



# EMPLOYMENT TRIBUNALS

**Claimant**

Miss J. Charles

AND

**Respondent**

Mitchells & Butlers Retail Ltd

**HEARD AT:**

Watford Tribunal

**ON:** 8 February 2023

**BEFORE:**

Employment Judge Douse (Sitting alone)

**Representation:**

**For Claimant:** In person

**For Respondent:** Ms. Laughton, Solicitor

## RESERVED JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claim for unfair dismissal was not presented in time, despite it being reasonably practicable to do so.
2. The claim for disability discrimination was not presented in time, and it is not just and equitable to extend the time limit.

3. The Tribunal does not have jurisdiction to hear either claims – they are therefore both dismissed

## REASONS

### Background

1. On 7 December 2021, following ACAS conciliation from 4 November 2021 to 6 December 2021, the Claimant brought claims for unfair dismissal and disability discrimination.
2. As the Claimant was dismissed without notice on 18 June 2021, on the face of it the claims are out of time.
3. The Claimant accepts that the claims were not made within the statutory time limit, and effectively seeks to extend that time on the basis it was not reasonably practicable to bring the claims in time.
4. This case was before me for an open preliminary hearing to decide that application.
5. The claim form does not address the issue of time limits – the only reference to the claim being out of time is at 3.1, where it is recorded *“The regional manager...kept saying to me that I was “out of time” I’m not quite sure what that means”* [7].
6. The Claimant was clear to me that she was relying on ill health as affecting her ability to make a claim.

### Procedure, documents, and evidence heard

7. I was provided with a bundle of 79 pages. The Claimant attended with multiple other documents, including medical evidence, which were potentially relevant to the issues. We spent some time going through these, ensuring everyone had the same documents and attributing them with page numbers up to E5.
8. I was also provided with a statement from the Respondent’s witness, Lorna Leach, who gave sworn oral evidence.

9. As the Claimant had not provided a witness statement, and was unrepresented, I asked her some introductory questions as her evidence chief.
10. Because of the time taken to finalise documents, evidence started shortly before 11am and left insufficient time for deliberation and delivery of an oral judgment.

### **Findings of fact**

11. Based on the evidence heard and the submissions made, I found the following facts.
12. The Claimant was employed as bar staff at the Miller & Carter site in Barnet from 1 July 2018, until termination.
13. The site was closed from March 2020 until 4 July 2020, due to covid-19 lockdown.
14. The site was closed again, due to covid-19 lockdown, from 5 November 2020 to 17 May 2021.
15. The Claimant's step-father passed away in November 2020.
16. The Claimant was signed off sick from work from 1 to 11 July 2021 [D4] and from 12 July until 8 August 2021 with "stress and depressed mood" [D5].
17. The Claimant was receiving counselling from 8 April 2021 [B2]. This was ongoing at 12 July 2021 [D1] and ended on 12 August 2021 [D6]. During this time, she was also prescribed Sertraline – she cannot recall the dose, other than it was the maximum – and took this a couple of times after counselling ended.
18. After this she was signposted to other services, and told that if she wanted further counselling sessions, she would need to ask her GP to refer her again. She did not do this.
19. The Claimant was also drinking excessively from November 2020 and received help from Spectrum drug and alcohol services [E1]. Her partner and mother took responsibility for childcare during this time.
20. She gave evidence that the combination of her alcohol use and depression was her issue at the relevant time.
21. The Claimant did not return to work on 17 May 2021. The Respondent called her on 21 May 2021 and left a voicemail.

