



EMPLOYMENT TRIBUNALS

Claimant: Miss J Rainford

Respondent: Asda Stores Limited

Heard at: Liverpool
By video hearing

On: 15 May 2024

Before: Employment Judge Aspinall

Representation

Claimant: in person supported by her partner

Respondent: Mr Llangaratne, Counsel

JUDGMENT

The judgment of the Tribunal is:

1. The claimant's complaint of unfair dismissal is dismissed, having been brought out of time.
2. The claimant's complaints of harassment save for the complaint in relation to the outcome of the appeal on 7 July 2023 are dismissed, having been brought out of time.
3. The claimant's only complaint of harassment, disability discrimination in relation to the outcome of the appeal on 7 July 2023, is dismissed on withdrawal, the claimant having decided not to proceed with it because seen in isolation she feels it cannot succeed.
4. The claim in its entirety stands dismissed.

REASONS

Background to the hearing

4. By a claim form dated 19 September 2023 the claimant brought complaints for unfair dismissal and disability discrimination harassment. She was a store assistant at Asda and was dismissed for gross misconduct. She said that her dismissal and subsequent failure to uphold her appeal was unfair and an act of harassment (amongst others dating back to 2019) because of her back condition which she says was a disability.

5. The claimant went to ACAS on 1 September 2023 and achieved a certificate on 18 September 2023 and brought her claim on 19 September 2023. The respondent defended the complaint but that Response was filed by head office and not the team locally who had more knowledge of the complaint. Employment Judge Slater allowed the respondent, having consulted the local team, to file an Amended Response which it did.

6. There was a preliminary hearing for case management before Employment Judge Ross on 23 January 2024. Judge Ross clarified the claim with the claimant so that it was clear what she was claiming about and prepared a List of Issues which set out her complaints; unfair dismissal and harassment.

Legal points to be decided today

7. The acts of harassment were listed by Employment Judge Ross at paragraphs 3.1.1 to 3.1.9 of the List of Issues. Judge Ross identified, and the respondent had raised this point, that the claimant's complaints may be out of time, that is brought too late for the tribunal to be able to hear them. Judge Ross listed today's hearing for me to decide:

Was the unfair dismissal complaint brought in time ? section 111 Employment Rights Act 1996 says

(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.**

[(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).]

8. The tribunal has to ask was the complaint brought within the three months less one day (plus any ACAS stop the clock time) time limit. If not, was it brought within such further period as the tribunal considers reasonable where it was satisfied that it was not reasonably practicable for it to have been brought within the three months.

9. Were the harassment complaints brought in time ? section 123 Equality Act 2010 says :

(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.
- (2)....
- (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)

10. Were some or all of the acts of harassment part of a course of conduct extending over a period of time so that the later ones which were in time, after 2 June 2023, (at paragraphs 3.1.8 ((in relation to the appeal only)) of the list of issues, brought the earlier ones into time ?

11. If they were not part of a course of conduct so that later acts brought earlier ones into time, and the complaints were out of time, should the complaints be allowed to be heard on the basis that they were brought within such further period as the tribunal considers just and equitable ?

Procedure

12. We agreed the issues for today as set out above and I went on to explain that I may, when it is clear which complaints are proceeding, look at making a deposit order. I explained the role of deposit orders and the procedure for deciding whether or not to make one. I was able to reassure the claimant that the £ 1000 that the respondent had raised in its request for a deposit order in the Response, was the maximum and that if a deposit order were appropriate I would (i) hear from both sides as to whether there should be an order or not (ii) think about whether an order would be fair / just and equitable and (iii) if there were to be an order then I would hear from her as to her financial position so that the amount of the order would be right for her and would not be set at a level that meant she couldn't afford to carry on. It would not be a bar to justice but a signal to say be careful because if you carry on and your complaints fail for the reasons I think they might then you could be ordered to pay the respondent's legal costs from the date of any deposit order onwards. We agreed to think about whether deposit orders would be considered at all later when it was clear what complaints would be going ahead.

13. We all agreed that acts prior to 2 June 2023 were out of time because they were three months prior to the claimant going to ACAS. The dismissal was out of time, the acts at paragraphs 3.1.1 to 3.1.7 were out of time, the appeal at 3.1.8 was in time and, it emerged from evidence, that the request for policies and procedures at 3.1.9 was made on 19th May 2023 (not July as in Employment Judge Ross' Order) so was also out of time.

Evidence

14. We agreed that the claimant would give evidence about why she had not brought the complaints sooner and answer questions from the respondent. She was sworn in and taken to an email that she had sent in response to Employment Judge Ross' order that she provide a witness statement explaining why she had not brought her complaints in time. That email stood as her evidence in chief. In effect the claimant said in that email that she had mistakenly believed that the time ran from the appeal hearing date of 7 July 2023. She did not go to ACAS until 1 September 2023. She gave supplementary evidence that she had not believed herself capable of pursuing a complaint in July and it was only

in mid August that her family and friends persuaded her to bring the claim and she decided to go ahead. She couldn't explain why she then waited a further two weeks before going to ACAS.

