EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Jasmine Anthony	**v**	**ASOS.com Limited**

Heard at: London Central
On: 20 December 2024

Before: Employment Judge Hodgson

Representation

For the Claimant: in person
For the Respondent: Ms A Smith, counsel

JUDGMENT

1. **The claim of unfair dismissal has been presented out of time and is dismissed.**

2. **All claims of direct discrimination are presented out of time and are dismissed.**

REASONS

Introduction

1. The hearing before me was listed by EJ Goodman at a preliminary hearing on 22 October 2024. There are three points to consider: have the claims being brought out time, and if so should time be extended; should the

claimant's application for amendment be granted; and should any claim be dismissed as having no reasonable prospect of success.

2. The claimant's employment with the respondent came to an end on 17 January 2022. The primary time limit for bringing claims of unfair dismissal and discrimination expired on 16 April 2022.

3. The claimant entered into early conciliation on 7 March 2024 and it concluded on 8 March 2020. She brought her claim on 20 March 2024.

The claims

4. On 22 October 2024, at a preliminary hearing, EJ Goodman considered, and identified, the relevant claims. She stated there were claims of unfair dismissal, and direct discrimination relying on the protected characteristics of race, and religion or belief.

5. EJ Goodman recorded that it appears the claimant may not have two years' service but in any event the claims appear to be brought out of time.

This hearing

6. It was agreed that I would first consider if all or any of the claims are brought out of time, and if so whether time should be extended.

7. We agreed that I should assume that the application for amendment could be granted. If time were extended, I would then go on to consider the application to amend, and thereafter, if time permitted, to consider the strike out application, and as part of the strike out, I would also consider whether the claim of unfair dismissal could be pursued, having regard to the claimant's length of service.

8. It was common ground that all claims arose on or before the effective date of termination, including those claims which could be added by amendment.

The evidence

9. The claimant filed a witness statement and gave oral evidence. Ms Emily O'Neil a current employee of the respondent, gave evidence.

10. I received a bundle of documents.

The relevant facts

11. The effective date of termination was 17 January 2022. The relevant primary time limits expired on 16 April 2022. The claimant did not bring a claim until 20 March 2024. The ACAS conciliation took place between 7 and 8 March 2024.

12. It follows that when the claim was issued, it was more than two years since the claims arose in nearly two years since the primary limitation expired.

13. The claimant's evidence stated that the delay was for multifaceted reasons and stemmed from "various challenges" that she faced during the relevant period. She alleged that she lacked adequate legal knowledge and understanding of the procedure involved for filing a tribunal case. The claimant is a single mother and sates she lacks a support network. She states she was "crippled with anxiety following these events." She states her mental and physical health was affected. She refers to anxiety and depression. She refers to her coping mechanism as being to "block the reasons… from my mind."

14. In addition, the claimant stated that she was intimidated by the prospect of taking legal action for the fear of potential repercussions and negative references. She stated she was unaware of the legal costs and the financial implications of bringing a claim.

15. After her employment ended, the claimant was able to secure new employment. I accept her evidence that she has had four jobs since being employed by the respondent. At times she has held down two jobs. At times she has worked seven days. I accept that this has been a difficult period for the claimant. At times she has had to travel for more than four hours a day. At times she has had to live with her father. She has found purchasing a new house stressful.

16. In or around September 2023, her employment with a different employer ended. She alleges she was not paid her last month's wages. She researched her rights by using the Internet and by speaking to others. She was able to identify the need for ACAS conciliation, which she entered into, thereafter she issued proceedings to recover her wages.

17. The claimant refers to limited medical evidence. She identified a fit note for a period of two weeks in November 2023. However, it is apparent that she has been able to work for the vast majority of the time since leaving the respondent's employment.

18. On 26 February 2024, the claimant met with an ex-colleague who referred to the respondent's disciplinary action against the claimant, which the claimant thought had been confidential. She states that this "reignited the mental turmoil that I tried to suppress." This alleged continuing discrimination was the "final straw" that compelled the claimant "to seek justice."

