EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss S Flynn **v** **British Airways plc**

PRELIMINARY HEARING

Heard at: Watford (by CVP) **On**: 8 January 2025

Before: Employment Judge Wyeth

Appearances:

For the Claimant: In person
For the Respondent: Ms H Kendrick (Solicitor)

Judgment having been sent to the parties on 21 January 2025 after being handed down along with reasons verbally on 8 January 2025 and a request for written reasons having been made in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2024, the following written reasons are provided:

REASONS

The claims and background

1. By way of a claim form issued on 1 February 2024 the claimant brings complaints of disability discrimination, unauthorised deduction of wages (including failure to pay holiday) and failure to pay notice pay of one week. The claimant relies on the condition of ADHD, for which she is medicated. The respondent accepts that the claimant's ADHD is a disability for the purposes of the Equality Act 2010 but maintains that this is well managed by medication.

2. Following a case management Preliminary Hearing that took place before Employment Judge Manley on 5 August 2024, this Public Preliminary Hearing has been listed to determine whether or not the tribunal had jurisdiction to hear the claimant's claims which, on the face of it, are out of time.

3. Whilst the claimant provided some clarity about her claims at the hearing before EJ Manley even now, the precise nature and basis of her disability discrimination claim remains somewhat vague. She has not identified or explained the factual basis for asserting that her lateness is in some way connected to her ADHD, which is controlled by medication. EJ Manley also ordered the claimant to provide further information explaining the basis for her money claims by 2 September 2023. The claimant was late providing this information and this was eventually forthcoming in the week commencing 21 October 2024. It is only within this further information that the claimant alleges that she was not paid fully from the very start of her employment in May 2022 until her eventual dismissal in August 2023. She claims there were shortfalls in her pay, but not every month. Notably she says there was a gap in those shortfalls between August 2022 and February 2023.

4. The claimant also says that there was some holiday pay not paid. I have found her schedule confusing and I have doubts about its accuracy. In particular it seems she is claiming outstanding holiday pay of 12 days, but then also appears to be claiming in respect of booked (and presumably taken) holiday in September and October 2022. It is not clear whether this might amount to double recovery or not but that is not a matter that is relevant to what is to be decided at this hearing.

5. It is undisputed that none of the claimant's claims crystalise beyond her dismissal, the date of which was either 14 or 18 August 2023. As such, all claims are on the face of it out of time and any argument about continuity (i.e. whether there was a series of deductions or a continuing course of conduct) ceases to be relevant beyond the claimant's dismissal and has no impact for the purposes of today's hearing. Likewise it is not necessary to identify the precise heads of claim regarding the claimant's disability discrimination complaint because that has no bearing on the question of whether the claims are in time (as no discrimination complaint extends beyond her dismissal).

Procedure

6. I had a file of papers in front of me consisting of 46 pages ('the bundle'). At my request a further eight pages were provided containing the further information supplied by the claimant in accordance with EJ Manley's order. The claimant requested that an email she received from ACAS, accompanying her early conciliation certificate, was also included in the bundle and Miss Kendrick did not object.

7. I had a witness statement from the claimant and I heard oral evidence from her. Ample time was provided to enable Miss Kendrick to ask the claimant succinct and structured questions, which the claimant was able to reflect upon and answered with clarity. I also asked the claimant some questions to assist in clarifying her evidence in relation to the time point. I then heard oral submissions from Miss Kendrick who had also provided written submissions in advance. This enabled the claimant the chance to digest the

respondent's arguments before making submissions in reply which she did with considerable eloquence.

The facts

8. The claimant commenced employment on 3 May 2022 as a cabin crew assistant at Heathrow Airport. She was subject to a probation period of 12 months. In December 2022, there was a probation meeting held with the claimant. The respondent says that on 6 April 2023 the claimant was referred to BA health service (in essence, the respondent's occupational health service) to advise as far as possible whether her health issues and, thus, disability were relevant to the issue of her lateness. The claimant was assessed on 14 April 2023. The claimant's probation was extended on 23 April 2023, according to the respondent, to 3 August 2023. In the meantime there appears to have been a meeting on 27 July 2023 between the claimant and one of the respondent's managers, Elspeth Manual, which was adjourned and reconvened on 14 August 2023.