15. I had a bundle of 138 pages which included facebook messages of the claimant talking to her union representative. She had included them. We had a short discussion about privilege but the claimant wanted the documents in the bundle because she said they showed that she had been asking for documents and not getting them. She understood that they also showed that she had been discussing time limits and ACAS with her representative during the primary limitation period which might go against her. She wanted them including and made no application for private advice content, though not from a lawyer, to be excluded.

The Facts

16. The claimant worked for the respondent from 1 December 2019 until her dismissal for gross misconduct on 6 May 2023. She was investigated for two occasions of having failed to scan and pay for goods amongst others that she was purchasing at the self checkout scanner. The claimant attended the investigatory interview with Jason Guy. She was suspended following interview. She then, during late April, spoke with her partner's uncle who was a union representative. He was able to give her some advice about proper processes and told her that if she felt her employer was not doing things properly she could take it further including going to tribunal. He told her to ring ACAS. He did not go into detail about deadlines but did tell the claimant that there were time limits. Within two weeks of the investigatory interview, so at some date in late April, the claimant rang ACAS and explained what had happened. ACAS informed the claimant that there were time limits to be met. She recalled that a time limit of three months was mentioned.

17. The claimant attended the disciplinary hearing before Chris Webber on 6 May 2023. There was CCTV footage of the claimant taking the clothing without paying for it. There were two separate occasions on which it was alleged she had taken goods that had not been scanned and not paid for. She was accompanied at the hearing and represented by Melissa Johnson, the union representative at the Asda store even though the claimant wasn't herself the union member. The claimant was dismissed at that hearing on 6 May 2023.

18. On 18 May 2023 the claimant exchanged messages with Melissa Johnson. In her message to Melissa the claimant said that she had spoken to ACAS and they had emailed her a template document to complete and explained to her that she had to get it in, in time, before the deadline. The claimant also confirmed in that message exchange that she been given the same information and the same link to an ACAS template document by Melissa.

19. The claimant appealed her dismissal and went to an appeal hearing before Gary Leggatt on 7 July 2023. Miss Johnson again accompanied the claimant to that hearing. Her appeal was dismissed.

20. The claimant contacted ACAS again after the appeal, probably in late July though she could not remember exactly when it had been. Amongst the things that were discussed were claimant's concerns that she had not been given copies of policy and procedure documents that she had wanted and had asked for. ACAS warned the claimant not to delay, not to allow herself to miss a deadline because her employer was stalling in providing her with documents. ACAS told her that if a deadline was missed it was possible to make an application for an extension of time.

21. Following the appeal the claimant thought that having been told by three people; Jason Guy, Chris Webber and Gary Leggatt that her conduct amounted to gross

misconduct it was not worth her pursuing a complaint. She thought it would be too difficult for her legally, that it would be beyond her ability to manage a complaint. She was concerned though that Donna Chapman was continuing to get away with treating people badly. Donna had not been at the claimant's investigatory meeting. Donna was not at the disciplinary hearing. Donna did not make the decision to dismiss. Donna was not at the appeal and didn't make any decision on appeal. The claimant had friends who still work at ASDA. Her opinion was that managers stuck together and that any complaints led to staff being penalised in terms of allocation of work duties or shift patterns. She had supported a colleague Lucy to bring a complaint against management earlier in the year and had formed the view that management stick together, complaints get shut down and things are worse for the complainant. She was persuaded by friends and family that now that she no longer worked there she could pursue a complaint without fear of being penalised and that she was more than capable of doing so. She came to the view by mid August 2023 that she was going to bring a claim.

22. During August 2023 the claimant was not medically incapacitated in any way. She had a smart mobile phone and could access the Internet. She regularly used Google on her phone and looked things up. She had found ACAS phone number earlier that year in April 2023 through using Google. Years before she had used her phone to find out about a chemical burn that she had sustained from using a cosmetic product. Her Google searches had led her to lawyers who brought a no win no fee complaint on her behalf which resulted in her receiving a settlement. Following her appeal on 7 July 2023 the claimant continued to have access to advice from Melissa Johnson, her partner's uncle and support from ACAS. She claimant contacted ACAS to begin early conciliation on 1 September 2023, achieved an ACAS certificate on 18 September 2023 and commenced proceedings on 19 September 2023.

