



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Elmi

**Respondent:** Royal Mail Group Limited

## RECORD OF A PRELIMINARY HEARING

**Heard at:** London Central Employment Tribunal (in private; by video)

**On:** 2 December 2021

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

### Appearances

For the claimant: Mr S Ali (representative)

For the respondent: Ms Z Tahir (solicitor)

## JUDGMENT

**All the claimant's claims are struck out on the basis that they have been presented out of time and there was no good reason to extend time.**

## REASONS

### Conduct of this preliminary hearing

- (1) This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP).
- (2) In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
- (3) No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

- (4) The respondent produced a bundle of documents. No evidence was given on oath. The tribunal had ordered that any party wishing to give evidence should serve a copy of that evidence on the other party by 18 November 2021. The respondent chose not to give evidence. The claimant did not comply with that order. The tribunal was told that the respondent had emailed the claimant's representative to find out when evidence was to be provided on 22 November 2021, but had received no reply. The claimant's representative told the tribunal that the claimant had wished to call evidence from two other people, Ms Mohammed and a trade union representative, but they were not available today. No witness statement had been filed in relation to any of them. The original order had made it clear that no additional witness evidence would be allowed at the hearing without the tribunal's permission. Given that no witness statements were available, and that the claimant's representative had not responded to the respondent's chasing for evidence, I did not give that permission. During the course of the hearing, I asked the claimant some questions about when she spoke to her union representative, to which she replied on the day she had received the appeal decision dated 20 March 2020, but her replies were not given on oath.
- (5) The parties were able to contribute to the discussion and to hear all comments made. The claimant was in the same room as her representative.
- (6) The participants were told that it is an offence to record the proceedings.

### **The claim**

- (7) The Claimant was employed by the respondent as an Operational Postal Grade, mail sorter until her employment was terminated with effect from 29 November 2019. By a claim form presented in the Leeds Employment Tribunal on 9 June 2020, following a period of early conciliation from 13 May 2020 to 4 June 2020, and later transferred to London Central Employment Tribunal, the claimant brought complaints of unfair dismissal and discrimination. The respondent defends the action generally and on the ground that it has been brought out of time.

### **The issues**

- (8) The issues for the tribunal to determine at this preliminary hearing are:
  - (i) Whether the claimant's claims for unfair dismissal and discrimination should be struck out on the basis that they have been brought out of time and so the tribunal has no jurisdiction to hear them;
  - (ii) Whether the claimant's claims that she has been discriminated against should be struck out on the basis that they have no reasonable prospect of success;
  - (iii) Whether one or more deposit orders should be made in relation to the claimant's claims that she has been discriminated against on the basis that they have little reasonable prospect of success;
  - (iv) The finalisation of the list of issues;

- (v) whether judicial mediation might be appropriate to resolve the claims;
- (vi) Any further case management directions that need to be made.

## Facts

The facts relevant to this hearing are as follows:

- (9) The claimant's employment with the respondent began in 2006. She was a single parent with child caring responsibilities. She was contracted to work on the late shift, which was very difficult for her to fulfil given her child caring responsibilities. She was allocated a temporary alternative early shift, the respondent stating that this was to allow her time to put child care facilities in place. This arrangement ended in about May 2019, when the claimant took a sabbatical. The time of the sabbatical was extended twice. There is a dispute over when the sabbatical period ended, but it is not necessary to determine that issue at this hearing. The respondent deemed that the sabbatical ended on 4 November 2019, having denied a request made by the claimant the previous day for a further extension. The claimant was asked to return to work immediately. She declined, being abroad at the time. She was invited to a disciplinary hearing, which she did not attend, and was dismissed on the ground of her absence from work with effect from 29 November 2019.
- (10) The claimant is from Somalia, and originally came to UK as a refugee. She told the tribunal that she had no knowledge of English employment rights. She was employed by the respondent in England for 13 years.
- (11) The claimant appealed against the decision to dismiss her, which she believed was unfounded. She told the tribunal that she had thought that her appeal would result in her reinstatement. In fact, the decision was upheld. She has complaints about the neutrality of the appeal, but those are not relevant for consideration at this hearing.
- (12) The claimant has brought claims for unfair dismissal and sex discrimination. The time limit for bringing those claims was at the latest 28 February 2021, extendable by any early conciliation period.
- (13) The claimant's appeal was rejected on 20 March 2020. The claimant told the tribunal that she had spoken to her trade union that day, and they had told her that she was out of time for bringing a claim. The claimant also spoke to other advisers, including the CAB.
- (14) The claimant applied for early conciliation on 13 May 2020, and the certificate was issued on 4 June 2020. This claim was brought on 9 June 2020.