9. There is no disagreement amongst the parties that at the meeting on 14 August, Elspeth Manual, on behalf of the respondent, informed the claimant that she was to be dismissed for her lack of punctuality and her poor timekeeping. There was no dispute that there had been repeated problems with the claimant's timekeeping, which was critical given the nature of her role and the obvious requirement to be at work in good time to meet flight schedule requirements and demands. The claimant was told that her probation was not going to be extended any further. As the claimant did not have two years qualifying service at this time and was not eligible to bring an unfair dismissal claim, there was no requirement for the respondent to follow any procedure or demonstrate a potentially fair reason for dismissal (although repeated poor timekeeping would in all likelihood amount to an issue of conduct that would be a potentially fair reason for dismissal). Accordingly, the respondent confirmed the decision to dismiss the claimant by way of a letter dated 18 August 2023.

10. The claimant delayed commencing ACAS Early Conciliation until 13 November 2023, which was almost the very end of the period of three months from her dismissal. A certificate was issued on 25 December 2023. Accordingly, the claimant should have lodged her claim on 25 January 2024 to be in time. Instead, the claimant failed to lodge her claim until 1 February 2024. As a result her claim was out of time by one week.

11. The claimant's primary reason for submitting her claim late is because she says she was advised over the phone by an ACAS adviser on or around 13 November 2023 (at the start of the ACAS Early Conciliation process and long before she received her ACAS EC certificate), that she had one month and one week to submit a claim. She has no evidence to corroborate her assertion that she received any such advice.

12. I do not accept the claimant's evidence that she was given advice of the kind she now asserts from the ACAS adviser and find that to be highly unlikely on the balance of probabilities. The claimant accepted that the ACAS guidance provided online is clear and that it states unequivocally that ACAS (through

its advisers) will not advise on time points or the date by when a claim should be submitted.

13. Notably on the claimant's own case she purported to have received what she claims transpired to be erroneous advice very early on in the ACAS EC process, long before she received the certificate with the accompanying email that she requested to be included in the material before me today. Again, that email states unequivocally that "…you have at least one month to bring a claim" (emphasis added). It does not say one month and one week. That should have been a red flag for the claimant to recognize that what she claims to have been told on 13 November 2023 might not have been accurate (if she had indeed been told it, which I reject). She had plenty of time to investigate the correct position upon receipt of that email. Indeed, according to her evidence, the claimant sought advice from the CAB and also from her trade union.

14. The claimant claims both of those organisations made reference to her to contacting ACAS which is, of course, very likely given that it is necessary to commence ACAS EC before a claim can be accepted and not in the context that she now advances. Notably, the claimant was vague about the context in which these organisations were referring her to ACAS in her evidence before me. I was not persuaded by the claimant's evidence that these organisations were referring her to ACAS to get advice on the process and time for issuing a claim. Those organisations are advisory in nature and their very purpose is to provide such advice to those who are seeking it rather than deferring such a matter to ACAS. Again, on the balance of probabilities, I simply do not accept the claimant's evidence on this point. Both the CAB and her Trade Union would or should have known that ACAS would not advise on such a matter. It is highly unlikely that not one but both of those advisory bodies would have referred the claimant to ACAS to obtain advice of the kind that they would ordinarily give to their service users.

15. In any event, despite seeking to advance before me that she had been told by the CAB and her trade union to obtain advice about the date to submit a claim from ACAS, she went on to assert that she did not make any specific enquiry with either the CAB or her union about the deadline for submitting her claim but allegedly chose instead to rely on what she says she had been told by the ACAS officer back in November 2023.

16. The claimant accepted that she was in a position to be able to research the ways and means of bringing a tribunal claim online. Need it be said there is ample information and materials online to explain what the process is for submitting a claim, the applicable time limits for doing so and how the time limit operates including allowing for ACAS EC. Notably the claimant stated in evidence before me that the reason she started the ACAS EC process on 13 November 2023 was a protective measure by her because she wanted to avoid any arguments about whether she had begun the process in time should there be arguments about whether she was dismissed on 14 or 18 August 2023. That is significant because it demonstrates that the claimant was aware in November 2023 of the applicable time limits and the importance of complying with them and the risks associated with leaving submitting her claim, metaphorically, to the 'eleventh hour'.

17. The claimant gave no explanation for not being able to lodge her claim within the time period from 25 December 2023 (the date her ACAS certificate was issued) up to the point that she did eventually submit her claim on 1 February 2024. The only reason she gave for not doing so was because she elected to delay until the very end of the period she thought she had to do so. There was no reason for her not to put in her claim within the relevant time frame and she could have done so well within the time limit. Instead she decided to take the risk of leaving it until the day she thought was the last day for doing so, only to find that she was wrong and that this was incorrect. That was entirely her choice.

