (or Acas) and to chase if it has not been received

• if an employee makes a mistake on a claim form which means that it is rejected by an Employment Tribunal (such as incorrectly stating the early conciliation certificate number) and thereafter the time limit for the claim expires while he is labouring under the misunderstanding that he has not made a mistake, that misunderstanding—provided it is reasonable in the circumstances—may justify an extension to the time limit on the basis that it was not reasonably practicable for him to have brought the claim in time

• where an error on the part of solicitors leads to an initial employment tribunal claim being rejected and a corrected resubmitted second claim being presented out of time, in deciding whether it was ‘not reasonably practical’ for the resubmitted claim to be presented

in time, the Employment Tribunal must assess the reasonableness of the solicitors' original error. This involves taking into account all the circumstances (eg in North East London NHS Foundation Trust v S M Zhou UKEAT/0066/18/LA the claimant had completed her own ET1 form to save costs and her solicitors did not spot her error in respect of the early conciliation certificate number) and a recognition that not every omission, however technical, is unreasonable. In accordance with the principle in Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379 CA:

◦ if the error which led to the first claim being rejected was reasonable, and the claimant and her solicitors thereby believed a valid claim had been presented in time, the Tribunal may find that it was not reasonably practicable to present the second claim in time, however

◦ if the error on the part of the solicitors was not reasonable, then the claimant is bound by their error, and it would have been reasonably practicable for the claim to have been presented in time

6. If the first limb of the test is satisfied, the Claimant must then satisfy the second as well: even if a Tribunal concludes that it was not reasonably practicable for a Claimant to present the claim within the three month time limit (or extended period where the requirement for early conciliation applies) no extension of time will be granted unless the claim was presented within a 'reasonable' time (judged according to the circumstances of the case) thereafter.

7. If a Tribunal concludes that the extent of the delay between expiry of the primary three-month limitation period (or extended period where the requirement for early conciliation applies) and the date the claim was presented was objectively unreasonable, the fact that the delay was caused by the Claimant's advisers rather than by the Claimant makes no difference, and hence a time extension will be refused.

8. The law is clearly set out by Eady J in Paczkowski v Sieradzka (Jurisdictional Points: Extension of time: reasonably practicable) [2016] UKEAT 0111_16_1907 at paragraphs 18-22, and I have applied it. The essence is that the issue of reasonable practicability is largely one of fact and falls to be determined on the particular circumstances of the case.

9. The test for discrimination claims (which have the same time limit) is whether it is just and equitable to extend time to permit the claim to proceed[3]. There is a similar extension of time for the Acas early conciliation procedure.

10. I have considered the case law summarised and explained in Robinson v Bowskill & Ors (p/a Fairhill Medical Practice) (Jurisdictional Points : Claim in time and effective date of termination) [2013] UKEAT 0313_12_2011 and the factors in section 33 of the Limitation Act 1980 which is referred to in the BCC v Keeble [1997] IRLR 336, cited in *Robinson*.

[3] S123 Equality Act 2010 Time limits
(1) Subject to sections 140A and 140B 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.

11. The most recent Court of Appeal guidance is in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23:

> *"37. The first concerns the continuing influence in this field of the decision in Keeble. This originated in a short concluding observation at the end of Holland J's judgment in the first of the two Keeble appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:*
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> > *"We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised."*
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> > *The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is 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 (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."*

38.I am not the first to caution against giving the decision in Keeble a status which it does not have. I have already noted the Judge's reference to the decision of this Court in Afolabi. At para. 33 of his judgment in that case Peter Gibson LJ said:

> *"Nor do I accept that the ET erred in not going through the matters listed in s. 33 (3) of the 1980 Act. Parliament limited the requirement to consider those matters to actions relating to personal injuries and death. Whilst I do not doubt the utility of considering such a check-list … in many cases, I do not think that it can be elevated into a requirement on the ET to go through such a list in every case, provided of course that no significant factor has been left out of account by the ET in exercising its discretion."*
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> *In Department of Constitutional Affairs v Jones [2007] EWCA Civ 894, [2008] IRLR 128, Pill LJ at para. 50 of his judgment referred to Keeble as "a valuable reminder of factors which may be taken into account" but continued:*
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> *"Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found."*
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> *That point was further emphasised by Elisabeth Laing J, sitting in the EAT, in Miller v Ministry of Justice [2016] UKEAT 0004/15: see paras. 11 and 29-30 of her judgment. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] ICR 1194, Leggatt LJ, having referred to section 123, says, at paras. 18-19 of his judgment:*
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> > *"18. … [I]t is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [Keeble]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [Afolabi]. …*
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> > *19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the*

