



EMPLOYMENT TRIBUNALS

Claimant: Miss N Stewart

Respondent: Northern Care Alliance NHS Foundation Trust

Heard at: Liverpool (CVP) **On:** 15 November 2023

Before: Employment Judge Horne

Representatives

For the claimant: did not attend and was not represented

For the respondent: Mr B Keen, solicitor

RESERVED JUDGMENT

1. The tribunal does not have jurisdiction to consider the claimant's complaints of discrimination or harassment. The claim was presented after the expiry of the statutory time limit and was not presented within such other period as the tribunal considers just and equitable.
2. The tribunal does not have jurisdiction to consider the claimant's complaint of unauthorised deduction from wages. The claim was presented after the expiry of the statutory time limit and the claimant has not shown that it was not reasonably practicable to present the claim before the time limit expired.
3. The claim is therefore dismissed.

REASONS

The preliminary issues

1. This reserved judgment follows a preliminary hearing in public on 15 November 2023.
2. The purpose of the preliminary hearing was decided upon by Employment Judge Poynton at an earlier preliminary hearing on 1 August 2023. Following that hearing, EJ Poynton caused a case management order to be sent to the parties on 10 August 2023. As stated in that order, EJ Poynton decided that there should be a further preliminary hearing to determine the following preliminary issues:
 - 2.1. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

- a. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?
 - b. If not, was there conduct extending over a period?
 - c. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?
 - d. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide: (a) Why were the complaints not made to the Tribunal in time? (b) In any event, is it just and equitable in all the circumstances to extend time?
- 2.2. Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:
- a. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the effective date of termination or date of payment of the wages from which the deduction was made?
 - b. If not, was there a series of deductions and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one?
 - c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - d. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

Scope of these reasons

3. I have deliberately kept these reasons to the minimum necessary to explain to the parties why they have won and lost. This is for reasons connected with the claimant's health and also with the factual subject-matter of the claim. If a party, or any other body, makes a request for more detailed reasons, I would consider whether or not, at the same time, to make orders under rule 50 of the Employment Tribunal Rules of Procedure 2013.

Background

4. The respondent is a health care provider. The claimant was employed by the respondent as a clinical support worker. Her employment began on 6 June 2019 and ended with her resignation on 1 October 2022. For some of that time, the claimant was absent from work on sick leave.

Procedural history

5. On 9 December 2022 the claimant notified ACAS of a prospective claim against the respondent. She was issued with an early conciliation certificate on 20 January 2023.
6. On 24 April 2023, the claimant presented her claim form to the tribunal. In her claim form she ticked boxes to indicate complaints of disability discrimination and a claim for "other payments". This latter complaint was interpreted by the tribunal as being a complaint of unauthorised deduction from wages.

7. Box 8.2 of the claim form briefly described the circumstances that were alleged to have amounted to disability discrimination and disability-related harassment. The claim was, essentially, about the behaviour of one manager. The nature of the alleged behaviour was such that it was unlikely to have been witnessed by any third person in the workplace. It may have been witnessed in other settings. There was no suggestion that the events had been documented.
8. It also appears from the claimant's description that all of the alleged behaviour took place whilst the claimant was employed by the respondent. The deductions from wages – if any were alleged at all – appeared to relate to the difference between full wages and sick pay during some part of the claimant's employment.
9. The claimant completed Box 12.1 of the claim form. For reasons which she explained there, she asked for the opportunity to make representations in writing, rather than attending a hearing.
10. The respondent presented a response form with brief grounds for resisting the claim. Other than confirming the claimant's dates of employment, those documents did not assert or admit any facts that would help me to determine the preliminary issues.
11. As noted above, a preliminary hearing took place before EJ Poynton. The claimant did not attend that hearing. Shortly after the hearing, she e-mailed the tribunal, indicating the reason for her non-attendance. The reason is set out in EJ Poynton's case management order, which expressly referred to Box 12.1.
12. Besides defining the preliminary issues, EJ Poynton ordered the claimant to make a written statement explaining:
“
 - 2.1.1 The reasons her claims were not submitted to the Tribunal within the time limits;
 - 2.1.2 Why it had not been reasonably practicable for her to present her claim for unauthorised deductions (sick pay) within the three month time limit;
 - 2.1.3 Whether she is willing to attend the preliminary hearing on 15 November 2023 or whether she wishes the Tribunal to consider the issue based on her written statement;
 - 2.1.4 Details of any reasonable adjustments that she would like the Tribunal to make which would enable her to participate in future hearings.”
13. The claimant did not make the statement she had been ordered to make.
14. The next preliminary hearing took place before me. The claimant did not attend. The evening before the preliminary hearing, the claimant e-mailed the respondent's representative, explaining why she could not participate in the hearing. She asked the respondent's representative to pass on a message to the judge that she sought an interim payment. Her e-mail expressed her doubt that she could “go through” with the case.
15. What happened at the hearing, and the decisions I made, are all set out in a case management order sent to the parties on 16 November 2023. I do not repeat the contents here. For present purposes, it is sufficient to record that I gave the claimant a further opportunity to make written representations or to request a hearing, or to discuss adjustments, and explained clearly what she should do if she did not think she was well enough to do these things. My order made clear to the

