



EMPLOYMENT TRIBUNALS

CLAIMANT: Ms E Sully

Respondents: (1) FEI Foods Limited
(2) Simon Lewis
(3) Aled Jones

Heard at: Cardiff (by CVP) **On:** 4 November 2024

Before: Employment Judge R Havard

Representation:

Claimant: Ms Naomi Gyane, Counsel

Respondent: Mr James Lewis-Bale, Counsel

RECORD OF PRELIMINARY HEARING

JUDGMENT

The Judgment of the Tribunal is that:

1. In respect of the Claimant's claims for unfair dismissal and unauthorised deductions from wages, it was not reasonably practicable for her to present her claim within the primary limitation period, and she presented her claim within a reasonable period thereafter;
2. It is just and equitable to extend time to allow the Claimant's disability discrimination claims to proceed.

REASONS

Background

- 1 The Claimant brings complaints of unfair dismissal and unlawful deduction from wages. She also brings complaints of disability discrimination, namely: direct disability discrimination; discrimination arising from disability; failure to make reasonable adjustments, and harassment related to disability. At a Case Management Hearing

on 9 July 2024, it was directed that a Preliminary Hearing should take place in public to determine:

- (a) whether it was reasonably practicable for the Claimant to have presented the complaints of unfair dismissal and unauthorised deductions from wages within the primary time limit;
- (b) if not, were they presented within a further reasonable time?
- (c) whether it would be just and equitable to extend the time limit for presenting the discrimination complaints.

2 I heard evidence from the Claimant and her two sons, Joe and Tom Sully. They had all provided written witness statements on which they relied. With the agreement of Mr Lewis-Bale, I also observed a number of short videos taken by Joe Sully in or about October 2023. I listened to oral submissions from Ms Gyane and Mr Lewis-Bale. Ms Gyane provided a document entitled "Submissions on Behalf of the Claimant for the Preliminary Hearing on 4 November 2024" and Mr Lewis-Bale provided a document entitled "Respondents Note on Legal Framework".

3 A hearing bundle had been provided which ran to 304 pages.

The Facts

4 On 13 May 2019, the Claimant commenced employment with the First Respondent as a Commercial Director.

5 Throughout the material time, the Second and Third Respondents were Managing Director and HR Manager respectively at the First Respondent. The Second Respondent was the Claimant's Line Manager.

6 It was alleged by the Claimant that, from August 2020, she was subjected to a campaign of bullying, harassment and mistreatment by the Second Respondent which caused her health to deteriorate.

7 This is denied by the Respondents.

8 On 22 February 2021, the Claimant underwent an operation to remove Basal Cell Carcinoma which the Claimant described as a very traumatic and worrying time for her and she reported her condition to the First Respondent. On 16 March 2021, the Claimant was signed off for a period of 4 weeks as not being fit for work as a result of "stress at work."

9 Between 16 March 2021 and 22 October 2021, the Claimant did not return to work.

10 Having considered the Claimant's medical records and the evidence of the Claimant and her two sons, I am satisfied that the Claimant's medical condition deteriorated significantly.

- 11 Absence Review Meetings were held between the Claimant and the Third Respondent on 25 June 2021, 5 August 2021, 25 August 2021, 3 September 2021, 14 October 2021 and 22 October 2021.
- 12 It was suggested that, as the Claimant was well enough to attend those meetings, which were held via Microsoft Teams, she was sufficiently aware of her ability to pursue a claim as a result of the alleged conduct on the part of the Second Respondent. Having considered the Claimant's medical records and listened to her give evidence along with her two sons, I prefer the Claimant's account that she felt that she had no alternative but to attend those meetings and she was there "in body only" and had no real ability to understand what was being discussed or make any coherent contribution. This was very much supported by the evidence of her two sons.
- 13 The Claimant described the meetings as, "a blur" and that she was "on autopilot and afraid of the repercussions of refusing to attend."
- 14 It was also during this period that the Claimant suffered a bereavement when her father died.
- 15 The Fitness for Work statement made reference to this bereavement and also described her condition as a depressive disorder and work stress.
- 16 Subsequent Statements refer simply to depression.
- 17 I note that it is conceded by the Respondents that the Claimant was suffering from a disability relating to her cancer and also, from May 2021, depression but it is denied by the Respondents that stress and anxiety amounted to a disability.
- 18 In addition to, or as a consequence of, her depression, the Claimant also lost a great deal of weight and there is concern expressed by her GP in a letter dictated 20 October 2021 regarding her inability to put on weight. The GP wrote, "it is really her mental health that is in the way although she would now be classed as anorexic actually with such a low weight."
- 19 On 22 October 2021, at an Absence Review Meeting, the Claimant was informed that her employment was being terminated on the basis of capability on the grounds of her ill-health. The Claimant did not appeal against that decision due to her ill-health, nor had she pursued a grievance.
- 20 She was placed on 6 months garden leave and therefore it was agreed that her effective date of termination of employment was 22 April 2022.
- 21 It was also agreed by the parties that, in terms of time limits, this was the relevant date both in terms of unfair dismissal and unauthorised deduction from wages, and also the disability discrimination complaints.
- 22 However, I am satisfied that from October 2021 to April 2022, the Claimant's mental health continued to deteriorate. Indeed, there is reference to an attempted suicide in October 2021 which led to a referral to the Adult Mental Health Services who

