



EMPLOYMENT TRIBUNALS

Claimant: Ann-Marie Joy

Respondent: Annie's Orphans (under charity number of Bangor Pentecostal Church)

Heard at: Southampton Employment Tribunal (via CVP) **On:** Friday, 12 April 2024

Before: Employment Judge M. Salter

Representation:
Claimant: In person
Respondent: Mr. Winrow, solicitor

JUDGMENT

1. The Claimant's claims of:
 - (a) wrongful dismissal;
 - (b) dismissal where the principal reason is making a protected disclosure;
 - (c) detriments on grounds of making a protected disclosure;
 - (d) payment for accrued but untaken holiday and
 - (e) for unlawful deduction from wageswere presented out of time in circumstances it was reasonably practicable to have been presented in time.
2. The Claimant's claim of a failure to make reasonable adjustment was presented out of time and was not presented within such other period as the tribunal considered just and equitable.
3. Accordingly the tribunal has no jurisdiction to hear the claims.

REASONS

INTRODUCTION

1. These are my reasons that were given orally at the final hearing on Friday, 12th April 2024. As explained at that time, in accordance with Rule 62(3) of

Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Regulations”) written reasons will not be provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written record of the decision. If no such request is made, then the tribunal will only provide written reasons if requested to do so by the Employment Appeal Tribunal or a court.

2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal’s Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.
3. These reasons have been prepared at the request of the Respondent, who despite being successful and represented at the hearing requested written reasons.

BACKGROUND

The Claimant’s case as formulated in her ET1

4. The Claimant’s complaint, as formulated in her Form ET1, presented to the tribunal on 8th June 2023, is in short, she was unfairly dismissed, that dismissal was wrongful and came about after she made protected disclosures. She was subjected to detriment on grounds of those disclosures and, in August 2022 had her request for reasonable adjustments refused.

The Respondent’s Response

5. In its Form ET3, the Respondent accepted the Claimant was an employee and that she was dismissed, but denied that that dismissal was unfair,

contending it was for a potentially fair reason, namely a reason related to the Claimant's conduct and that that dismissal occurred after a reasonable investigation and was within the band of reasonable responses open to it. It also denied the claimant had sufficient continuity of employment to present a claim of unfair dismissal and raised a jurisdictional argument concerning the tribunal's time limits.

Relevant Procedural History

6. The matter came before E.J Livesey on 7 December 2023 for a Preliminary Hearing during which a list of issues was drawn up, standard case management orders given to a Final Hearing and today's Preliminary Hearing.

THE PRELIMINARY HEARING

General

7. The matter came before me. The hearing had a three-hour time estimate. I was to determine whether the claims have been presented in time and, if not, whether I should exercise the relevant discretion to extend time
8. The Claimant represented herself, the Respondent was represented by Mr. Winrow, a solicitor.
9. This was a remote hearing which was not objected to by the parties, being conducted entirely by video platform. A face-to-face hearing was not held because it was not practicable and no-one requested the same it was conducted using the cloud video platform (CVP) under rule 46.
10. The parties agreed to the hearing being conducted in this way.
11. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.
12. The participants were told that it was an offence to record the proceedings.
13. Evidence was heard from the Claimant via video link. I was satisfied that she was not being coached or assisted by any unseen third party while giving her evidence.

DOCUMENTS AND EVIDENCE

Witness Evidence

14. I heard evidence from the Claimant. She gave evidence by way of written witness statement that was read by the me in advance of her giving oral evidence.

Bundle

15. There was no agreed bundle for this hearing. I did however have the tribunal file of papers and in light of the issue that I had to determine, where the facts were largely agreed, there did not appear to me to need for many papers. Both parties were able to direct me to the papers they wished me to consider and I had them before me. The Claimant provided me (and Mr Winrow) with additional pages of her documents during the hearing.

SUBMISSIONS

Claimant

16. The Claimant made oral submissions which I have considered with care but do not rehearse here in full. In essence, in the course of the hearing, it was submitted that: the claimant thought she had complied with tribunal procedure and accordingly had complied with the time limits.

