# EMPLOYMENT TRIBUNALS

**Claimant:** Cynthia Pinto

**Respondent:** City and Essex Limited

**Heard at:** London South (by video)

**On:** 22 May 2024

**Before:** Employment Judge Evans (sitting alone)

## WRITTEN REASONS PROVIDED FOLLOWING A REQUEST MADE PURSUANT TO RULE 62(3)

The Tribunal gave oral judgment with reasons in this claim on 22 May 2024. On 7 June 2024 the respondent made a request for written reasons pursuant to Rule 62(3) of the Employment Tribunal's Rules of procedure. Those written reasons are set out below.

The Tribunal's judgment given on 22 May 2024 was as follows:

1. The complaints of unfair dismissal and for breach of contract were not presented within the applicable time limit, but it was not reasonably practicable to do so. The complaints of unfair dismissal and for breach of contract were presented within a further reasonable period. They will therefore proceed.

2. The complaints of disability discrimination (s.15 and a failure to make reasonable adjustments) and of victimisation were not presented within the applicable time limit. Subject to paragraph 3, it is just and equitable to extend the time limit. The claims therefore proceed.

3. Some of the complaints of disability discrimination and victimisation relate to events which took place before the effective date of termination. The issue of time limits was considered today on the basis that there was a *prima facie* case that such complaints were conduct extending over a period of time continuing until the effective date of termination. However, the respondent

may contend at the final hearing that there was no conduct extending over a period of time and, if the Tribunal finds in the respondent's favour in relation to this issue, the question will arise whether time should be extended on a just and equitable basis in respect of such complaints.

# REASONS

## Preamble

1. These are the Tribunal's reasons for its decision given orally at the end of the Hearing in relation to the following issues:

   1.1. Whether the claimant's complaint of unfair dismissal was out of time;

   1.2. Whether the claimant's complaint of wrongful dismissal (i.e. breach of contract) was out of time;

   1.3. Whether the claimant's complaint of disability discrimination (discrimination arising from disability and a failure to make reasonable adjustments ) was out of time;

   1.4. Whether the claimant's complaint of victimisation was out of time.

2. The above issues and others came before the Tribunal on 22 May 2024. I have also made case management orders in relation to this claim which are contained in a separate document.

3. The parties had agreed a bundle of 68 pages prior to the Hearing. All references to page numbers are to the pagination of the bundle. I also had before me written submissions from both parties.

4. The claimant had produced a witness statement as had her son. So too had Ms Dove of the respondent. The claimant and her son were both cross-examined. A witness statement was also provided on behalf of Ms Margetts, the claimant's previous representative, but she did not attend to give evidence and so I have given only very limited weight to it.

5. The claimant gave her evidence in Twi. The hearing was adjourned to the afternoon because the Twi interpreter was not available in the morning. Originally the claimant had requested a Ga interpreter but the Tribunal had been unable to find one. The claimant indicated that she was able and happy to give evidence in Twi rather than Ga. I was satisfied that when the claimant gave evidence there was no difficult with the interpreting.

6. At the beginning of her witness evidence the claimant was unable to confirm that it contents were correct or, really, that she either understood it or that its contents had been translated for her into a language that she understands. The statement

was therefore translated line by line for her and she confirmed its contents were correct.

## The issues

7. A first round of Acas early conciliation began on 24 August 2022 and ended on 5 October 2022. A second round of Acas early conciliation began on 2 November 2022 and ended on 14 December 2022. The claim form was presented on 13 January 2023. The claimant says that the second round of Acas early conciliation and the date on which the claim form was presented resulted from the claimant's adviser being unaware of the fact of the first round of Acas early conciliation.

8. It was agreed in light of these dates that:

    8.1. The complaints of disability discrimination and victimisation were out of time subject to time being extended under the just and equitable provisions.

    8.2. The complaints of unfair and wrongful dismissal were out of time unless I found that it was not reasonably practicable for them to be presented within the primary time limit and that they were presented within a reasonable further period.

9. The dates of the alleged discriminatory acts in the discrimination/victimisation claims are various but in each case the claimant says that the treatment complained of continued until her employment ended (and so was conduct extending over a period) and/or that dismissal was the last discriminatory act.

10. We discussed how I should approach the question of time limits in relation to the disability discrimination/victimisation claims. It was agreed that I would not decide whether there had been conduct extending over a period. We agreed that I should reach a decision in relation to the question of whether it was just and equitable to extend time on the assumption that there was conduct extending over a period which continued until the date on which the claimant's employment terminated (on the basis that the claimant had shown a *prima facie* case to this effect).

11. The result of this is that, if I decide that it would be just and equitable to extend time, it will still be open to the respondent to argue where relevant that there was not conduct extending over a period and consequently those parts of the claimant's discrimination and victimisation claims which did not arise on the termination of her employment were presented outside the primary time limits (subject of course to an argument that it would be just and equitable to extend time from whenever the primary three month time limit in respect of each such claim expired).