described the Claimant as being “very distant” and that she “seemed to struggle to process any questions and took a long time to contemplate her answers.”

23 I note that both Joe and Tom Sully were so concerned about the condition of their mother that they decided to take a gap year from university in order to be available to support her.

24 I found their evidence compelling and, in fairness to Mr Lewis-Bale, he did not challenge their account to any material degree.

25 Joe Sully moved back into the family home in July 2021 and, along with his brother and their father, attempted to support the Claimant as best they could.

26 In Tom Sully’s evidence, he stated “I can only describe the period October 2021 to January 2024 as like being in a horror movie.” He described how the Claimant stopped eating and began to drink more heavily.

27 I accept Tom Sully’s account of the Claimant’s behaviour as set out in the form of examples in paragraph 14 of his Statement. Again, quite properly, this was not challenged by Mr Lewis-Bale. Of particular importance were the following:

- She would turn off all the lights and hide around the house;
- Whenever friends or family tried to visit she would hide from them;
- She refused to leave the house;
- She refused to speak to anybody – not us, family, friends or neighbours;
- She stayed in her room listening to loud music, regardless of the day or night;
- She stopped eating and so became anorexic;
- She became dependant on alcohol – when and where she would get alcohol becoming her sole objective.

28 At another stage in his evidence, Tom Sully said that there was no prospect of her being in a position to think about issuing proceedings. He said it was not possible for her to prepare a shopping list during this time.

29 Tom Sully’s evidence was consistent with that of the Claimant and also his brother who would describe the Claimant as “very confused. Mentally she wasn’t there. She neglected her hygiene.”

30 In August 2023, the Claimant was placed under the care of Mental Health Services once again due to suicidal thoughts and there is also reference to her attendance at Accident and Emergency for a head injury where the problem is described as “depression” and that she was under the care of the Mental Health Team.

31 In a summary of a Mental Health Service consultation on 19 August 2023, it states as follows:

“A 54 year old lady with low mood and suicidal thoughts, who had a lot of traumas at once in 2021 and has not been able to recover. She has spent the last two years in her home after having a successful career. She is unable to go out due to feeling ashamed of herself and low self-worth. She would need home intervention from the community team.”

- 32 This description is consistent with the evidence of the Claimant and Tom Sully.
- 33 In October 2023 the family called the police due to the Claimant’s violent behaviour and I had watched the short video clips taken by Joe Sully of his mother’s behaviour at or about this time. Again, quite properly and fairly, Mr Lewis-Bale accepted that what was seen on the videos was consistent with the written evidence not only of the witnesses but also of the medical records.
- 34 On 26 October 2023, the Claimant was sectioned under the Mental Health Act 1983 and, upon being discharged, Joe Sully called the Mental Health Team on 30 October 2023 expressing concerns for her welfare and she was admitted to hospital on the following day when her son and husband had found that she had taken a full strip of her husband’s aspirin.
- 35 In November 2023, the Claimant was admitted to hospital having been found by her husband and son lying on the ground between the sofa and wall within the home. The medical records describe that she had no recollection of events surrounding this event and referred to “frequent falls while intoxicated”. She was hospitalised for 3 weeks having suffered a fractured hip and was discharged on 20 November 2023 but the Claimant indicates that, having been discharged, she attempted suicide again.
- 36 Subsequently, on 1 December 2023, the Claimant’s husband died suddenly from a heart attack.
- 37 This was a traumatic event for the family. Tom Sully stated that, “I thought Dad passing away would be the end of her. I thought she would follow”. However, whilst tragic, it would appear to be the case that her husband’s death forced the Claimant to re-engage with her children and her health started to improve.
- 38 In January 2024, the Claimant stated that she depended very much on the support of her Crisis Team and then her Community Psychiatric Nurse from February 2024. Indeed, it was on 31 January 2024 that she was discharged from the Crisis Team and it was at this point that her medical team considered she was well enough to live without the level of medical intervention she had been receiving up to that point.
- 39 Early Conciliation started on 25 January 2024 and ended on 7 March 2024. The claim form was presented on 13 March 2024. In the Issues the Tribunal will be required to decide, it is suggested under time limits that anything that happened before 2 November 2023 may not have been brought in time.