22. On 27 May 2021, the General Manager – Chris - emailed the Claimant, attaching a letter, regarding her absence. The Claimant replied the next day, advising she hadn't got the voicemail and that she didn't know the restaurant was reopening until other members of staff told her on 22 May 2021 [43].
23. Although she replied to the email itself, the Claimant says she does not recall seeing the attached letter. However, the contents of her replies refer to details that were not in the covering email, which simply stated "*Please find the letter regarding your unauthorised absence from work*" [44].
24. In her initial reply on 28 May 2021, the Claimant stated that she accesses her voicemail and email daily. In cross examination, she said that this was a stretch, but could not say how often she would have been accessing these systems.
25. The Claimant exchanged emails with Chris on 28 May, and sent another email on 2 June 2021 [41 & 42].
26. A phone call also took place between the Claimant and Chris – she provided notes of this call [C1a].
27. On 3 June 2021, Chris provided the Claimant with an email address for Rob [C1]. The suffix was ".cocm" rather than ".com", so was incorrect.
28. The Claimant copied the email address exactly as it was provided, and sent an email Rob, although it is not clear when this was as I was not provided with this email. She says that she simply asked him to contact her. She did not check/see any 'bounceback' email.
29. On 15 June 2021, the Respondent sent the Claimant a letter via Docusign. This invited her to attend a disciplinary hearing on 18 June 2021 regarding her absence, and warned that the meeting would go ahead in her absence if she did not attend. This email/letter was voided as expired unread on 15 July 2021.
30. The Claimant did not attend the disciplinary hearing on 18 June 2021, and was dismissed in her absence for gross misconduct.
31. On 18 June 2021, the Respondent sent the Claimant a letter via Docusign. This informed her of her dismissal with effect that day. This email/letter was voided as expired unread on 17 July 2021 [C2].

32. On 24 June 2021, the Claimant was removed from the Miller & Carter WhatsApp group [D3] - she says she noticed this sometime in August.
33. On July 2021 the Respondent sent the Claimant her P45 [65]. This was sent by 2<sup>nd</sup> class post. The address on the letter is different to the one on the ET1. The Claimant told me that she thinks she moved to the address on the ET1 in January 2020, and thinks she filled in a form telling the Respondent her new contact details, but cannot be sure. As this discrepancy was only spotted towards the end of the hearing, neither party had provided any independent evidence about the address held by the Respondent for the Claimant. In any event, I have to find that the Claimant did not receive the letter enclosing her P45.
34. The Claimant says that her sicknotes ending, and noticing the WhatsApp removal, along with not having had a reply from Rob, prompted her to contact the HR department in August. She was unclear what date this was.
35. Similarly, she says that she first spoke to Citizens Advice Bureau ("CAB") in August, but cannot recall the date, and then had to wait to speak to someone from ACAS. She gave evidence that CAB advised her on time limits and that because of her circumstances she may still be able to claim out of time.
36. When asked specifically about her ability to contact the Respondent and other agencies during the relevant period, and presented with examples of doing this, the Claimant said that some days were better than others and some days she was able to reply etc. She said she tried to do some things on some days.
37. On 5 October 2021, the Claimant emailed Rob [57] saying she had previously tried to contact him but had been given the wrong email address, but had got he She also stated: *"I'm in the middle of a claim against Miller & Carter Stirling Corner for unfair dismissal and stress at work."*
38. The Claimant explained that when she said this she meant that she knew she was going to CAB and trying to get advice.
39. On 12 October 2021, Rob replied offering to arrange a time to talk. I was not provided any specific details of a call that took place, but it is clear from later emails that there was some communication. On 21 October, an internal email from Rob to HR says that he has spoken to the Claimant. On 25 October, the Claimant

emails Rob that she was expecting a call back on 21 October, and got his out of office reply.

40. The Claimant continued to make contact with the Respondent in November 2021.

She says she still hoped to resolve the situation and return to work.

41. On 7 December 2021 the Claimant brought claims for unfair dismissal and disability discrimination.

42. There is no specific information within the ET1 regarding the alleged discriminatory act(s) - whether it is only the dismissal itself, or other prior acts. However, there is reference to *“evidence from other staff and managers...that the general manager...was trying to fire me”* and *“my Step Father’s Death has bene used against me”* [10]. Additionally, in her email of 2 June 2021 [41], the Claimant makes comments which indicate she is perhaps relying on other incidents, including: *“you make me so depressed”*; *“you just want to destroy me as a person”*; *“I feel you’re doing this to bully me out of working there...(so many examples to give”*; and *“I feel like you’ve targeted me from the beginning. You know what I’ve been going through and I feel like you purposely try to make my life difficult.”*

## The Law

### *Time limits*

43. Section 111 Employment Rights Act 1996 states:

— Complaints to [employment tribunal].