12. It was also agreed that in light of the dates set out above, and in light of this approach, I should deal with the question of limitation on the basis that the last date the claims could have been presented in time was 19 December 2022. (Limitation would ordinarily have expired on 7 November 2022 but is extended by the 42 days taken up by Early Conciliation.)

13. It was therefore agreed that I should approach the question of limitation on the basis that the claims had been presented 3 weeks and 4 days out of time.

## The Law

### Time limits under the Equality Act 2010

14. Section 123 of the Equality Act 2010 provides where relevant as follows.

> *(1) Subject to sections 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.*

15. The Court of Appeal's decision in Aziz v FDA [2010] EWCA Civ 304 dealt with the procedural point of how the Employment Tribunal should approach the question of whether there is a continuing act at a preliminary hearing. The Court approved The Court approved the approach laid down in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548 that the test to be applied at the pre-hearing was whether the claimant had established a prima facie case, or, to put it another way, 'the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'. If the claimant fails to show this, their claim will be struck out (unless the Tribunal finds it would be just and equitable to extend time). If, on the other hand, the claimant does show that it is reasonably arguable that there was a continuing act, the question of time is not determined but is left to the full merits hearing.

16. Turning to the "just and equitable" extension, it is for the claimant to show that it would be just and equitable to extend time. However, the discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. The Tribunal should assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. These will usually include:

    16.1. the length of and reasons for the delay;

    16.2. whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigation the claims while matters were fresh);

17. Other factors which may be relevant include:

    17.1. the extent to which the cogency of the evidence is likely to be affected by the delay;

    17.2. the extent to which the party sued had co-operated with any requests for information;

    17.3. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;

    17.4. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action;

18. In Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576 the Court of Appeal noted that the Tribunal when considering the exercise of its discretion has a "wide ambit" within which to reach a decision. However, although the discretion is wide, there is no presumption that it should be exercised so as to extend time. Indeed, the exercise of discretion is the exception rather than the rule. Further, the burden, which is one of persuasion, is on the claimant to persuade the Tribunal it is just and equitable to extend time.

## Time limits under the Employment Rights Act and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994

19. Section 111(2) of the Employment Rights Act 1996 ("the ERA") and Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provide that a complaint for unfair dismissal/ breach of contract should be presented within three months of the effective date of termination. If it is not, the Tribunal will only have jurisdiction to consider it if it was not reasonably practicable for the complaint to have been presented within that three-month period and it was presented within such further period as the Tribunal considers reasonable.

20. The Tribunal must therefore consider two things if a claim is presented outside the three-month time limit. First, whether it was not reasonably practicable for the claim to be presented within the three month time limit (the burden of proof is on

the Claimant). Secondly, if it was not, the Tribunal must be satisfied that the further period within which the claim was presented was reasonable.

21. The Tribunal must determine as a matter of fact the substantial cause of the Claimant's failure to comply with the primary time limit. The whole of the limitation period should be considered but "attention will in the ordinary way focus upon the closing rather than the early stages" (Schultz v Esso Petroleum Ltd [1999] IRLR 488.)

22. The leading case in relation to reasonable practicability remains Palmer and Saunders v. Southend-on-Sea Borough Council [1984] IRLR 119. In this case, May LJ stated that the test was one of reasonable feasibility:

> *We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories: compare Marshall v Gotham Co Ltd [1954] AC 360, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection.*

23. The question of what is or is not reasonably practicable is essentially one of fact for the Tribunal to decide.

24. If a claimant seeks and receives advice from a skilled adviser prior to the time limit, the "escape route" provided by the "not reasonably practicable" wording will generally not be available to them. This is "the Dedman principle" arising from Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379. However, in order for the Dedman principle to apply:

    24.1. The advisers must be a professional or skilled adviser;

    24.2. The adviser must themselves have been at fault or negligent in the advice they gave;

    24.3. The wrong advice must have been the substantial cause of the missed deadline.

25. Lord Denning repeated and considered the Dedman principle in Wall's Meat Co Ltd v Khan [1979] ICR 52 stating:

> *I would venture to take the simple test given by the majority in [Dedman]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights — or*

*ignorance of the time limits — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.*

26. If an adviser was not at fault or negligent, then the Dedman principle will not apply. Consequently, reasonable reliance by a claimant on a reasonable mistake by an adviser will not engage the Dedman principle and it may be held that it was not reasonably practicable to lodge the claim in time.

## Findings of fact

27. **The length of the delay:** It was agreed that the question of time would be approached on the basis that the claims were around 3 weeks and 4 days out of time. This is a fairly short period of time.

28. **The adviser/representative:** The claimant was represented by Ms Margetts from around 16 September 2022 until her claim was presented. Whilst Ms Margetts was a volunteer adviser at the claimant's union, she was nevertheless legally qualified and at the time employed elsewhere as a paralegal. She has since been called to the bar. She was therefore a skilled adviser and so this was a case to which the Dedman principle might have applied.