18. Despite the claimant complaining about the fact that she did not receive payslips she had requested until the end of August 2023, she accepted that this did not impact on her ability to submit her existing claim within the statutory time limit. The claimant also accepted in evidence that she had received her pay slips for May, June and July 2022 at the end of each of those months even though she now seeks to allege that she has not been paid correctly for that period. It is therefore surprising that the claimant did not take any action sooner given she now maintains she was underpaid as far back as 2022.

19. The claimant asserted in evidence that she had experienced symptoms of illness shortly after she was dismissed. Her evidence about this was vague and poor. Other than a reference to “chronic pain”, she gave no indication as to what the symptoms were, how long any symptoms were said to have lasted or how frequently and why this might have had any bearing on her ability to submit her claim.

20. She stated in evidence that she had chosen not to produce any medical evidence before this tribunal because of the public nature of these proceedings. I did not accept that as a sufficient reason for the total absence of medical evidence in support of her bare assertion that she had suffered from some kind of unspecified illness. In any event, when I asked her about her condition, she volunteered in evidence that her chronic pain ceased in November/December 2023 and did not start again until two months later (i.e. February 2024 – post issuing her claim). As I have indicated earlier, the claimant accepted that there was nothing preventing her from submitting her claim within the month after her ACAS EC certificate was issued. Furthermore, the claimant indicated that she was not relying on this as the primary reason for not submitting her claim in time. Accordingly the claimant was not impeded by any illness during January 2024, which is the period in which she should have submitted her claim.

21. Ultimately, in essence the claimant’s case is that she was unable to lodge her claim in time because of incorrect advice she claims to have received from an ACAS adviser who she says misled her about have a further week beyond a calendar month to submit her claim after receiving her ACAS EC certificate.

The Relevant Law

22. In relation to time limits for deduction of wages claims, section 23 Employment Rights Act 1996 provides that:

> "(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
> (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
> ….
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

23. As for the applicable time limit for pursuing a breach of contract claim in the tribunal, Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that:

> "Subject to article 8B an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented –
> (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
> (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, ….
> …
> (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

24. The question of what is reasonably practicable is a question of fact for the tribunal. The burden of proof falls on the claimant.

25. In Palmer and anor 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 possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Subsequently, 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'.

26. In Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488, EAT Mr Justice Wood explained that, when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and

advice about how to enforce that right. Failure to do so will usually lead the tribunal to reject the claim. In essence, the claimant is usually put on inquiry as to the time limit.

27. It may not be reasonably practicable for a claim to have been presented in time in cases where a claimant has received wrong advice from an ACAS officer or Employment Tribunal staff member (see cases such as DHL Supply Chain Ltd v Fazackerley EAT 0019/18 and Rybak v Jean Sorelle Ltd [1991] ICR 127, EAT) but that will depend upon a tribunal being satisfied that it was reasonable for the claimant to have approached the matter on the basis of that incorrect advice.

28. Section 123 EqA provides the limit for Equality Act complaints:

"(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."

29. The 'just and equitable' test is a broader test than the 'reasonably practicable' test in section 111 Employment Rights Act 1996. The burden is on the claimant to persuade a tribunal that it is just and equitable to extend time. Indeed, in Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal observed 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."

30. Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 at [31] and [32] that there is "no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised" and that whether to grant an extension "is not a question of either policy or law" but "of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it".

31. Following the decision of the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5, CA, it is no longer appropriate for the factors in British Coal Corporation v Keeble and others [1997] IRLR 336 to be taken as a starting point by tribunals when addressing the question of 'just and equitable' extensions. Instead, tribunals should consider and assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in Keeble – the length of, and the reasons for, the delay when determining if and how the exercise of the discretion should be engaged.

32. Furthermore, as noted by the EAT in Secretary of State for Justice v Johnson [2022] EAT 1 the EAT, in accordance with Adedeji tribunals should consider the consequences for the respondent of granting an extension, even if it is of a relatively brief period and any assessment is not limited only to the period by which the complaint was out of time.

33. Merits can be a factor to be taken in to account when deciding whether to exercise any discretion to extend time (Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132).

