# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Gleeson

**Respondents:** 1. Asda Stores Limited
2. Greenwich Leisure Limited

**Heard at:** Manchester **On:** 9 January 2024

**Before:** Regional Employment Judge Franey
(sitting alone)

**REPRESENTATION:**

**Claimant:** In person
**First Respondent:** Mr C Ilangaratne (Counsel)
**Second Respondent:** Did not attend

# JUDGMENT

1. All complaints against the second respondent, Greenwich Leisure Limited, are dismissed upon withdrawal by the claimant.

2. The complaint of unfair dismissal is dismissed upon withdrawal by the claimant.

3. The complaint of breach of contract is dismissed as it was presented outside the time limit in Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 when it was reasonably practicable for it to have been presented within time.

4. All complaints of discrimination contrary to the Equality Act 2010 are dismissed as they were presented outside the time limit in section 123(1)(a) of that Act and it would not be just and equitable for the Tribunal to allow a longer period for presenting those claims.

# REASONS

## Introduction

1. Judgment was given orally with brief reasons at the conclusion of this public preliminary hearing. The claimant requested these written reasons, which contain more detail than my oral reasons.

2. Case number 2408747/2023 was presented on 14 August 2023. It gave an early conciliation number referring to a certificate showing that early conciliation had begun on 17 July 2023 and ended on 19 July 2023. The respondent was Asda Stores Limited ("Asda"), and the complaints were of discrimination because of sexual orientation and religious/philosophical belief. The narrative asserted that after it had been alleged by a colleague that he had likened gay men to Nazis, the claimant had been suspended on 6 March 2022, not paid properly in May 2022, and then subjected to a disciplinary process resulting in dismissal.

3. That claim also mentioned that the claimant had been talking about this incident at his gym when he had been overheard and excluded from the gym without any investigation.

4. Case number 2408904/2023 was received by post the following day. It was completed by hand rather than online. The narrative given was very similar, but on this claim the box for unfair dismissal was ticked as well as sexual orientation and religion or belief discrimination, and Greenwich Leisure Limited ("Greenwich") was made second respondent. That was the company which managed the gym from which the claimant had been excluded.

5. Response forms in both cases were received on 29 September 2023.

6. The response form from Asda asserted that the claim had been brought out of time, that the claimant had been employed for less than two years so could not complain of unfair dismissal, but the dismissal had in any event been a fair one for gross misconduct. Asda denied any breach of the Equality Act.

7. The response form from Greenwich said that it had never employed the claimant: he had been a customer banned from its premises for using homophobic language.

8. The two cases were combined and listed for hearing today to determine time limits.

9. For the hearing I had a bundle of documents prepared by Asda's representatives which ran to almost 100 pages. Any reference to page numbers in these Reasons is a reference to that bundle.

10. I also had the benefit of a witness statement from the claimant together with 15 exhibits. The respondent had prepared a bundle in which those exhibits were separately numbered, and that bundle too ran to approximately 100 pages. Any

reference to page numbers preceded by the letter "C" is a reference to the documents exhibited to the claimant's witness statement.

11. After dealing with some preliminary matters recorded below, I heard oral evidence from the claimant. He was cross examined by Mr Ilangaratne. Both sides then made a submission before I made a decision.

**Greenwich Leisure Limited**

12. One of the preliminary matters was whether the claimant was pursuing any claim against Greenwich.

13. On 16 November 2023 Employment Judge Barker issued a notice to the claimant under rule 27 to the effect that she considered that the claim against Greenwich had no reasonable prospect of success because the claimant was a customer, not an employee or worker of that organisation. Her order said that the claim would be dismissed on 23 November 2023 unless the claimant had explained in writing why it should not be dismissed.

14. The claimant did provide a letter dated 23 November 2023 in which he accepted there was no claim against Greenwich but said that it had been made a respondent because Greenwich held evidence vital to his case which would need to be submitted in due course.

15. Understandably, in the light of that letter, Greenwich chose not to attend this hearing.

16. I explained to the claimant that the Tribunal had power to order a company that was not a respondent to provide documentation if it was necessary to do so in order for the claim to be heard fairly. On that basis the claimant accepted that Greenwich did not need to be a respondent, and withdrew the proceedings against that company. Those proceedings were dismissed.

**Legal Claims against Asda**

17. I asked the claimant whether he was pursuing an unfair dismissal complaint, making the observation that he lacked the two years of continuous service necessary to do so. He said he had ticked that box in error. That claim was withdrawn and dismissed.