> *delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*
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> *Although the message of those authorities is clear, its repetition may still be of value in ensuring that it is fully digested by practitioners and tribunals."*

12. In Owen v Network Rail Infrastructure Ltd EA-2022-000609-JOJ, heard on 27 June 2023 and promulgated on 01 August 2023, Auerbach J held that the absence of an explanation did not mean that overall it might still be just and equitable to extend time in a discrimination case. This means that it is not a precondition of the just and equitable consideration that an explanation must be given.

13. I have also taken note of the judgment of Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 (again cited in *Robinson*):

> *"25. It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule"*.

Chronology

1. In this case:

   1.1. The Claimant resigned on 31 March 2022 by email with immediate effect.

   1.2. The Acas early conciliation process started on 14 April 2022.

   1.3. The Acas certificate is dated 11 May 2022.

   1.4. The claim form was lodged on 19 August 2022.

2. The three-month period, without the Acas early conciliation period, would have ended on 30 June 2020.

3. The Acas early conciliation period "stops the clock" in a variety of ways, depending on when that period occurs during the standard three-month period.

4. In this case the period was wholly within those three months, and so the number of days in the Acas early conciliation period is added on to the end of the standard period.

5. That is 27 days.

6. 30 June 2020 plus 27 days is 27 July 2022.

7. The claim form was lodged on 19 August 2022, and so was was lodged over three weeks out of time.

Late filing of the claim – Claimant's explanation and findings of fact and observations on it

8. Ms Tuffney's witness statement, which she adopted in oral evidence says:

   8.1. On 01 May 2022 she was invited to take part at Bishops Walton Fayre as a part of her dog training business, and that took a lot of time and mental effort. (Her claim form states that she started this business in May 2021.)

   8.2. On 10 May 2022 she joined a pain clinic zoom course which took place every Wednesday from 11 May 2022 to 06 July 2022.

   8.3. On 18 May 2022 she attended a meeting about her application for universal credit, which had been refused.

   8.4. On 11 June 2022 she was supporting a dear friend whose dog had died, it being bred from her own (late) dog.

   8.5. On 02 July 2022 she had to cancel the dog training class by reason of ill health and call in sick at the care company where she was due to work.

   8.6. She was not able to return to work until 13 July 2022, but was still feeling unwell.

   8.7. After 14 July 2022 she was unable to run her dog training classes as it was too hot. This was stressful as she felt she was letting people down, and as she was not earning this added financial pressure.

9. In her oral evidence Ms Tuffney said that she had financial pressures and needed to work, which meant running her dog training classes and training for her care job, including shadowing shifts and working there.

10. Ms Tuffney accepts that for the whole period, apart from when it was, she decided, too hot to do so she was running dog training classes.

11. Ms Tuffney tried to set up a website for her business during this period. She found that too difficult to accomplish, but the point is that while she was doing that she could have been putting in her claim.

12. Ms Tuffney accepts that for almost the whole time she was working at a care home. Her claim form states that she started work there on 08 April 2022.

13. There is no medical evidence of any medical reason affecting Ms Tuffney's ability to file an Employment Tribunal claim. Ms Tuffney says that by reason of her conditions she gets very tired and is unable to work a full day and for some of the time was affected by Covid-19. She does not say that any medical condition stopped her from lodging her claim at any time. Nothing changed between her leaving work for the Respondent and the filing of the claim.

14. Ms Tuffney does not say that she was wrongly advised about time limits.

15. Ms Tuffney accepts that the letter from Acas sending the early conciliation certificate has in bold type in a larger font and in a different colour the warning that there are time limits, and it is for the claimant to check what they are. Ms Tuffney accepts that she should have done so. She said that she could not afford legal advice, but accepted that she did not, and could have, asked the Citizens Advice Bureau. She has a computer and internet access, and she

accepted that there was no reason why she could not have done an internet search for "Employment Tribunal time limit" or similar which would have been the work of a moment and immediately provided the information.

16. The Respondent made efforts to persuade Ms Tuffney to change her mind about resignation at a meeting on 11 April 2022, but that was well before the expiry of the time limit, and Ms Tuffney had no intention of returning, and so that was not the cause of any delay.