Respondent

17. Mr Winrow made brief submissions on behalf of the Respondent:

- (a) the claims are clearly out of time,
- (b) using reasonably practicable discretion first, it would seem to me and the Respondent that the Claimant had ample time to submit a claim, she received advice and seems to have been aware of the time limit is it unclear when she became aware of the time limits,
- (c) when considering the just and equitable extension of time discretion the claim arose in August 2022 and the claim not submitted until June 2023, again there was ample time, and the Claimant did obtain appropriate advice

MATERIAL FACTS

General Points

18. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant in evidence, both in her statement and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest

of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

19. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Claimant's Employment

20. The Claimant was employed by the Respondent from 9th March 2022 as a Charity Shop Manager. For the purposes of this hearing it is sufficient to say that the Claimant considered herself disabled within the meaning of the Equality Act 2010 and that, therefore, the Respondent had an obligation to make reasonable adjustments where she was suffering from a substantial disadvantage at work from that disability. The issue of whether the Claimant was disabled within the meaning of the Equality Act 2010 was one matter that would be determined at Final Hearing, so I make no other comment about that.
21. The adjustment the Claimant sought was to modify the requirement of her attending the bank to deposit the shop's takings. She had to undertake the journey to the bank by bus and she wanted the adjustment to be that she could take a taxi to the bank or be paid a petrol allowance to make that journey [CMO paragraph 7]. Again, I make no findings about this claim.
22. It is an agreed fact that the Claimant was refused this variation in August 2022.
23. The claimant was dismissed on 14th January 2023.
24. She commenced ACAS conciliation on 27th January 2023 and received her certificate by way of email on 10th March 2023. She spent 42 days in Acas

conciliation. Her evidence was, and I accept, that she was advised of a timelimits to present her claim from ACAS.

25. Limitation for presenting her claim form should have been 13th April 2023 (14th January plus three months less a day), to which the 42 days spent in ACAS conciliation would be added. Employment Judge Livesey calculated that limitation was the 25th May 2023 [CMO §1.1].
26. The claimant sent a document entitled Particulars of Claim to the Reading Employment Tribunal. This was sent by recorded delivery and is stamped as received by that Tribunal on 25th April 2023. It was a 9-page document, and was accompanied by a covering letter which had the Claimant's name and address on it. There were no other documents sent to Reading by the Claimant.
27. The Claimant believes that she presented her claim to Reading within the required time limit.
28. The Claimant said that at some point she telephoned the tribunal (she was unclear if this was Reading or Bristol tribunal) to be told that she needed to complete the form ET1. She was unclear when this was. I find that it most likely to have been the Reading tribunal which she called as, at this point, she had no reason to call or be involved with the Bristol Tribunal as her claim, she thought was with Reading.
29. When the Claimant became aware she had to use Form ET1 she went online and gained information as to how to complete the form and how to present it.
30. The Claimant presented her ET1 on 8th June 2023 [CMO §1.1]. This was the first time the Claimant had used the Form. The Claimant told me that she was aware the claim form had been presented out of time and sought advice from the CABX and her housed insurers as to this.
31. At the Case Management Hearing on 7th December 2023, E.J. Livesey identified the claims as wrongful dismissal; detriment because of whistleblowing; automatically unfair dismissal because of whistleblowing; Failure to make reasonable adjustments, failure to pay accrued but untaken

holiday pay, an unauthorised deduction from wages and a failure to provide written terms and condition of employment.

THE LAW

Statute

32. So far as is relevant the Equality Act 2010 states:

123 Time limits

- (1) Subject to section 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.
- ...
- (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

33. Time limits were not just targets, they were 'limits' and were generally enforced strictly. A good reason for an extension generally had to be demonstrated (*Robertson v Bexley Community Centre* [2003] IRLR 434, CA), albeit that the absence of a reason would not necessarily have been determinative (*ABMU v Morgan* [2018] IRLR 1050, CA).

34. More recently in Jones v Secretary of State for Health & Social Care EA-2022-000744-JOJ the Employment Appeal Tribunal urged lawyers not to rely on para 25 of Bexley without setting it in its context of a wide discretion to grant an extension of time in Equality Act claims on a just and equitable basis

35. Tribunals had been encouraged to consider the factors listed within s.33 of the Limitation Act 1980 (the *British Coal v Keeble* factors), although it was not mandatory to do so; the length and reasons for the delay, the extent to which the Claimants had sought professional help and the extent to which information was not known to them until later and the degree to which the Respondents ought to have been blamed for any late disclosure. Consideration also had to be given to whether the Claimants had dragged

their feet once they knew of all of the relevant information and, if so, to what extent.

36. It used to be thought that the touchstone was the issue of prejudice and whether and to what extent delay had caused prejudice to either side but, as was made clear in *Miller v MoJ* UKEAT/0003/15, at paragraph 13 by Laing J, whilst that was another, important factor to consider, it was not determinative.

EMPLOYMENT RIGHTS ACT

37. So far as is relevant the Employment Rights Act 1996 states:

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.