parties that, unless particular steps were taken, I would decide the preliminary issues without a further hearing, based on the evidence available to me.

16. No further representations or request for a hearing was received.

Relevant law

17. Section 123 of the Equality Act 2010 (“EqA”) provides, so far as is relevant:

(1)... proceedings on a complaint [of discrimination or harassment in the field of work] 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...

18. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650, CA.

19. Section 140B of EqA provides, relevantly:

“

(1) This section applies where a time limit is set by section 123(1)(a)...

(2) In this section-

(a) Day A is the day on which the complainant ... complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant ... receives ... the certificate under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a)... expires the period beginning with the day after Day A and ending with Day B are not to be counted.

...”

20. The “just and equitable” extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is “broad and unfettered”: *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

21. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation

period in personal injury cases): *British Coal Corp v. Keeble* [1997] IRLR 336. These factors include:

- 21.1. the length of and reasons for the delay;
- 21.2. the effect of the delay on the cogency of the evidence;
- 21.3. the steps which the claimant took to obtain legal advice;
- 21.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and
- 21.5. the extent to which the respondent has complied with requests for further information.

22. In *Adedeji v. University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal warned against using section 33 as a checklist. The statutory test is whether or not the extension is just and equitable.

23. Section 23 of the Employment Rights Act 1996 (“ERA”) gives the tribunal the legal power to consider a complaint of unauthorised deduction from wages and continues, relevantly:

(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)...the date of payment of the wages from which the deduction was made...

(3) Where a complaint is brought under this section in respect of –(a) a series of deductions... the references in subsection (2) to the deduction ... are to the last deduction... in the series...

(3A) Section 207B (extension of time limits to facilitate conciliation [etc]) applies for the purposes of subsection (2).

(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.

24. Section 207B of ERA contains provisions relating to the effect of early conciliation on time limits. Those provisions operate in the same way as the equivalent provisions in section (set out above).

25. “Reasonably practicable” can be expressed as meaning “reasonably feasible”. It is not enough for a claimant merely to show that they acted reasonably. The claimant is not required to show that presentation of the claim was physically impossible. What is “reasonably practicable” lies somewhere between those two ends of the spectrum.

Evidence

26. The only evidence I have is from the claim form itself, the agreed dates of employment, and the claimant’s e-mails explaining why she was unable to attend hearings.

Conclusions

Fair hearing

27. I am satisfied that the claimant has had a reasonable opportunity to participate in this hearing. The parties have my case management order and can see how that opportunity was provided to the claimant.

Time limit for discrimination and harassment complaints

28. I assume, in the claimant's favour, that the alleged discrimination and harassment amounted to conduct extending over a period. Based on the limited evidence I have, I find that the last day of that period could have been no later than the last day of the claimant's employment.

29. The last day for presenting the complaints of discrimination and harassment could not therefore have been any later than 31 December 2022.

30. The day after the claimant notified her claim to ACAS was 10 December 2022. There was a period of 42 days beginning with that day and ending on 20 January 2023 when the claimant received her early conciliation certificate. That 42-day period is not to be counted when working out the limitation period. Once those 42 days are discounted, the last day for presenting the complaints of discrimination and harassment could have been no later than 11 February 2023.