(1) A complaint may be presented to an [employment tribunal]<sup>1</sup> against an employer by any person that he was unfairly dismissed by the employer.

(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 of three months.

44. Section 123 Equality Act 2010 states:

(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.

*Reasonably practicable extension*

45. When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

45.1 S.111(2)(b) ERA should be given a 'liberal construction in favour of the employee' — *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*

4.2 what is reasonably practicable is a question of fact and so a matter for the tribunal to decide - *Wall's Meat Co Ltd v Khan 1979 ICR 52, CA*

4.3 the onus of proving that presentation in time was not reasonably practicable rests on the claimant. 'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — *Porter v Bandridge Ltd 1978 ICR 943, CA.*

46. 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'. 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'.
47. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.
48. In Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA, the Court of Appeal accepted that illness may justify the late submission of claims. In that case, the Court found that during the last six weeks of the three-month time limit S had been too depressed to instruct solicitors and, overruling the tribunal and the EAT, held that it was not reasonably practicable for S to have presented his claim in time. The Court emphasised that the test is one of practicability — what could be done — not whether it was reasonable not to do what could be done. In the Court's view, the tribunal had failed to have regard to all the surrounding circumstances, which included the fact that S had been trying to avoid litigation by pursuing an appeal against his dismissal. Although it was necessary to consider what could have been done during the whole of the limitation period, attention should be focused on the closing stages rather than the earlier ones. In this case S's disabling illness took place at the end of the period in question and it was not reasonably practicable for him to have made the claim in time.
49. Medical evidence showing that the claimant was struck down by illness at the relevant time will not necessarily be conclusive where that evidence is contradicted by the claimant's own actions during that time. In Chouafi v London United Busways Ltd 2006 EWCA Civ 689, CA, for example, C had been dismissed as a



result of a medical condition — severe depression — on 21 January 2004. On 30 January, he was admitted to a psychiatric ward, where he remained until 9 March. In May C submitted claims of unfair dismissal and disability discrimination to an employment tribunal, accompanied by a letter from his doctor stating that the extent of C's mental disorder prevented him from lodging the claims on time. An employment tribunal declined to accept the claims out of time, in part due to the evidence that C had written coherent letters to third parties about his pension during the limitation period. The EAT declined to overturn the tribunal's decision and C appealed to the Court of Appeal, arguing that the tribunal had rejected uncontested medical evidence without good reason. Dismissing the appeal, the Court held that the tribunal had assessed the doctor's opinion in the light of all available evidence and had reached a permissible conclusion that it would have been reasonably practicable to lodge the claim within the time limit.

50. The EAT found a 'not reasonably practicable' extension to be unavailable for similar reasons in *Cygnets Behavioural Health Ltd v Britton 2022 EAT 108*. There, an employment tribunal had concluded that it was not reasonably practicable for B to have presented his unfair dismissal claim in time because of depression and dyslexia, combined with ignorance of the time limit. He had limited mental and physical energy and his primary focus during the relevant time was on a regulatory investigation into his fitness to practise as a physiotherapist. Overturning that decision on appeal, the EAT observed that, notwithstanding B's conditions, he had been able to do a great deal during the period between his dismissal and the expiry of the time limit, including appealing against his dismissal, contacting Acas about his potential claims, working as a locum and then in a temporary post, moving house and engaging in great detail with the regulatory investigation. While he had been very busy, the EAT considered that it would be 'the work of a moment' to ask somebody about unfair dismissal time limits or to type a short sentence into a search engine. There was no rational explanation or justification in the tribunal's judgment as to why B's conditions prevented him from finding out about the time limit. Thus, the tribunal's decision was perverse and B's claim was dismissed as having been presented out of time.