18. That meant that the claims which were pursued were as follows.

19. Firstly, the claimant was pursuing a breach of contract claim by way of "wrongful dismissal". It was apparent, however, that he regarded himself as having been wrongfully dismissed in May 2022 when he was underpaid during suspension, although he could not recall whether he had communicated to Asda any acceptance of a breach of contract by Asda as bringing the contract to an end. Understandably Mr Ilangaratne cross examined the claimant about the effective date of termination of his employment, but I decided to proceed for time limit purposes on the basis most favourable to the claimant, which was that his employment ended on 20 June 2022.

That was not a finding I made but simply an assumption for the purposes of this time limit hearing.

20. Secondly, the Equality Act complaints were the subject of some cross examination. The claimant said that he was pursuing a claim based on less favourable treatment because of his belief in Rastafarianism, which he also characterised as belief in being an honest man, an upright man and standing his ground in the face of adversity.

21. As for the sexual orientation complaint, in cross examination he said that he had been treated less favourably because he was a man, which would be a complaint of sex discrimination, but in giving an explanation of that he said that people had made false allegations against him "as a man under their homosexual protected characteristic". It was unclear, therefore, whether his claim was one of sex discrimination, or sexual orientation discrimination, or both. However, the precise nature of the claim had no impact on time limits and so it was not necessary for me to get to the bottom of that issue, which I would have done as part of case management had time been extended.

**Relevant Legal Principles on Time Limits**

Breach of Contract

22. The time limit for a complaint of breach of contract appears in Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994:

> **"..an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented**
>
> **(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or…**
>
> **(c) in a case where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within** [that period]**, within such further period as the tribunal considers reasonable."**

23. Two issues may therefore arise: firstly whether it was not reasonably practicable for the claimant to present the complaint within time, and, if not, secondly whether it was presented within such further period as is reasonable.

24. The provision for unfair dismissal claims is the same, and many of the cases on this provision are unfair dismissal cases.

25. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal). Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

26. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal

approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Equality Act Claims

27. The discrimination claims were brought under the Equality Act 2010. The time limit for bringing a claim appears in section 123 as follows:-

> **"(1) …. proceedings on a complaint within Section 120 may not be brought after the end of –**
>
> **(a) the period of three 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**."

28. The task of the Tribunal in deciding what is just and equitable is to take account of all relevant factors, and leave out of account any which are not relevant. In **Abertawe Bro Morgannwyg University Local Health Board v Morgan [2018] EWCA Civ 640** Leggatt LJ said this at paragraphs 18-19:

> **"18. First, it 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 British Coal Corporation v Keeble [1997] IRLR 336), 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 Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, para 75.**
>
> **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)."**

29. In **Robertson v Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]** the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

> **"It is also of importance to note that the 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 a 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."**

30. Subsequently in **Chief Constable of Lincolnshire v Caston [2010] IRLR 327** the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

31. The relevant factors can include the merits of the complaint as well as the balance of prejudice: **Rathakrishnan v Pizza Express (Restaurants) Limited UKEAT/0073/15**, a decision of the EAT of 23 October 2015. The absence of a good explanation for the delay is relevant but not determinative.

## Findings of Fact

32. The respondent did not call any evidence in this case and there was no real dispute about the facts relevant to time limits. On the basis of the evidence from the claimant and the documents I made the following findings of fact.

33. The claimant was employed by Asda as a Customer Delivery Driver from December 2021.

34. In the period between 2022 and August 2023 the claimant was not a regular computer user, although he had a smartphone from which he could send emails. He chose not to use his smartphone for internet access. Occasionally he was able to access the internet if at a local library. He was not proficient in computing and needed help with some things.

35. On 15 April 2022 (pages 82-83) a colleague made a formal complaint about comments the claimant was said to have made involving Nazis and gay people.

36. The claimant was suspended on 20 April 2022.

37. He contacted the Citizens' Advice Bureau ("CAB") and they gave him the number to ring ACAS. He did so and discussed his suspension with ACAS. That same day he wrote a letter to Asda (pages 84-85) which included this paragraph:

> **"I have spoken to ACAS about my legal rights and obligations of the suspension agreed upon…"**

38. The claimant attended an investigatory meeting on 7 June 2022. Extracts from the notes of that meeting appeared at pages 86 and 87. The notes recorded him saying that he was "going to court" over what had happened.