38. Similarly worded provisions exist for:

- (a) wrongful dismissal: Article 7, Employment Tribunals Extension of Jurisdiction (England and Wales Order) 1994
- (b) whistleblowing detriment: s48 Employment Rights Act 1996;
- (c) failure to pay accrued but untaken holiday: s23 Employment Rights Act 1996; Working Time Regulations 1998 regulation 30; and
- (d) unlawful deduction from wages: s23 Employment Rights Act 1996.

CONCLUSIONS ON THE ISSUES

General

39. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Findings on the Issues

Issue 1: was the Claim Presented in Time?

40. I have determined the claims were not presented in time. Limitation expired on 25th May 2023; the claim form was not presented until 8th June 2023.

41. I have considered the status of the Claimant's submission to Reading Employment Tribunal on April 2023:
- (a) A claim form is presented when a proscribed form has been presented to the employment tribunal in the appropriate method
 - (b) The only form permissible is the form et1. The claimant did not present a form Et1 until the 8th June
 - (c) Two Presidential Practice Directions are in force relating to the presentation of tribunal claims: one applicable in England and Wales and the other in Scotland. Issued under the power given to the Presidents of Employment Tribunals in Reg 11 of the Tribunal Regulations, the latest England and Wales Practice Direction came into effect on 2 March 2020
 - (d) The Practice Directions state that a claim may be presented to an employment tribunal in one of three ways:
 - (i) online using the online form submission service
 - (ii) by post to a central address
 - (iii) in person to a regional employment tribunal office

42. The Claimant, by sending a Particulars of Claim to Reading Employment Tribunal, did not present her claim by a proscribed form, and by sending it by post to Reading she had not used a proscribed method. There is no claim presented within the relevant time limits.

Issue 2: If Not, was it reasonably practicable for the Claim to have been presented in time?

43. The Claimant did however present her ET1 on 8th June 2023. Everyone accepts this was out of time.

44. It is for the claimant to show that it was not reasonably practicable to have presented her claim in time. "reasonably practicable" means reasonably feasible: Dedman v British Building and Engineering Appliances [1974] ICR 53; Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119.

45. I find that it was reasonably practicable to have presented her claim in time:
- (a) the Claimant was aware of limitation periods having received advice on this from ACAS;
 - (b) she clearly knew of her right to complain to the employment tribunal
 - (c) she thought she had complied with the requirements by sending her Particulars of Claim to Reading tribunal
 - (d) the failure to comply with the correct process for presenting a claim is that of the Claimant. Whilst there was some delay in Reading rejecting

the claimant's documents this, I find, does not make it not reasonably feasible for the claimant to have presented her claim in time

46. there is no other reason given in evidence to me other for the Claimant missing this date.
47. Accordingly I conclude the tribunal has no jurisdiction to hear those claims where the discretion to extend time is to be considered on a reasonably practicable basis, namely:
- (a) wrongful dismissal [CMO §2],
 - (b) whistleblowing detriment [CMO §4];
 - (c) automatic unfair dismissal where the principal reason for dismissal was whistleblowing [CMO §5];
 - (d) non-payment of accrued but untaken holiday pay [CMO 8] and
 - (e) unauthorised deduction from wages [CMO §9].

48.

Discrimination

49. I then turned to the pleaded case of discrimination.

Issue 1: was the claim form presented in time

50. For the reasons given above I find it was not.

Issue 2: If not, is it conduct extending over a period?

51. These are acts that culminated in August 2022 when the Claimant's request was for adjustments was rejected. Here was appositive act of a respondent not to comply with, what the claimant contends was their obligation to make adjustments. I find, on the evidence I heard that these were not acts extending over a period beyond that date: Kingston upon Hull City Council v Matuszowicz [2009] EWCA Civ 22

Issue 3: if not, was it presented within such other period as the employment tribunal considers just and equitable?

52. I am, therefore in situation where I must consider the discretion contained within s123 of the Equality Act 2010. I remind myself it tis the period of extension that must be just and equitable.

53. Whilst Employment Tribunals have a wide discretion to allow an extension of time under S.123, this does not however mean that the extension is automatic. There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general

backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time. It is also established that the onus is on a claimant to persuade a tribunal that there is some good reason why it would be just and equitable to extend time in the given case. The Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that:

'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 the discretion is the exception rather than the rule.'

54. It would be wrong to think that exceptional circumstances are necessary, all that is required is that it is just and equitable to extend time: Pathan v South London Islamic Centre EAT 0312/13, and more recently the Appeal Tribunal have reminded practitioners and tribunal that the quote from Bexley must be considered in the context of the wider discretion to extend time under the Equality Act 2010.