29. **The reasons for the delay:** I find that the reason for the delay was that Ms Margetts was not aware of the issuing of the first Acas certificate until after the claim had been issued. I so find because:

    29.1. Given that she did present the claim the day before limitation would have expired if there had been no first Acas certificate, she was clearly paying attention to time limits. Consequently, I find that it is highly likely that if she had been aware of the first Acas certificate she would have presented a claim at an earlier date. She was instructed on a date when this would have been possible.

    29.2. Ms Margetts was not involved in any way in the first Acas certificate. The claimant with the assistance of her minor son applied for it before Ms Margetts became involved. It was the claimant's minor son who made contact with Acas on her behalf. Ms Margetts would only have known about the first Acas certificate if someone had told her about it.

    29.3. In light of the claimant's evidence I find that she did not tell Ms Margetts about it because she was only aware in the most general terms that her son had approached Acas on her behalf, did not realise that an Acas certificate had been issued, and was unaware of the significance of such a certificate. I find that the claimant's lack of understanding of these matters was contributed to by her limited English language ability.

    29.4. In light of the claimant's son's evidence, I find that he did not tell Ms Margetts about it because he was only 16 at the time, was suffering from some mental ill-health, did not have any real understanding of the Acas

process, and did not have any understanding of the significance of the Acas certificate.

29.5. In making these findings I have taken account of Ms Dove's evidence that the Acas conciliator told her that he had told the claimant's representative about the first round of early conciliation. Just as I have given very little weight to the evidence contained in Ms Margett's witness statement in light of her not attending today, I give little weight to what it is said that the Acas conciliator said to Ms Dove. In reality it is Ms Dove's recollection of what the Acas conciliator told her about a conversation he had had some time previously with a third party (Ms Margetts) and there is no documentary evidence to support this.

## Relevant in particular to the discrimination claims

30. **Prejudice to the respondent:** the respondent has not advanced an argument of forensic prejudice – for example, that a particular witness is no longer available because of the delay or that documents have been lost with the passage of time.

31. **Effect of delay on cogency of evidence:** The delay is short and I find will not have had any effect on the cogency of the evidence.

32. **Steps taken to obtain professional advice:** the claimant did take steps to obtain advice. She contacted a law centre shortly after her dismissal and then joined the Cleaners and Allied Independent Workers Union on 7 September 2022. The delay in presenting her claim was not in any way due to a failure to seek advice at an appropriate time. She involved her son. The steps she took to pursue her rights cannot reasonably be criticised.

## Relevant in particular to the unfair dismissal claim

33. As noted above, the substantial cause of the delay in presenting the claim was Ms Margetts being unaware that the claimant had previously commenced Acas early conciliation.

34. I find that in all the circumstances set out above the ignorance of Ms Margetts of the first Acas certificate did not result from fault or negligence on her part. She became involved within just over a month of the claimant's dismissal and the claimant speaks only limited English. In these circumstances it is reasonable for her to have been unaware of the previous notification to Acas. I do not find that Ms Margetts ignorance was a result of fault or negligence on her behalf simply because she might have dispelled it if she had questioned the claimant and her son closely about whether they had previously contacted Acas. There was no good reason for her to imagine that they might have done this.

35. I further find that in the particular circumstances of this case the claimant not being aware that her son had begun early conciliation on her behalf (and so not telling Ms Margetts about this) was reasonable. I so find because the claimant's son was under the age of 18 at the time and, I find, suffering from some mental ill-health. This combined with the claimant's limited English (and so inability to

fully understand any written information in relation to Early Conciliation) made it reasonable for her not to be aware that her son had begun Early Conciliation on her behalf and, also, of the significance of Early Conciliation.

## Conclusions

### Discrimination and victimisation claims

36. Bringing the various matters considered above together, I conclude that it is just and equitable to extend time by under four weeks so that the claimant can pursue her victimisation and discrimination claims (subject to the question of whether there was a continuing act in relation to those parts of the discrimination and victimisation claims which pre-date her dismissal).

37. There is no real prejudice to the respondent caused by the delay and the reality is that it has arisen as a result of the claimant's representative being reasonably unaware of the fact of the first Acas EC certificate.

### Unfair dismissal and breach of contract

38. In light of my findings above, I find that it was not reasonably practicable for the claimant to present the complaint to the Tribunal within the relevant three months. This is because her representative was not negligent or at fault in failing to establish that the first Acas certificate had been issued and because it was also reasonable for the claimant to be unaware that her son had commenced Early Conciliation on her behalf.

39. The question then becomes whether it was presented within a reasonable further period. I conclude that it was: the delay was less than four weeks and the claim was presented before the date that Ms Margetts reasonably considered to be the actual limitation date in light of the second Acas EC.

40. Consequently all of the claimant's claims may proceed.

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Employment Judge Evans
Date: 16 June 2024