39. On 9 June 2022 the claimant wrote again to Asda (pages 88-89). His letter referred to the "vicarious liability" of the Chief Executive Officer, and referred to a "failure to perform the simple term of the contract". It also contained an accurate formulation of wrongful dismissal as follows:

> **"You also breached the contract by failure to give notice under contract law which is termed wrongful dismissal in any court of law…"**

40. The claimant could not remember how he had gained this accurate understanding of the concept of wrongful dismissal. It may have been through speaking to ACAS.

41. At that stage the claimant went to see a solicitor. He showed the solicitor all the paperwork from what was happening at Asda. The solicitor was not willing to take on his case.

42. The claimant attended a disciplinary hearing on 20 June 2022. Extracts from the notes appeared at pages 90-91. The notes recorded him saying the following:

> **"I believe I have been unlawfully dismissed by the protocol not carried out. I went to see a solicitor. I was suspended on full pay and given £166. It was in** [my] **May pay."**

43. The claimant was told of his dismissal at the conclusion of that meeting.

44. He appealed. His appeal was rejected at a meeting on 9 August 2022.

45. The claimant spoke to the CAB again at this point. Although there was no documentary evidence, I accepted his recollection that at this stage he contacted ACAS again for the purposes of early conciliation, and completed an Employment Tribunal claim form using form ET1. Importantly, however, he did not submit that claim form to the Tribunal but instead did something else with it. He recalled that he sent it to Asda. That may or may not be the case. In any event no claim was presented to the Employment Tribunal in 2022.

46. In October 2022 the claimant contacted the CAB again and was given details of the Greater Manchester Law Centre. On 11 October 2022 (page C99) he emailed the Law Centre asking for help in a wrongful dismissal case. He gave a brief summary of what had happened. He did not receive any response.

47. In the months that followed the claimant was pursuing a complaint to the Information Commissioner about a failure by Asda to respond in a timely fashion to his Subject Access request. That resulted in correspondence from the Information Commissioner's Office between February and July 2023.

48. In July 2023 the claimant saw a YouTube video of a person who explained how she had brought an Employment Tribunal complaint. He decided to try again. He contacted ACAS by telephone. ACAS told him that he already had a number, presumably from August 2022. Nevertheless he started early conciliation against Asda again. The certificate confirming the completion of early conciliation was issued on 19 July 2023.

49. The claimant completed and filed his first claim form on 14 August 2023, and the second claim was received by post the following day.

50. I accepted his evidence that when these two claim forms were presented he still did not know that he only had three months less a day from the events about which he complained in order to bring a claim. During this period the claimant was under the misapprehension that he had six years to bring any kind of legal claim.

## Submissions

51. At the conclusion of the evidence each side made an oral submission.

Respondent's Submission

52. For Asda Mr Ilangaratne submitted that the claimant had failed to establish that time should be extended. He said that the discrimination complaints had no merit given the lack of detail in the claim form and the confusion about whether it was sex discrimination or sexual orientation discrimination. He invited me to conclude that the claimant should not have been ignorant of the three month time limit given his contacts with the CAB, with ACAS and his meeting with a solicitor. Further, the claimant had been able to use a computer and therefore could have conducted research to have ascertained the correct position. Finally, he submitted that the respondent would be prejudiced if time was extended because of the passage of time since the incidents about which the claimant now sought to complain.

53. As for the breach of contract claim, he submitted that it was based on a misapprehension because there had been no breach of contract in May 2022 which resulted in the contract ending, but in any event for the same reasons I ought to conclude that it had been reasonably practicable for the claim to have been lodged within time.

Claimant's Submission

54. The claimant made clear his strong belief in the merits of his case, and the importance of the way he had been treated being judged. The claims he was pursuing resulted from a misunderstanding by colleagues and staff at Asda which had caused him prejudice and distress. His suspension had been unnecessary and had led to confusion. He stood by the record of events set out in his witness statement and emphasised the importance of his case being heard on the merits.

## Discussion and Conclusions

55. My task was to apply the legal framework summarised above to the facts of the case.

Preliminary Points

56. I declined Mr Ilangaratne's invitation to treat these as claims with no merit. I assumed in the claimant's favour that with the assistance of the Tribunal in a case management hearing he would be able to articulate cases which were potentially viable.

57. I also assumed in the claimant's favour that the last act of discrimination on which he relied would be the rejection of his appeal on 9 August 2022, and that he would show that any earlier discriminatory acts were part of a continuing act ending on that date.

58. As for the effective date of termination of employment, again in the claimant's favour I assumed that it would be 20 June 2022, rather than the date in the previous month for which he contended in his evidence.