Submissions

23. The respondent submitted as follows:

1. That the complaints, save the appeal were out of time.
2. There was no course of conduct in relation to the discrimination complaints as they were acts by different decision makers and no later act in the same discriminatory state of affairs to bring the earlier, different acts into time.
3. The claimant had the burden of proof to establish any exercise of discretion and had not been able to do so.
4. In relation to the unfair dismissal complaint she had had advice from ACAS and a union representative and had chosen not to pursue a complaint then changed her mind. It was reasonably practicable for her to have brought her complaint in time and even if it hadn't been she did not then bring it within such further period as was reasonable because, even if she were to be believed that she thought time ran from the appeal, she then delayed a further 7 weeks before going to ACAS for no credible reason.
5. The respondent made similar submissions on the just and equitable extention. It said the claimant was not credible or consistent as to her reason for not bringing the complaints in time. She had added a new reason, that she was not feeling confident enough to complain after the appeal, had decided not to and was only persuaded to do so by her family and friends in mid-August, today.

24. The claimant submitted that:

1. She had not understood that it was three months from dismissal, that she believed

at the time that she was within time of three months from appeal.

2. She now accepts her complaints, save the appeal were out of time,
3. Her complaints they were all part of the same course of conduct that led to the appeal because someone had to stand up to Donna Chapman who was continuing to bully people at work.
4. She did not bring the historic complaints sooner because she was afraid that she would be penalised for complaining whilst employed.
5. Donna Chapman and the decision makers on investigation, dismissal and appeal were all managers and that managers stuck together. She says in that way the dismissing and appeal officers would know that Donna wanted to get rid of the claimant and this was part of the same course of conduct so that the dismissal and appeal were all influenced by Donna.

Applying the law

25. The claimant was dismissed on 6 May 2023. The primary limitation date was 5 August 2023. By 5 August 2023 the claimant had neither commenced proceedings nor contacted ACAS to begin early conciliation. Her complaints of unfair dismissal was out of time. I then had to consider whether or not she brought her complaint within such further period as was reasonable, it having not been reasonably practicable for her to have brought it before the primary limitation date.

26. Between 6 May 2023 and the primary limitation date of 5 August 2023 it was reasonably practicable for the claimant to have brought her complaint. She had been given advice by her partner's uncle that relevant time limits applied, she had been directed to ACAS and spoken to them on at least three occasions. She had been sent a link by ACAS to follow to complete the early conciliation requisite information template and had been told about time limits. She had been sent a link by Melissa Johnson to complete the early conciliation template and had discussed deadlines with Melissa. She had the use of the smart phone, was not incapacitated in any way and had previously brought proceedings. She was able to submit an appeal against dismissal, and appear at that appeal hearing and make her own submissions. She was corresponding with her employer to seek documentation. I find that it was reasonably practicable for the claimant to have brought her unfair dismissal complaint in time.

27. Even if it had not been, she did not bring her complaint within such further period as was reasonable. She delayed beyond 5 August 2023 to 1 September 2023 without good reason. Accordingly, the Tribunal has no jurisdiction to hear the claimant's unfair dismissal complaint and it stands dismissed.

28. Turning now to the discrimination complaints. They were helpfully set out by employment Judge Ross at paragraph 3.1.1 to 3.1.9 of her case management order dated 23 January 2024. The dates of those alleged acts of discrimination were as follows;

The historic complaint made against Donna Chapman at 3.1.1 dated back to 1 December 2019. The historic complaint at 3.1.2 made against Donna Chapman dated 2 November 2022. The complaint at 3.1.3 against Donna Chapman dated 2 January 2023. The complaint at 3.1.4 against Donna Chapman dated 2 November 2022 and throughout a period until April 2023. The complaint at 3.1.5 related to Donna Chapman and January 2023. The complaint at 3.1.6 related to Donna Chapman and dated to March 2023. The complaint at 3.1.7 related to Donna Chapman and dated to 20 April 2023.

29. Everyone agreed that those complaints prior to 2 June 2023 were out of time. The claimant's only argument in support of them being part of a course of conduct extending over a period of time so that the later in time act of appeal brought the earlier complaints into time was an assertion that managers stuck together, that she had seen managers standing together at the front of the store watching the checkout colleagues and seen the reaction to Lucy's complaint and this was her evidence for the fact that managers stuck together. The Tribunal had regard to the nature of the acts complained of. Applying the law from a case called Hendericks, which explains which kinds of allegations of discrimination can be taken together and which kinds of allegations of discrimination are stand-alone events, I find that the complaints at 3.1.1, 3.1.2, 3.1.3, 3.1.4, 3.1.5, 3.1.6 and 3.1.7 could themselves be said to be part of a course of conduct extending over a period of time in that they were all examples of Donna Chapman making adverse decisions against the claimant. They were different from the decisions made on investigation by Jason Guy, at disciplinary hearing by Chris Webber and at appeal by Gary Leggatt. It was not enough to say that "managers stuck together" to establish that the acts done by Donna were part of a course of conduct with those acts done in the disciplinary process. They were not part of the same course of conduct. They were each individual decisions. I therefore find that there was no later act of discrimination that was part of the same course of conduct with the earlier acts. The appeal could not bring the earlier acts by Donna, Jason or Gary, into time. Accordingly, I find that the complaints at 3.1.1 to 3.1.8 (save the appeal) were not brought in time.