17. Ms Tuffney was not able to offer any clear reason why she lodged her claim when she did: there was no particular trigger for her to do so. She got round to it after she visited her aunt on the occasion of her aunt's birthday and her aunt urged her to get on with it.

Late filing of the claim for unfair dismissal discrimination claim

18. The essence of what Ms Tuffney says is that she was too busy with other things to get round to her claim.

19. She was at work at the care home most of the three-month period.

20. She was running dog training classes almost all of the three-month period, and when she was not, because of the heat, she could have used that time to fill in the claim form. She stopped her dog training classes on 02 July 2022, which was well within the limitation period.

21. The attempt by the Respondent to persuade Ms Tuffney to stay is not relevant because she was determined to leave and because it was long before the expiry of the limitation period.

22. Ms Tuffney had Employment Tribunal proceedings in mind by 14 April 2022, because that was when the Acas early conciliation period started: she approached Acas solely about the prerequisite of the Acas early conciliation certificate for starting a claim. She accepted that this was the case.

23. Ms Tuffney may well have issues with tiredness arising from medical conditions, but they do not preclude her from all sorts of activity. Some of the effort that went into her work could have gone into lodging the claim.

24. Perhaps the clearest example of that was when Ms Tuffney cancelled her dog training classes in July 2022, before the expiry of the limitation period. She then had free time when she could have put in her claim.

25. The Acas period ended on 11 May 2022 and the claim was issued on 19 August 2022. That is over three months after the end of the early conciliation period.

26. There is no adequate explanation for the delay. It was reasonably practicable for Ms Tuffney to have devoted time to filing a claim. She handwrote her claim form, and it is in narrative form. It is not that there was any technical difficulty for her. It was reasonably practicable for her to have lodged her claim within the limitation period.

27. Accordingly, I dismiss the claim for unfair dismissal.

Late filing of the discrimination claim

28. The Tribunal has an obligation to be fair to both parties. The long and the short of this claim is that Ms Tuffney just did not get round to putting in her claim, as she was too busy with other things.

29. In assessing whether to extend time for a discrimination claim the effect on the Claimant of the events complained about is relevant. That Ms Tuffney did not give the bringing of a claim priority over, for example, going to Bishops Walton Fayre does not suggest any great degree of anguish over her treatment by the Respondent. I put this to Ms Tuffney who did not disagree.

30. The timing of the resignation indicates that Ms Tuffney resigned when it was pointed out to her that her flexible working request, based on not being able to work before 2pm for medical reasons, was not consistent with the dog training classes which she was running commercially at 11am. This is not a strong claim. It is fair to add that Ms Tuffney says that she could manage an hour's dog training course at 11:00, but not 6 or 8 hour shift at the Respondent.

31. Time for the claim for failure to provide auxiliary aids runs, on Ms Tuffney's own account, from 02 February 2022 and so that is about three months out of time, for which no clear explanation was given, and I can see no reason why it is just and equitable to extend time for that claim.

32. From the facts set out above it cannot be just and equitable to extend time for the presentation of any part of the discrimination claim. Accordingly, I dismiss that claim also.

Costs

33. Having delivered an ex-tempore judgment, Ms Casseley said that there would be a written application for costs. She was content for that to be determined on the papers.

34. I told Ms Tuffney that she would be sent that application and she should respond to it, sending that response to the Tribunal and to the Respondent. I said that I expected that the Respondent would refer to letters it had sent to her. When she responded she should comment on any letters she had received from the Respondent about costs. As there is discretion as to the amount of a costs order, should one be made, Ms Tuffney might wish to add detail of her financial circumstances.

35. Ms Tuffney also wished the costs application to be determined on the papers.

36. I note that the time point was an obvious one to take, but that the Grounds of Resistance goes into detail about the merits or otherwise of the claims made. If the Respondent seeks to make a claim for the entire cost of preparing the Grounds of Resistance it should deal with the point that this could easily have been raised as a preliminary jurisdictional matter, asking for a preliminary hearing and for leave to amend the Grounds of Resistance to deal with the merits if the case were permitted to proceed. My preliminary view is that would have been the way to adhere to the overriding objective.

Employment Judge Housego
Date 03 August 2023

Judgment & Reasons sent to the Parties on 18 August 2023

For the Tribunal Office