Breach of Contract Claim

59. I firstly considered whether to extend time in the breach of contract claim. The claimant had to establish that it had been not reasonably practicable for him to have brought his claim within time. That means that it was not reasonably feasible. The three month time limit for contacting ACAS to initiate early conciliation and "stop the clock" ended on 19 September 2022, three months less a day from the date his employment ended.

60. The difficulty for the claimant was that in that period he had contacted the CAB, spoken to ACAS and sought legal advice on his problems at work. Further, he had also sought – unsuccessfully – to present a claim by going through early conciliation and completing an ET1, which he appears to have sent to Asda or elsewhere rather than to the Tribunal.

61. In my judgment it was entirely feasible or practicable for him to have ascertained the correct procedure in that period and to have sent his claim form to the Employment Tribunal to initiate the claim within the primary time limit. There had been nothing stopping him taking that step. It was well within his capabilities to ascertain the correct way of doing this, online or by post to Leicester. He knew how to get advice, having already been in touch with the CAB and with ACAS, and he was also capable of researching matters on the internet using the computer at his local library. He managed to do exactly that in the summer of 2023 and could have done it in the summer of 2022.

62. I therefore declined to extend time and the breach of contract claim was dismissed.

Discrimination Claims

63. The test for the discrimination complaints was a different test: whether it would be just and equitable to extend time. Bearing in mind that the relevant factors are not limited to those identified in the **Keeble** case, but taking account of paragraph 19 of the judgment of Leggatt LJ in **Morgan**, it seemed to me that there were three significant factors in this case: the length of the delay, the reason for it, and the effect on the evidence.

64. The first factor was the length of delay. This was not a claim presented a few days or weeks out of time but it was at least eight months out of time even if the last date of any alleged discriminatory act was taken to be the appeal decision on 9 August 2022. On that basis time would have expired on 8 November 2022, and the claim was not presented until 14 August 2023. That is 278 days outside the time prescribed by section 123 Equality Act 2010 for presenting a claim. The delay was almost three times as long as the primary limitation period.

65. The second factor was the reason for the delay. I accepted that the claimant did not have a clear awareness of the time limit of three months for claims to an

Employment Tribunal, even though he had had a number of contacts with the CAB, spoken to ACAS and taken some legal advice before the primary time limit expired. He may or may not have been told about time limits but even if he was told I am satisfied it did not register with him. He was under the misapprehension he might have as long as six years to bring a claim.

66. However, the claimant clearly knew within the primary time limit that he had the right to go to an Employment Tribunal over the termination of his employment because he sought to do so in August 2022 when he underwent early conciliation with ACAS and then completed form ET1. As explained in paragraph 61 above, he was capable of presenting that claim within time but failed to do so.

67. I was satisfied that there was no good reason for his failure to lodge his claim properly in August 2022, or for his failure to check what had happened to it when he received no response. The reason for the delay during the primary time limit of three months was that failure to check that the claim had been properly presented, and/or his failure to seek advice about time limits. Thereafter he appears to have thought he had six years to bring a claim and took no steps to do so, instead pursuing a related matter with the Information Commissioner, until prompted to try again by seeing a video on YouTube.

68. The third factor was the effect on the evidence. The disciplinary process appears to have been relatively well recorded in the documents I saw, given that there were notes of the various meetings, and no doubt the reason for dismissal was put in writing in the dismissal letter.

69. However, a discrimination case alleging less favourable treatment because of sex, sexual orientation and/or a religious or philosophical belief is a different kind of claim because it requires the Tribunal to make a finding about the mental processes, conscious or subconscious, of the decision makers. Those mental processes are not necessarily committed to writing.

70. I was satisfied that instead of being aware that there was a claim within three months of the appeal decision, the fact the respondent was only aware of a claim a year after the appeal decision would have a significant impact on the ability of witnesses to recall and give evidence about their thought processes at the relevant time.

71. Putting these factors together I was satisfied that the claimant had not established that it would be just and equitable to allow him until August 2023 to present a claim alleging discrimination in the course of his employment which ended in June 2022, or at the very latest in terms of the appeal process in August 2022.

72. The discrimination complaints were therefore dismissed because they were out of time.

73. As both claims have been dismissed the whole case is now concluded.

Regional Employment Judge Franey
10 January 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 January 2024

FOR THE TRIBUNAL OFFICE

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**Recording and Transcription**

This Tribunal hearing was not recorded by the Tribunal because it took place in a hearing room with no recording facilities.