30. The complaint at 3.1.9 is slightly different. The claimant confirmed today that the date in relation to that complaint was 19 May 2023. It was also out of time. It was a request for documents including policies and procedures. It was made in writing Bridget Thornley, store manager. This complaint did not relate to Donna Chapman and would not, even if it had been made in time, have formed part of a course of conduct with the earlier allegations against Donna Chapman. The claimant tried to say for the first time today that she had repeated the request for those documents at the appeal hearing on 7 July 2023. This was an attempt by her to find a later act that could bring the complaint at 3.1.9 into time. I reject her attempt to do that. I read employment Judge Ross's case management order carefully and can see that there was discussion about the complaint at 3.1.9. It did not relate to the appeal hearing. The claimant herself confirmed today that her letter to Bridget Thornley was 19 May 2023 and that 3.1.9 insofar as it said July 2023 contained an error.

31. I then went on to consider whether or not to allow the complaints to have been brought within such further period as was just and equitable. I had regard to the nature of the complaints, the potential merits of the complaints, the fact that the claimant, as set out in the facts above, had had advice from her partner's uncle, Melissa Johnson the Asda union representative and had had regular contact with ACAS; on at least three occasions during the primary limitation period, including having been sent the link to complete the requisite information for early conciliation to begin in May 2023, the claimant was well able to put forward case appeal, composing an appeal letter setting out a grounds of appeal and making oral submissions on 7 July 2023, that she had a smart phone and was able to use it to make contact with ACAS in April/May 2023, that she could communicate on Facebook and was an Internet user, that she had used Google on a previous occasion to access legal representation bring a complaint.

32. I had regard to the impact on the respondent of having to face complaints that were brought out of time. In this respect I paid particular attention to the fact that the claimant had done nothing at the relevant times to complain about the acts that she said, post dismissal, were acts of disability discrimination. She only raised discrimination after she was found to have committed acts of gross misconduct. The respondent would have to face allegations of disability discrimination that were otherwise (save in relation to the appeal) out of time.

33. I considered whether or not to apply the discretion that the tribunal has to allow the complaint to be brought out of time. I had regard to the words of the statute, the overriding objective and relevant case law including Robertson v Bexley. I have decided against exercising the discretion for the reasons set out above. Accordingly, the complaints at 3.1.1, 3.1.2, 3.1.3, 3.1.4, 3.1.5, 3.1.6, 3.1.7, 3.1.8 insofar as it relates to dismissal but not appeal and 3.1.9 are all out of time and stand dismissed.

34. The only remaining complaint was the in time complaint of disability discrimination by harassment in the rejection of the claimant's appeal on 7 July 2023. I had concerns about the prospects of success in that complaint. In particular, because the decision maker on appeal was Mr Gary Leggett. The claimant has not even said whether or not Mr Leggett knew that she had a back problem. Her complaint rests on her assertion that he must have known because "managers stuck together" and further, that his decision to dismiss her appeal related to her back condition/ disability rather than the reasonable belief of Mr Webber having watched CCTV footage and heard from the claimant, that she had committed an act of gross misconduct in taking goods that she had not paid for on two occasions. Because of my concerns about the prospects of success in the one outstanding allegation of harassment I was considering whether or not to make a deposit order. I outlined my concerns about the potential merits of the complaints and invited submissions. The respondent said the harassment complaint had little reasonable prospects of success and it sought a deposit order.

35. The claimant was invited to make submissions but was upset. We took a short break and returned to the statement from the claimant, part of which was read by her partner, as follows:

I do believe I was dismissed due to discrimination by Donna. I agree though that without everything on the table it looks a very weak case. If everything was on the table and a deposit order was made I would have gone ahead but on its own I agree it looks weak. I don't want to waste anyone's time. I knew I would not be able to do this and should not have listened to my family and friends. I want to withdraw the complaint.

36. At 3.19pm, after having been offered a break and told that even if a deposit order was made she would have time to think about whether or not to pay it and if she did not the claim would end, the claimant said she did not need time and she withdrew the one outstanding allegation of harassment.

37. All complaints stand dismissed. The hearing for May 2025 has been vacated. The respondent agreed to feed back through its instructing solicitors to the respondent, the claimant's feelings that she was not able to complain about discrimination at the hands of Donna Chapman because to have done so would have led to her being penalised in relation to task allocation and shifts. The respondent made no admission and no application for costs.

Employment Judge Aspinall

Date: 15 May 2024

JUDGMENT SENT TO THE PARTIES ON

29 May 2024

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.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>