Applying the law to the facts

34. Turning to the reasonably practicable test first (the ERA and breach of contract claims), I do not accept, and on the basis of the evidence, I cannot conclude that it was not reasonably practicable for the claimant to put her claim in on time. It may well be that she only missed the statutory deadline by a matter of days, but the claimant had access to two advisory services (the CAB and her trade union) from whom she could have checked the position regarding the date by which her claim should have been lodged. Furthermore, there is ample advice available online that the claimant could have been reasonably expected to access given that she had already done so in relation to ensuring she commenced ACAS conciliation in time. Instead, taking her case at its best (which I do not accept on the balance of probabilities), she relied on an alleged verbal assurance from an ACAS officer about when her claim had to be submitted, even though the ACAS guidance available online makes it clear that ACAS officers do not provide such advice. Furthermore, that remark was apparently made to her over the telephone by an ACAS officer some considerable time before she put in her claim and long before the ACAS EC certificate was issued. That was not an appropriate approach for the claimant to have chosen to take. The claimant decided to adopt the high-risk strategy of leaving the issuing of her claim to what she thought was the very last date for doing so even though there was no reason why she could not have put her claim in much sooner – a risk that she was or should have been alive to given the wording in the accompanying ACAS correspondence to which I have already referred.

35. It was reasonably practicable for her to put her claimant in time irrespective of the incorrect advice she says she received and she did not do so. As such her unauthorised deductions of wages claim (including unpaid holiday) under the Employment Rights Act 1996 and her breach of contract claim in respect of notice pay are out of time and the tribunal has no jurisdiction to hear them.

36. Turning next to the question of whether it is just and equitable to extend time in respect of her discrimination claim under the Equality Act 2010, it is, of course, for the claimant to satisfy this tribunal that time should be extended in her favour. For the reasons given already in the above section dealing with the reasonably practicable test, I do not accept that the claimant had a good reason for not submitting her claim in time. When addressing this question however, I have nevertheless carefully weighed up the balance of prejudice to both parties.

37. One of the problems for the claimant is that she has not provided the factual information on her claim form (or subsequently, at or after the previous hearing before EJ Manley) that is needed to properly understand and identify how she maintains that she has suffered disability discrimination, which, of course, puts the respondent to a continued disadvantage because

it remains unclear about the case it has to meet. Be that as it may, it seems that the claimant's claim is about a lack of punctuality. There is also no real dispute about the fact that there were instances of the claimant being late, which the respondent says led to the claimant on at least one occasion not being available for, and thus missing, her scheduled flight that in turn resulted in her having to be on standby instead. As a matter of common sense, the need for punctuality is highly likely to be crucial in the airline industry, given the role the claimant was employed to undertake. I am necessarily cautious about considering the merits of the claim at this early stage but this is nevertheless a factor that I cannot ignore and that needs to be added in to the scales for the purposes of balance of prejudice test that I am to apply.

38. Taking the claimant's case at its best, on the agreed facts the claimant was a short serving employee who was still working through her period of probation. Again, taking the claimant's case at its best, even if the claimant's instances of lack of punctuality were disability related, on any realistic assessment of the undisputed facts of this case and given the industrial context the respondent must have a very good prospect of being able to objectively justify any decision not to proceed with her employment if her medical condition was causing her not to be able to attend her flight schedules on time. I emphasis however, that this not the principal reason for the way in which I have exercised the discretion available to me in this case.

39. Parliament has legislated in such a way that time limits within which tribunal claims have to be brought are deliberately short. The factual matrix in these types of cases can be vast and wide, and justice relies upon those involved being able to recall and give an accurate account of matters relevant to what is in dispute. Even at the date of the last hearing before EJ Manley, the claimant was still unable to be clear about the factual basis for asserting that she had suffered discrimination and the basis of any case against the respondent. Even if she is unable to engage with the legal framework, the claimant is the only one who can offer the factual account necessary to be able to make out the basis of a claim and she has failed to do so. Even now, the respondent is still in a position whereby the claim it is expected to meet is not immediately obvious. That causes the respondent inevitable prejudice. I accept Ms Kendrick's submission made on behalf of the respondent that the delay both in submitting the claim and also failing to clarifying it subsequently has impacted on the cogency of the evidence and the respondent's ability to accurately recall and preserve such evidence.

40. In any event, the onus is on the claimant to demonstrate that time should be extended. In this instance, she has not satisfied that requirement. There is no basis to extend time. The claimant is in no worse position than most other unrepresented claimants. The reasons that she gives for not submitting her claim in time are not compelling ones. She relies almost exclusively on a purported verbal remark by an ACAS officer that she had a further week beyond the calendar month to submit her claim but failed to check the accuracy of that remark with not one but two advisory services she approached about her claim and further failed to undertake her own research online about this important issue.

41. I am not satisfied that it is just and equitable to extend time and as such, the tribunal has no jurisdiction to hear any disability discrimination claim under the Equality Act 2010.

42. Accordingly, the tribunal does not have jurisdiction to hear any of the claimant's claims and they are dismissed.

Approved by:

Employment Judge Wyeth

Date: 22 April 2025

Sent to the parties on:

24 April 2025

For the Tribunal Office