51. However, the opposite conclusion was reached in University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12 where the EAT refused to overturn a tribunal's decision to accept an out-of-time unfair dismissal claim. It specifically rejected the argument that the tribunal's decision that W's serious mental health problems made it not reasonably practicable for her to have put in a timeous complaint could not stand because she had been able to cope with domestic responsibilities. The tribunal had decided that an extension should be granted in this case because the fact that W was able to find new accommodation and a new school for her child — something that it considered to be essential tasks — did not mean that she was also able to cope with putting in an employment tribunal claim, and she had submitted the claim as soon as she was sufficiently stable to do so. The EAT could find nothing wrong in this decision and accordingly dismissed the Trust's appeal.

#### *Just and equitable extension*

52. The discretion for tribunals to hear out-of-time claims within whatever period they consider to be 'just and equitable' is clearly broader than the discretion to allow late claims to proceed where it was not 'reasonably practicable' to present the claim in time (and then only if the claim was presented within a reasonable time thereafter).

53. Section 123 EqA does not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.

54. Previously, the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980 — British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the

decision reached, and to have regard to all the circumstances of the case, in particular:

54.1 the length of, and reasons for, the delay;

54.2 the extent to which the cogency of the evidence is likely to be affected by the delay;

54.3 the extent to which the party sued has cooperated with any requests for information;

54.4 the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;

54.5 and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

*Termination date*

55. Section 97 Employment Rights Act 1996 states:

(1) Subject to the following provisions of this section, in this Part "*the effective date of termination*" —

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

(3) In subsection (2)(b) “*the material date*” means—

(a) the date when notice of termination was given by the employer,  
or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

56. If the employee is informed that he or she has been summarily dismissed by letter, then the EDT will be the date on which the letter is received and read. According to the EAT in *Brown v Southall and Knight 1980 ICR 617, EAT*, a summary dismissal communicated to the employee for the first time in a letter addressed to his or her home will not take effect until the letter reaches the employee or until he or she has had a reasonable opportunity to read it.

### **Submissions**

57. Both parties made oral submissions following the evidence.

### ***Respondent***

58. The primary position is that the effective date for termination is 18 June 2021, and so the time limit expired on 17 September 2021. If that is not accepted, they say that the Claimant had reasonable opportunity thereafter to read the email that was delivered on that date. It is only if the Tribunal determines that the termination date was in August – when the Claimant says she was first made aware of her dismissal – that the claims are potentially in time. However, the Claimant is unable to say

when in August this was notified to her, and if before 3 August it is still out of time as conciliation started on 4 November.

59. Ms Laughton highlighted the Claimant's inability to recall key details and submitted that this was particularly relevant to the Tribunal's consideration of the just and equitable extension factors, and the ability to particularise her claims and give evidence.

60. The Respondent was sympathetic to the Claimant's situation regarding her mental health but did not accept that there was an inability to start proceedings for the entire relevant period. The available evidence suggested she was able to communicate effectively at various points.

#### *Claimant*

61. The Claimant was apologetic about the delay in starting proceedings, stating she hoped to go back to work. She agreed that ACAS and CAB told her she may be out of time but could still "get a look in".

62. She asked me to consider that there is no time limit on depression, and she wasn't in a place to look at emails or speak to anyone. She did the best she could at the time.

63. The Claimant emphasised that it was not a case that she didn't care or couldn't be bothered.

#### **Conclusions**

##### *Termination date*

64. Given the facts found in relation to receipt of the termination letter, I have to consider whether 18 June 2021 was the correct effective termination date, as the email with this document was returned as expired and unread. The Claimant clearly did not read the letter sent on that day, and, having not read the earlier document regarding the disciplinary meeting, would not necessarily have been

expecting to receive the dismissal letter. I therefore cannot conclude that the termination date was 18 June 2021.

65. However, the Claimant was expecting to receive some communication from the Respondent around this time as she had attempted to contact them. Applying the principles from Brown, I then have to consider what period she would have had a reasonable opportunity to read the dismissal letter. The document expired after a month, at a time when she was expecting *some* contact from the Respondent.

66. The Claimant's position is that she could not have acted on anything until she was aware of termination, and this was not until some point in August.

67. I have taken into account the effect of the Claimant's mental health conditions in assessing her ability to access the relevant document, and address these in detail below when considering their effect on her ability to present the claim itself within the time limits. Those conclusions apply equally to this specific instance, so I do not repeat them in full.