*Time limits – unfair dismissal claim.*

- (15) S. 111 (2) (a) and (b) of the Employment Rights Act 1996 provides that claims for unfair dismissal must be brought before the end of the period of 3 months beginning with the effective date of termination of the employment, or "within

such further period as the tribunal considers reasonable in a case where it is satisfied that it had not been reasonably practicable for the complaint to have been presented before the end of that period of 3 months.” That time can be extended by any period of early conciliation, provided that the early conciliation is applied for before the expiry of the three month period.

*Time Limits – sex discrimination claims.*

- (16) S. 123 of the Equality Act 2010 provides that complaints of sex discrimination must not be brought after the period of 3 months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. Again, this time limit may be extended by any period of early conciliation.

**Submissions**

- (17) The respondent argued that the burden of proof as to why time should be extended was on the claimant, yet no evidence had been presented. She had taken advice from her union. By the time she contacted her trade union she should have been aware of the legal requirements to present claims within three months. It had been practicable for her to present her claim on time, and she did not do so within a reasonable time thereafter. The unfair dismissal claim should therefore be dismissed on the basis that it had been presented out of time and there was no reason for the tribunal to extend time for the unfair dismissal claim. So far as the discrimination claims were concerned, the tribunal had a wider discretion, but bearing all relevant factors into account it would not be just and equitable to extend time. The respondent argued that the claimant's claim for indirect discrimination were unmeritorious and should be struck out as disclosing no reasonable cause of action, as there was no evidence of any PCP being applied to her.
- (18) The claimant's representative argued that the claimant had been a refugee from Somalia. She had been a long-standing and loyal employee, but had never experienced any employment-related issues. The relevant laws were complex. Her dismissal had caused her anxiety, and the appeal process gave her false hope. After her appeal, Covid restrictions applied and the claimant was not able to access the outside world. She had applied for ACAS early conciliation in good faith, but the respondent had rejected her approach. The decision to dismiss was unfair, because the claimant was still on authorised leave at the material time, and the respondent was inconsiderate to the childcare needs of a loyal employee. Any ruling should evaluate the whole claim. The claimant had been discriminated against as a mother, and had not been offered an alternative shift even though there were temporary workers employed on an another shift that was convenient to her. Her representative believed that she had a good claim.

## Conclusion

- (19) The claimant's employment with the respondent terminated on 29 November 2019. Her complaint was presented to the tribunal on 9 June 2020, after a period of early conciliation from 13 May 2020 to 4 June 2020. Any event which happened before 14 February is therefore potentially out of time, so the tribunal may not have jurisdiction to deal with it.

### *Unfair dismissal claim*

- (20) The claimant presented her claim over 3 months late. The first question for the tribunal to determine is whether it had been reasonably practicable for her to have presented her claim on time. Complete ignorance of rights, if reasonable, may be a ground for making it not reasonably practicable for the claimant to have filed her complaint within time. Ignorance of time limits only does not give rise to such a lenient outcome – generally if employees are aware of their legal rights, they are expected to be put on enquiry as to when the claim should be brought.
- (21) I have determined that there may have been exceptional circumstances which meant that the claimant may have been unaware of her rights. She was a Somali refugee, and had not experienced the English employment law system. She had however been employed in England for 13 years, and such ignorance of her ability to bring a claim would be surprising. However, even giving the claimant the benefit of the doubt on that ground, in the absence of direct evidence, the tribunal concluded that the claim had not been presented within a reasonable time after the deadline had expired. The claimant told the tribunal that on 20 March 2020, she was informed by her union that her claim was out of time. Nevertheless, she did not apply for an early conciliation certificate until 13 May 2020, over 7 weeks later. I do not find the claimant's representative's argument that Covid was a factor convincing. The claimant had been advised of her rights by her union, and while she might not have been able to visit advisers face to face, she could still have researched the position or have contacted alternative advisers by phone or electronically. By 20 March 2020 the claimant was on notice that restrictions applied to the launch of tribunal proceedings, and in my judgment from that point it is reasonable to expect her to have promptly been put on a train of enquiry as to what steps to take next. The delay was unreasonable. The claimant's claim for unfair dismissal is therefore struck out on the basis that the tribunal does not have jurisdiction to hear it: it has been presented out of time, and there is no reason to extend time.