19. The statement goes on to say that “it has become apparent that there has long been a racial issue at ASOS which has been swept under the rug.”

The law

20. Under section 111 of the Employment Rights Act 1996, an employment tribunal shall not consider a complaint unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination or within such a 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.

21. The leading case on reasonable practicability is **Dedmen V British Building and Engineering Appliances** Ltd 1973 IRLR 379. The burden of proof is on the claimant to show it was not reasonably practicable to present the complaint in time.

22. In a complicated case were further facts come to light the escape clause can be applied more than once.

23. The application of the escape clause is a question of fact for the tribunal. This has been affirmed in **Parmer Southend-on-Sea Borough Council** 1984 IRLR 119. Here the Court of Appeal stated the overall test is whether it was "reasonably feasible to present the complaint to the employment tribunal within the relevant three months". The case suggests that there are a number of factors which may be considered. However, those factors may or may not be relevant to the tribunal's view. Those factors that may be taken into account include the following: the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used; what was the substantial cause of the employee’s failure to comply with the statutory time limit; whether the employee had been physically prevented from complying with the limitation period, for instance by illness or postal strike or something similar; at the time of dismissal, and if not when thereafter, did the employee know that he had the right to complain of unfair dismissal; has there been misrepresentation about any relevant matter by the employer to the employee; did the employee receive advice at the material time, and if so, from whom; what was the extent of the advisers knowledge of the facts of the claimant's case; what was the nature of the advice given; and has there been substantial fault on the part of the employee or his adviser which has led to failure to comply with the statutory time limit.

24. That is of course guidance. The tribunal may take into account all the circumstances of a particular case.

25. If the tribunal finds it was not reasonably practicable to bring the claim within the primary limitation period, it must consider whether it was brought in such further time as was reasonable.

26. The test for extension of time in discrimination claims is different. The tribunal has a broader discretion must consider whether to just and equitable to extend time.

27. Section 123 Equality Act 2010 sets out the time limits for bringing a claim.

> (1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of--
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> > (*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.

28. It is possible to extend time for presentation of a claim of unlawful discrimination beyond the primary period. The test is whether the tribunal considers in all the circumstances of the case that it is just and equitable to extend time.

29. It is for the claimant to convince the tribunal that it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link** 2003 IRLR 434 CA).

30. It is necessary to identify when the act complained of was done. Continuing acts are deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given to the timing of omissions. In any event, the relevant date must be identified.

31. The tribunal can consider a wide range of factors when considering whether it is just and equitable to extend time.

32. The tribunal notes the case of **Chohan v Derby Law Centre 2004 IRLR 685** in which it was held that the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980. Although the list of factors set out in the Limitation Act 1980 s 33 may be of some use, it should not be used formulaically as a check list *see* **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 27, disapproving **British Coal Corporation v Keeble** [1997] IRLR 336, EAT on this point.

33. A tribunal should consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances of the case which can include: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

34. This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion the tribunal may consider whether the claimant was professionally advised and whether there was a genuine mistake based on erroneous advice or information. We should have regard to what prejudice if any would be caused by allowing a claim to proceed.

35. When there are amendments to the claim, the position has been complicated by **Galilee v The Commissioner of Police of the Metropolis** EAT/0207/16 in which HHJ Hand decided that the relation back principle does not apply, and section 35(1) of the Limitation Act 1980, which provides for a statutory deeming of a relation back, does not apply to employment tribunals.

36. If the relation back principle does not apply, time remains a jurisdictional issue. If a claim is out of time, a tribunal must formally extend time or dismiss the claim. Granting an amendment does not extend time, as time is merely a factor to be considered as part of the exercise of discretion. It follows that granting an amendment may lead to a claim that is out of time being included in the final hearing. Time could be considered at a further preliminary hearing or it could be left to the final tribunal. If left to the final tribunal, there is a real risk that significant costs will be incurred in pursuing and defending a claim that may well be dismissed if it was presented out of time. HHJ Hand in **Galilee** found that the amended claim will be deemed brought at the date the amendment is granted.

37. Tribunal's may, if they consider it necessary in exercising discretion, also consider the merits of any prposed amended claim, but if the tribunal does so the party should be invited to make submissions.