31. The claim was presented 10 weeks later on 24 April 2023.

Not just and equitable to extend time

32. I have considered whether the necessary 10-week extension period is just and equitable. When making my decision I have taken into account what I know from Boxes 8.2 and 12.1 of the claim form and the circumstances described in the claimant's e-mails. It is likely that the claimant found it more difficult to present her claim than a person to whom those circumstances did not apply.

33. Nevertheless, I have concluded that it is not just and equitable to extend the time limit by 10 weeks. This is because:

33.1. An extension of the time limit would put the respondent at a disadvantage. It is likely that the delay has adversely affected the memories of the claimant, the manager whose alleged behaviour is the subject of the claim, and anyone who may have witnessed what happened. This would not be as important if the events were well documented, but there is no suggestion that such evidence exists in this case. Facts in cases like these need to be found with great care. Ascertainment of the truth or otherwise of allegations such as are raised in this case usually depends on picking out patterns of behaviour from a series of incidents which might be unremarkable when seen in isolation.

33.2. When assessing the magnitude of the disadvantage, I have to bear in mind that an extension of 10 weeks might well open the door to allegations of discrimination and harassment going back over a period of years. The nature of the alleged behaviour is such that, if events in 2020 or 2021 were alleged to be part of conduct extending over a period, the tribunal would have to consider all the evidence relating to all the allegations before deciding when the time limit for the historic behaviour started to run.

33.3. A refusal to extend time would, of course, prevent the claimant from pursuing her important complaints of discrimination and harassment. But from the evidence available to me, this is less of a disadvantage to the claimant in this case than it would be to claimants in other cases. It is important for me to be clear about what I mean – and do not mean – by this. I will attempt to do so

in a way that does not reveal any more than is necessary. I do not in any way hold it against the claimant that she doubts her ability to “go through” with the claim. Employment tribunals have to try to make it possible for all parties to participate, including those who think they would be unable to face it. The tribunal makes adjustments so that this can happen. In this case, however, the tribunal has tried to encourage the claimant to discuss with the tribunal how she could be enabled to participate, but the claimant has not engaged with that process. On the evidence available, it is unlikely that the tribunal could find a way to enable the claimant to give the evidence she would need to give in order to prove her claim. The claimant’s account of what happened would be particularly important in this case. The events of which she complains are unlikely to have been witnessed in the workplace. I have considered the potential for evidence of witnesses who observed the manager and the claimant in other settings. There is no suggestion that those witnesses ought to give evidence. The parties, being familiar with the claim form, will understand that there would be important factors to be balanced against any decision to call them.

34. The balance of disadvantage favours refusing the extension of time. The tribunal therefore has no jurisdiction to consider the complaints of discrimination and harassment.

Time limit for wages complaint

35. If there is a complaint of unauthorised deduction of wages at all, it would relate to a series of occasions on which sick pay was paid at a lower rate than the claimant’s normal contractual pay. The claimant was almost certainly paid monthly. The last date on which wages were paid could not realistically have been any later than 30 November 2022. Once the 42-day early conciliation period is discounted, the last day for presenting the claim could not have been any later than 10 April 2022. The claim was actually presented 14 days later.

Reasonably practicable to present the claim on time

36. The claimant has not proved that it was not reasonably practicable for her to present her claim within the time limit. Although Box 12.1 and the claimant’s e-mails suggest that there were factors making it more difficult for the claimant to present her claim than it would otherwise have been, that is not enough to enable the tribunal to consider the claim. The claimant has to show that, because of her difficulties, it was not reasonably feasible for her to present her claim within the time limit. There is insufficient evidence to enable me to reach that conclusion.

37. The tribunal therefore has no legal power to extend the time limit and cannot consider the complaint of unauthorised deduction from wages.

Disposal

38. For the above reasons, the claim is dismissed.

Employment Judge Horne
22 January 2024

ORDER SENT TO THE PARTIES ON
25 January 2024

FOR THE TRIBUNAL OFFICE

This judgment and reasons will be entered onto the tribunal's online register of judgments.