### *Discrimination claims*

- (22) The claimant did not take up the opportunity offered in the case management summary held on 22 July 2021 to object to any of the contents of the list of issues set out in the note of the summary sent to the parties. It is therefore a reasonable assumption that she accepts that the List of Issues in the document is accurate. As set out in that list of issues, the claimant brought two discrimination claims.

- (23) The first claim of indirect discrimination is based upon a provision, criterion or practice that flexible working arrangements put in place to accommodate child care responsibilities were temporary and could be reversed, which put women at a particular disadvantage because women are more likely than men to have childcaring responsibilities and therefore find it difficult to work shifts that are incompatible with childcare arrangements, and put her at that disadvantage. The respondent in its amended ET3 denied the claim but in any event it relies on the fact that any PCP would be a proportionate means of achieving a legitimate aim, in essence that it had an obligation to ensure that it was appropriately staffed at all times to maintain a level of postal delivery service expected of it as a public service provider.
- (24) The second claim is of harassment related to sex (section 26 Equality Act 2010). The claimant relies on two events: Ms L Brewster telling her, during meetings held between 17 May and 10 June 2019 that the respondent was not a charity, that it did not have time to worry about the claimant's childcare and that she had to do her duty and return to work, and Mr C Threlkeld intimidating her during a telephone call in October 2019 when the claimant had asked for leave to be extended, accusing her of being in Africa, and saying that she must return to work and that the respondent did not have time for this.
- (25) For the reasons set out above in relation to dismissal, the claimant was out of time for bringing her discrimination claims. Nevertheless, the test as to whether time should be extended is less harsh: it should be extended if it is just and equitable to do so. The tribunal is recommended to consider this issue by reference to the factors set out in s33 of the Limitation Act 1980.
- (26) I now deal with as many of these factors as I am able, given the lack of evidence before the tribunal. As set out above, the claimant did not apply for an early conciliation certificate until 7 weeks after she had been told that her claims were out of time. She therefore did not act promptly once she knew that she had a claim which was already out of time. The cogency of the evidence may not be affected by the delay, not least because the respondent's potential witnesses are still employed by the respondent. Having heard from the parties on the issue of the merits of the claims I have concluded that the discrimination claims have at best little reasonable prospects of success. In relation to the indirect discrimination claim, it will be difficult for the claimant to establish that the respondent has the PCP relied on, and the respondent's legitimate aim defence is plausible. So far as the harassment claim is concerned, the claimant is unlikely to establish that the two acts of harassment relied on amounted to a continuing act given that they were discrete conversations held with two different individuals, and my view is that it will be difficult for the claimant to assert that the second act relied on amounted to unwanted conduct related to her sex. Therefore, although in dismissing the claim, the claimant will be deprived of her opportunity to argue her case at a full merits hearing, the fact that I think that her discrimination claims have little reasonable prospect of success neutralises this factor. Bearing all these factors in mind, I concluded that it would not be just and equitable to extend time for service of the claimant's discrimination claims. I recognise that it is unusual to strike out a claim for discrimination on the basis that it has been presented out of time at a preliminary hearing, but I have concluded that the special factors in this case warrant it.

- (27) All the claimant's claims are therefore dismissed.
- (28) As a result of this decision, there was no need for the tribunal to consider any of the other issues to be determined at this preliminary hearing.

**Employment Judge Palca**

**02/12/2021**

Sent to the parties on:

02/12/2021.

For the Tribunal