Discussion and conclusions

38. As noted, all claims are out of time, including any claim that may be added by amendment. No allegation postdates the effective date of termination, and whilst there is reference to ongoing discrimination in the claimant's statement, no such claim is pleaded.

39. I considered first the claim of unfair dismissal and whether it was reasonably practicable to present the claim in time.

40. I considered the reason for delay. I find there are a number of reasons.

41. I do not accept that the claimant's mental health, whether by anxiety or depression, was such as to make it impracticable to bring a claim. Her evidence on this is poor. It is clear that she could continue to work. On the balance of probability, she had the mental capacity to bring the claim.

42. I accept that her personal circumstances made it difficult to bring the claim. They did not make it impracticable.

43. I do not accept that any feelings of intimidation made it impracticable to bring her claim. Her reference to feeling intimidated demonstrates that she understood she could bring a claim.

44. The concepts of unfair dismissal and discrimination are well known and I have no doubt the possibilities were known to the claimant. This is illustrated by her reference to being unsure as to the costs and being intimidated. If the claimant had exercised reasonable diligence, she could have easily researched the point, and established the possibility of bringing a claim.

45. The reason for bringing the claim when she did is, in part, following the events in February 2024, she formed a belief that there was more generalised discrimination in the respondent company.

46. I do not accept that the respondent has behaved in a way which would mislead the claimant, or inhibited from bringing proceedings.

47. I do not accept the claimant has acted promptly when she knew that the claim could be brought. This is relevant both to the practicability point and ultimately to whether the proceedings were brought in such further time as was reasonable.

48. Having regard to all these factors, I find, first, that claimant has failed to establish that it was not reasonably practicable to bring the claim. If I

were wrong in that, I would go on to find that she did not bring the claim of unfair dismissal in such further time as was reasonable. I therefore refuse to extend time for the unfair dismissal claim. It follows that I do not need to consider whether the claimant had the two years requisite continuity of employment.

49. I next consider the discrimination claim. The test is whether it is just and equitable to extend.

50. I have regard to the factors referred to above.

51. I have already considered the reason for the delay. I find that at all times the claimant knew that she could bring the claim. The claimant refers to a triggering event in February 2024 which caused her to consider the respondent's conduct, both in relation to herself, and her view of more generalised discrimination in the respondent company. Ultimately, this demonstrates that the claimant chose to delay bringing her claim, and when she decide to proceed, it was at least in part because of her perception about the way others were treated.

52. In this case there has been considerable delay.

53. I have received some evidence from the respondent as to the evidence that may be brought. That evidence largely related to a potential claim involving Mr Kwayke. That relates to a claim which is not in the claim form, not in the application to amend, but has been referred to generally in correspondence.

54. I do accept that the passage of time could cause difficulties generally, but the evidence I have on this is limited. I accept that it is likely to be difficult for the respondent to obtain evidence. It is not uncommon for the relevant witnesses to have limited memory, or to have moved on and be unwilling to give evidence. I have received some evidence from Ms Emily O'Neil, which, as noted, is more directly relevant to the existence of evidence in relation to a claim which has not been brought, but nevertheless appears to be relied on by the claimant as evidence from which inferences can be drawn. This illustrates the difficulty of obtaining relevant evidence.

55. As noted previously, the respondent has not contributed to any delay by any of its actions.

56. I have a wide discretion as to whether to extend time. There is no automatic right, even where the respondent may be able to deal with the claim.

57. In this case, I do not consider it just and equitable to extend time. Ultimately, the claimant chose not to bring her claim, but has now changed her mind. Moreover, she has sought to suggest that in some manner she had been inhibited by the mental health, and I have rejected that

argument, as it has not been supported by any adequate medical evidence, and is inconsistent with her ability to work.

58. I do not find it just and equitable to extend time.

59. It follows that all claims will be dismissed as I have declined to exercise my discretion to extend time.

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Employment Judge Hodgson

Dated: 7 January 2025

Sent to the parties on:

10 January 2025
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For the Tribunal Office