Factors in General

55. In s123 Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list, and whilst a useful guide of some factors can be found in s33 of the Limitation Act 1980— British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT: for tribunals, however, this is only a guide to some potentially relevant factors: Southwark London Borough Council v Afolabi [2003] ICR 800, CA and a mechanistic use of the so-called *Keeble* checklist is to be deprecated, what factors are relevant in the given case is case-sensitive, and so must be identified by the tribunal, case by case. These include:

- (a) the length of, and reasons for, the delay;
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued has cooperated with any requests for information;
- (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

- (e) the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of acting.

Particular factors

56. There is no set list of factors that should be considered; however the following appear relevant to me.

57. As a matter of law, there is no particular feature that must necessarily be present in order for a just and equitable extension to be granted, nor that, if present, is automatically sufficient to warrant such a grant. However, some factors are, as it is put, customarily *relevant*. In every case the implication of refusing to extend time will be that the claimant will not be able to have a complaint adjudicated on its merits, as they would, had time been extended. Conversely, the effect of granting an extension of time will be that a respondent will be obliged to defend a complaint on its merits, and exposed to the risk of losing, in a way that would not be so, were time not to be extended.

The Length of the Delay

58. The delay here was significant. It was not just a matter of days or weeks. It was measure in months.

Explanation for the delay

59. The Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA held that the discretion under S.123 EqA for an employment tribunal to decide what it ‘thinks just and equitable’ is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant.

60. The lack of a reason may, however, be a factor to consider.

61. I have considered the Claimant’s account of why she did not present a claim in the Autumn of 2023 was that she “was being a good employee”, whilst I have some sympathy for that it does not appear to me to be a strong reason to delay presenting a claim to the tribunal for an adjustment when this is impacting on her role. Often claimants do present claims to tribunals whilst in

employment, albeit I acknowledge that the pressure by doing so may not be inconsiderable.

The Claimants' awareness of the relevant facts:

62. The Claimants had knowledge of the factual background which supported her reasonable adjustment claim by the summer of 2023, noting was being concealed from her deliberately or by circumstance.

Ignorance of rights

63. The Claimant was, I find, aware of her right to present a claim, she told me she did not want to make a claim as she was “focusing on being a good employee”. She did not say she was oblivious to her rights at the time.

Strength of case:

64. In Lupetti v Wrens Old House Ltd [1984] ICR 348, EAT, the Appeal Tribunal noted that tribunals may, if they think it necessary, consider the merits of the claim, but if they do so they should invite the parties to make submissions. However, this is not necessarily a definitive factor: even if the claimant has a strong case, time may not be extended for it to be heard. In Ahmed v Ministry of Justice EAT 0390/14 an employment tribunal found that A, a legal adviser in the magistrates' courts, had been treated less favourably because of race. However, the tribunal considered that it was not just and equitable to extend time to allow the claim even though its merits were strong, given that A had given no satisfactory explanation for why the claim was not presented in time and given the difficulty some witnesses had in recollecting what had happened. The EAT upheld the tribunal's decision.

65. Neither party made specific submissions on any aspect of the claims which they considered were weak or strong and so I have not considered this.

Balance of prejudice

66. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent. Whilst some prejudice will always be caused to the employer if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that.

67. What prejudice has been caused here? From the Claimants' point of view, if the complaints dismissed, they would obviously lose their right to have them determined on their merits. They did not point to any other particular areas of prejudice that they might have suffered through their evidence.
68. Similarly, the Respondents did not identify any particular evidential or other prejudice that they would have suffered if the claims had continued, beyond the obvious additional cost and expense of having to defend the complaints.
69. I find therefore, the balance of prejudice slightly favours the claimant here.

Conclusion

70. However, drawing together the strands on the discretion to extend time set out above and the submissions that I heard, I consider that I should not exercise this discretion in circumstances where the Claimant was aware of her claim, was aware of her opportunity to litigate the claim, took advice on timelimits and yet did not present a reasonable adjustment claim within time, or soon after she had been dismissed from the Respondent. She chose to wait to present a claim, and, as I set out above, incorrectly presented a claim to Reading Tribunal. In any event, had the claim been presented properly in April, for the purposes of the Equality Act, that claim would have been presented out of time.
71. Accordingly the tribunal does not have jurisdiction to hear the claim under the Equality Act 2010.

Employment Judge Salter
Sunday, 5 May 2024

REASONS SENT TO THE PARTIES ON
22 May 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented

by either party within 14 days of the sending of this written record of the decision.

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