68. I consider that a month is a wholly reasonable period in which the Claimant could have been expected to access her emails, find the termination letter, read it and act upon its contents.

69. I therefore conclude that the termination took effect on 17 July 2021, and the date by which a claim should have been presented, or ACAS conciliation started, was 16 October 2021. All conclusions that follow are made in light of these dates.

*Unfair dismissal - Reasonably practicable extension*

70. ACAS conciliation started on 4 November 2021, which is after the time limit expired. I therefore have to decide if it was reasonably practicable for the Claimant to have presented her claim of unfair dismissal by 16 October 2021.

71. The Claimant relies on the effects of her mental health as the reason for not presenting the claim in time.

72. Looking at the period from 17 July 2021, the Claimant was clearly actively pursuing matters in August. She contacted HR, and at the very least was aware that CAB may be able to assist her.
73. Depression can be a fluctuating condition. I accept the Claimant's evidence that her mood and abilities would not have been the same every day.
74. Applying the principles in xx, I have focused my attention to the end of this period.
75. The Claimant was clear in her evidence that CAB advised her of the time limits, and that at least generally it might be possible to extend those limits. As she could not recall when she spoke to CAB, she was less clear on whether the conversation happened once the time limits had already expired, or during the limitation period. At no point did the Claimant say that she had been wrongly advised by CAB.
76. The email of 5 October 2021 assists me in relation this. The Claimant indicated that she is in the middle of a claim, and specifies what the complaints were. I therefore conclude that she had received specific advice by this point.
77. Focusing on the end of the 3-month period, regardless of what was happening in July, August, and September - which is a confused account - by at least 5 October the Claimant was very aware that she had claims that she wanted to bring. She had received advice/assistance in relation to time limits particularly, and has not been able to give any specific reason as to why she took no action before starting ACAS conciliation on 4 November 2021.
78. On her own evidence, there were days where she felt able to do things, and this is demonstrated by actions she took to contact Rob, HR, and CAB. She has not provided any reason why in those days she could not have started proceedings.
79. It was reasonably practicable for the Claimant to have commenced proceedings before 16 October 2021.
80. As I have determined that it was reasonably practicable for the Claimant to bring her claim in time, I do not need to move on to consider the next stage of the test.
81. The Tribunal does not have jurisdiction to hear this claim – it is therefore struck out.

*Disability discrimination - Just and equitable extension*

82. The Claimant has not given specific details of how she says the Respondent discriminated against her in relation to disability, which may cause difficulty identifying time limits. Applying the most generous interpretation, that the dismissal itself was discriminatory, the date for presentation of the claim/starting ACAS conciliation was 16 October 2021.
83. I have to decide if it is just and equitable to extend time beyond that date, considering the multiple factors outlined above.
84. In relation to the reasons for delay, I adopt the conclusions I have made in relation to the unfair dismissal claim and the reasonably practicable extension. The length of delay – nearly 3 weeks until ACAS conciliation started - may seem an insignificant amount of time, but during that period the Claimant was able to undertake other actions related to her employment issues. She continued to chase a response from Rob, rather than beginning more formal action, despite being aware of the time limits. She failed to act promptly, and has not given a specific reason for this failure.
85. In relation to the balance of prejudice, the Claimant has provided little information about the alleged discriminatory act(s) for me to assess the seriousness of her claim. I have applied the most generous interpretation to pinpoint the date of the alleged act. However, the available documentation suggests that there are other acts complained of and that these may run from the start of employment in 2018. Subject to time limits, and any necessary applications to extend time, there would be potentially a lot of investigation for the Respondent – requiring significant resources – and the cogency of evidence related to earlier complaints is likely to be affected. In particular, I agree with the Respondent's observations that the Claimant's own evidence is likely to be affected given her inability to recall matters during this hearing.
86. Taking all of the factors into account, it is not just and equitable to extend time to present this claim.



**Case number: 3323447/2021**

87. The Tribunal does not have jurisdiction to hear this claim – it is therefore struck out.

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Employment Judge K Douse

Dated: ...11 May 2023.....

Sent to the parties on: 12 May 2023

For the Tribunal Office

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