The Law

Reasonable practicability

40 Section 111 Employment Rights Act 1996 provides:-

(1)

(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 or three months.”

41 The burden rests with the Claimant to show that it was not reasonably practicable to present her claim in time (**Porter v Bandridge Ltd [1978] IRLR 271, [1978] ICR 943, CA**). Second, if she succeeds in doing so, the tribunal must be satisfied that the further time beyond the primary time limit within which the claim was in fact presented was reasonable.

42 In **Schultz v Esso Petroleum Ltd [1999] IRLR 488** the Court of Appeal held that an Employment Tribunal should ‘focus upon the closing rather than the early stages’ of the overall limitation period.

43 In *Walls' Meat Co Ltd v Khan* [1978] IRLR 499 (paragraph 44) Brandon LJ stated:

‘The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant [...]’.

44 In **Marley (UK) Ltd v Anderson [1994] IRLR 152 (paragraph 30)**, the EAT held the Tribunal fell into error when it concentrated on the length of the delay to the exclusion of a proper consideration of all the relevant circumstances in which the delay occurred. In **Marley**, the Tribunal had considered a delay of four weeks or more after knowledge of relevant facts should be regarded as longer than a reasonable period.

45 In **Palmer and another v Southend-on-Sea Borough Council [1984] ICR 372, CA**, the Court of Appeal conducted a general review of the authorities and concluded that “Reasonably practicable” does not mean reasonable, which would be too favourable to employees, and does not mean physically impossible, which would be too favourable to employers, but means something like “reasonably feasible”.

46 Lady Smith in **Asda Stores Ltd v Kauser EAT 0165/07** explained it in the following words: “The relevant test is not simply a matter of looking at what was possible but to

ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.”

Just and equitable

47 Section 123(1) of the Equality Act 2010 (EqA) states that complaints 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 Tribunal thinks just and equitable.

48 Section 123(3) EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

49 The burden of proof is on the claimant to establish that it is just and equitable to extend time, as explained in **Robertson v Bexley Community Centre [2003] IRLR 434**, in which the Court of Appeal said, at para 25:

“When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

50 This does not however mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The only requirement is that the extension of time should be just and equitable.

51 In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT indicated that the task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act 1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised.

52 In **London Borough of Southwark v Afolabi [2003] IRLR 220** the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA (‘such other period as the Employment Tribunal thinks just and equitable’) that 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.

53 In **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, the Court of Appeal approved the approach set out in Afolabi and Morgan and, at paragraph 37, Underhill LJ confirmed, that ‘rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad

general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular “the length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.’

54 In **Jones v Secretary of State for Health and Social Care, EAT, 2024 ICR D11**, the EAT reviewed the authorities relating to extensions of time on just and equitable grounds, stating that the judgment of Auld LJ in Bexley, stating that time limits are, “exercised strictly” and that a decision to extend time is the, “exception rather than the rule” should always be considered in context, and that the Tribunal retains a wide discretion and that there is no one set of factors that needs to be considered in every case.

55 However, in **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA**, Lord Justice Leggatt said that ‘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)’.

Conclusions

56 It was not in dispute that the effective date of termination of employment, and thus the starting point for the running of time for the purposes of Sections 111 and 123 was 22 April 2022. The primary time limit would have expired on 21 July 2022 subject to a period of extension through Early Conciliation.

57 It was not until 13 March 2024 that the Claimant lodged her claim form with the Tribunal, thereby instituting proceedings. On any basis, therefore, the proceedings are substantially out of time.

Unfair dismissal/unauthorised deduction from wages

Reasonable practicability

58 In reaching my decision, I reminded myself that the burden of proving that it was not reasonably practicable to present her claim in time rests with the Claimant.

59 In fairness to Mr Lewis-Bale, the chronology and the evidence of the witnesses and contained within the medical records were not greatly in dispute.

60 Indeed, although the short video clips of the Claimant’s behaviour related to a period in October 2023, I am satisfied that the medical records support the evidence of the Claimant and her sons that, having been signed off work in March 2021 with stress, her illness became very severe not only in the months leading to her dismissal on 22 October 2021 but also throughout 2022 and 2023. As stated, the Respondents accept

that the Claimant suffered not just from stress but, from May 2021, depression which they accept amounted to a disability under section 6 of the Equality Act 2010.

61 I am satisfied that, throughout the primary limitation period commencing on 22 April 2022, the evidence on which my findings of fact are based, both in the form of the medical records and correspondence and the written and oral evidence of the Claimant and her two sons, support the conclusion that it was not reasonably practicable for the Claimant to present her claims within the primary limitation period. The severity of the Claimant's illness was such that it presented an insurmountable impediment which reasonably prevented the presentation of the claim within the primary limitation period or the extended period following conciliation.

Was the claim presented within a reasonable time thereafter?

62 If anything, the Claimant's illness, and her inability to function, became even more acute later in 2022 and throughout 2023.

63 This must have been an extremely difficult period for the Claimant's sons and husband. I am satisfied that both Joe and Tom Sully presented their evidence in a way which was not designed to exaggerate but the description that they provided of their mother's behaviour caused by her illness was such that I am satisfied the delay was explicable and that the claim form was submitted within a reasonable time thereafter.

64 I have taken into account the length of the delay, which is substantial. However, the evidence of the Claimant's two sons, which I accept, illustrates the seriousness of the Claimant's illness throughout the relevant period and her inability to engage rationally with anyone, including her family. It is significant, in my view, that the Claimant had not felt able to leave the house for two years. I refer in particular to the description provided by Tom Sully as set out in his statement and summarised in paragraphs 26 and 27 above.

65 It was submitted by Mr Lewis-Bale that it was not reasonable for the Claimant to delay for as long as she did following the commencement of Early Conciliation in January and in the absence of any response from the Respondent. Again, taking account of all the circumstances, I note that the claim form is dated 13 March 2024 which is just under a week after the Early Conciliation Certificate was issued on 7 March 2024. I do not consider it is reasonable to place responsibility with the Claimant for a lack of progress following the commencement of Early Conciliation on 25 January 2024.

66 Consequently, I conclude that the Claimant presented her claims within a reasonable time following the expiry of the primary time limit.

Disability Discrimination complaints

Just and Equitable

67 Again, I reminded myself that time limits within the Employment Tribunal are to be enforced and I need to be satisfied that a sufficient case has been put forward by the Claimant to enable me to exercise my discretion in favour of an extension.

- 68 In many ways, the rationale for my decision reflects what I have already said when reaching my decision on the reasonable practicability test.
- 69 The Claimant has put forward a substantial and substantiated reason for the delay.
- 70 Nevertheless, I must take into consideration all relevant factors. This includes whether the Respondent has been prejudiced as a result of the delay and whether this means that the balance of prejudice leads me to a different conclusion.
- 71 The evidence in relation to prejudice was thin. It is suggested at paragraph 4 of the Amended Grounds of Response that, “the cogency of the evidence and ability to secure the support of witnesses (one who has since left the First Respondent’s employment) is likely to be affected by the delay”.
- 72 I had not been provided with any evidence to support this submission, which only talks of the likelihood of the cogency of the evidence being affected. I have not been provided with any direct evidence of the nature of the claimed prejudice. Furthermore, a witness leaving a Respondent company before proceedings are commenced or before a hearing is not unknown. It was not suggested that the First Respondent had not been able to trace a witness or gain their cooperation.
- 73 As for the delay, I am not satisfied that there is any evidence to suggest it is of such an order that witnesses will not be able to recall the events which form the basis of the Claimant’s claims. Finally, I note that a final hearing has been listed for five days in February 2025. Therefore, any further delay will be minimal.
- 74 As for the suggestion that the Claimant paints a much bleaker position regarding her engagement in the Absence Review Meetings than that which is portrayed in the Grounds of Response, again, I have not been provided with any evidence in the form of a witness statement regarding the Respondents’ position during that period.
- 75 I am satisfied that the Respondent has been unable to show that they cannot receive a fair trial in relation to the Claimant’s claims.
- 76 In the circumstances, I am satisfied that it would be just and equitable to extend time to the Claimant for her to pursue her disability discrimination claims.
- 77 The parties are now required to continue to comply with the directions made at the case management hearing on 9 July 2024 to ensure that the final hearing listed to commence on 17 February 2025 remains effective.

Employment Judge R Havard

Dated: 17 November 2024

ORDER SENT TO THE PARTIES ON

...18 November 2024.....

Case Number: 1600854/2024

...M Bateman.....

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS