# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms S Marazzi**

**Respondent:** **Islington (T) Hairdressing Ltd T/A Toni & Guy**

**Heard at:** **Central London (By CVP remote videolink)**

**On:** **10 September 2021**

**Before:** EJ Brown

**Representation**

Claimant: Mr H Marazzi (Claimant's father)
Respondent: Mr Brown (Counsel)

# JUDGMENT AT AN OPEN PRELIMINARY HEARING

**The Judgment of the Tribunal is that:**

**1. The complaints of sex discrimination and unfair dismissal are rejected under r12 ET Rules of Procedure 2013.**

**2. The claim for a redundancy payment is not rejected and was presented in time. It will be listed for a Final Hearing (Short Track).**

# REASONS

1. By a claim form presented on 19 April 2021 the Claimant brought complaints of unfair dismissal, sex discrimination and failure to pay a redundancy payment against the Respondent, her former employer.

2. While the Claimant ticked these boxes at section 8.1 of the ET1 claim form, indicating that she intended to bring those complaints, she did not provide any details of the complaints at all.

3. The Respondent defended the claim. In its ET3 Response, it contended that, because the Claimant had failed to provide any particulars of her complaints, her claim had been presented in a form which could not be sensibly responded to and should therefore have been rejected under *r12(1)(b) ET Rules of Procedure 2013.* Further, the Respondent contended that the Claimant had been dismissed on 4 December 2020, so that she ought to have contacted ACAS for Early Conciliation by 3 March 2020; she had failed to do so and had not presented her claim until 19 April 2021. It said that her complaints of unfair dismissal and sex discrimination had been presented out of time. The Respondent contended that the Tribunal did not have jurisdiction to hear these complaints and that they should be struck out

4. This Open Preliminary Hearing was listed to consider whether the claims should be rejected or struck out.

5. Mr Marazzi, the Claimant's father, represented her at the hearing and gave evidence. He said that he had full knowledge of all the correspondence between the parties as he had been involved throughout the process. The Claimant did not attend.

6. Mr S Richardson, Head of Human Resources at the Respondent, also attended and gave evidence.

7. There was a Respondent's Bundle of documents and skeleton argument. Page numbers in this judgment refer to the Respondent's bundle. The Claimant provided additional documents to the Tribunal, including an email dated 15 August 2021, which set out her legal arguments. Both parties made submissions. The Respondent agreed that the Claimant's redundancy complaint was presented in time, although it contended that it had still been presented in a form which could not sensibly be responded to.

8. I reserved my judgment.

**Relevant Facts**

9. It was not in dispute that the Claimant was dismissed in a meeting on 4 December 2020 and that this was confirmed to her in writing by a letter of 11 December 2020.

10. The 11 December 2020 letter said, "Your termination date and last day of work will be 4 December 2020." The letter informed the Claimant of her right to appeal. It enclosed a calculation of the Claimant's redundancy and other entitlements. The calculation was wrong in a number of significant respects. For example, the Claimant was recorded only to have 4 years' continuous service when, in fact, she had been continuously employed since June 2005. The Claimant's weekly wage was also incorrect.

11. The Claimant sent a number of emails to the Respondent between 11 and 18 December 2020, querying the calculation. These had not been included in the Tribunal bundle prepared by the Respondent, which was unhelpful. Nevertheless, I accepted Mr Marazzi's evidence that the Claimant had sent such emails. It was clear that the Respondent had received them because some of its own emails to the Claimant, sent in December 2020, were replies to earlier correspondence from her.

12. On 17 December 2020 Mr Richardson, Head of HR, emailed the Claimant, encouraging her to exercise her right of appeal. Amongst other things, he said, "You also state that you have been unfairly discriminated against on the grounds of your sex. Again, in order for us to address this matter, we would need to meet with you at the appeal hearing and we also need you to provide us with a detailed statement confirming why you believe this to be the case."

13. Also on 17 December 2020, Mr Richardson sent the Claimant a second calculation of her entitlements to pay on termination of employment, including notice, holiday and redundancy pay.

14. The Claimant did not appeal against her dismissal. Mr Marazzi told me that she did not believe that the hearing would be impartial.

15. Mr Richardson wrote to the Claimant on 19 December 2020, telling her that no further furlough payments would be paid to her, in that she was no longer employer. He said that she would be paid her entitlements on termination of employment, calculated on the basis of a 2005 start date, with her December 2020 pay.

16. Mr Richardson told the Tribunal that the Claimant was always paid one month in arrears – so that she would be paid in January for her December pay.

17. The Claimant received a payslip dated 29 December 2020 detailing a furlough payment in the sum of £550.47 gross. She received a further payslip dated 29 January 2021 for "Dec Furlough" in the sum of £108.74 gross. The Claimant received a final payslip dated 28 February 2021 recording payments for "redundancy" "notice pay" and "holiday pay".

18. The Claimant wrote to the Respondent again on 28 February 2021, further querying the sums which she had been paid on account of her redundancy. Mr Richardson again revised the termination calculation and sent a revised version on 10 March 2021, Bundle p76. The Claimant agreed that those figures were accurate. Mr Marazzi told me, however, that the Claimant had still not received all the money she was owed.

19. Mr Marazzi told the Tribunal that it was not until January 2021 that the Claimant became aware of the identity of all the other employees who had been made redundant at the same time as she had been. He said that, of 14 stylists, the 5 individuals who were made redundant were all females and all had children.

20. Mr Marazzi agreed that the Respondent's 11 December 2020 letter to the Claimant made clear that she had been dismissed on 4 December 2020, but he said that the January and February 2021 payslips implied that the Claimant was still employed. He said that the Claimant was not aware that she had presented the claim out of time because of the payslips.

21. Mr Marazzi, who was assisting the Claimant throughout, said that he knew, in February 2021, that employees could approach ACAS if there was a dispute in the workplace. He said that he and the Claimant had been searching online for solutions. Mr Marazzi said that they had not looked online for remedies in

December 2020 and January 2021 because they were trying to discuss matters directly with the Respondent at that time.

22. On all the evidence, I found that the Claimant was told on 4 December 2020 that she was being made redundant and her employment was being ended. On 11 December 2020 she received a letter confirming that her employment termination date and last day of work was 4 December 2020. She was sent incorrect calculations of her termination payments during December 2020, which she challenged. The Claimant spent time corresponding with the Respondent in December 2020 to resolve her disputes directly with the Respondent.

23. The Claimant received payslips from the Respondent in January and February 2021. I found that the January 2021 payslip referred to "Dec furlough" – December furlough - and that the February payslip referred to payments on termination of employment. None of the 2021 payslips referred to payment for work done in 2021.

24. I decided that the Claimant had clearly been told on 11 December 2020 at the latest that her employment had ended on 4 December 2020. I found that, while the Claimant may have been a little confused about why she continued to received payment for work done in December 2020, there was no other indication that she was still employed. Indeed, given that the Claimant had communicated extensively with the Respondent in December 2020 about her termination payments, I considered that she knew that she had been dismissed.

25. In December 2020 the Claimant alleged, in correspondence with the Respondent, that the Respondent had discriminated against her on the grounds of sex. The Claimant therefore believed, as early as December 2020, that the Respondent had subjected her to sex discrimination. She was reinforced in this belief in January 2021, when she discovered that her colleagues who had been made redundant were also female. The Claimant knew in February 2021 that she could contact ACAS to resolve workplace disputes. She was able to search online for information about employment disputes and had the assistance of her father in doing so.

26. The time limit for bringing complaints of unfair dismissal and sex discrimination is 3 months beginning with the date of dismissal, or the date of the act of sex discrimination. In this case the Claimant ought to have contacted ACAS by 3 March 2021. She did not do so and she did not bring her claim until 19 April 2021, some 6 weeks out of time.

**Relevant Law**

27. By *r12 ET Rules of Procedure 2013*

**Rejection: substantive defects**

**12.**—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

(a) one which the Tribunal has no jurisdiction to consider; or

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) or (b) of paragraph (1).

28. (3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

29. In *E.ON Control Solutions Limited v Caspall* UKEAT/0003/19/JOJ (paragraphs 53 and 54 of the judgment) the EAT decided that the fact that the matter was not initially referred to an Employment Judge under Rule 12(1) does not mean that the obligation to reject ceases to apply; the Respondent is entitled to take the point at a Preliminary Hearing; and the ET has no discretion to allow the claim to proceed by granting an amendment.

30. The time limits for presenting complaints of unfair dismissal to an Employment Tribunal are set out in *s111 Employment Rights Act 1996*.

31. By *s111(2) ERA 1996,*

"‥ 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 the period of three months."

32. Where a Claimant fails to present his claim in time and seeks an extension of time, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests on the Claimant, *Porter v Bandridge Ltd* [1978] IRLR 271, [1978] ICR 943, CA. If he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was, in fact, presented was reasonable.

33. The question of whether it was reasonably practicable for the complaint to be presented is one of fact for the Employment Tribunal, taking into account all the relevant factors *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. Relevant factors can include the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

34. The fact of a pending internal appeal does not, on its own, allow a claimant to establish that it was not reasonably practicable to present a claim in time.

35. The Claimant's lack of knowledge of his rights and of the time limit may, however, assist the Claimant in establishing that it was not reasonably practicable to present the claim where an internal process was also being followed. In *Marks & Spencer v Williams-Ryan* [2005] ICR 1293, the Claimant's belief that she had to complete an internal appeal before starting tribunal proceedings, combined with her reasonable ignorance of the time limit for bringing an unfair dismissal claim, meant that it was not reasonably practicable for her to make her claim in time. In *John Lewis Partnership v Charman* UKEAT/79/11 the EAT held that it was not unreasonable for the Claimant to be ignorant of his right to bring a Tribunal claim where the Claimant was pursuing an appeal and deferred investigation of his rights until after the appeal had been concluded.

36. In *Cullinane v Balfour Beatty Engineering Services Ltd* UKEAT/0537/10 (5 April 2011, unreported), Underhill J stated (at para 16) that the question whether a further period is reasonable is not the same as asking whether the claimant acted reasonably, 'still less is it equivalent to the question whether it would be just and equitable to extend time'; instead it requires 'an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted', having regard to the 'strong public interest' in claims being brought promptly, and against a background where the primary time limit is three months.

37. By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of

    37.1. the period of three months starting with the date of the act to which the complaint relates or
    37.2. such other period as the Employment Tribunal thinks just and equitable.

38. Where a claim has been brought out of time the Employment Tribunal can extend time for its presentation where it is just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure Link* [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless they can justify a failure to exercise the discretion. Quite the reverse; a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in *s33 Limitation Act 1980* as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, in particular, the length of and reasons for 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 has cooperated with any requests of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the

Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

39. Mr Marazzi asked me to consider the case of *Robinson v Fairhill Medical Practice UKEAT/0313/12 (20 November 2013, unreported)*. In that case, the EAT decided that, where a Claimant who seeks an extension of time says that they put the claim into the hands of a solicitor or experienced representative, the Claimant is putting forward an explanation which is capable of being a satisfactory explanation for delay in the presentation of the claim.

40. He also asked me to consider the case of *Norbert Dentressangle Logistics Ltd v Hutton* UKEATS/0011/13/BI where the EAT upheld the decision of an Employment Tribunal, which had accepted it was not reasonably practicable for a Claimant to begin proceedings within three months of his dismissal, despite the fact he had entered into detailed email correspondence, and pursued a grievance in respect of related matters during that time, because it accepted his evidence that he simply became unable to function properly and could not bring himself to do it. It held that it was reasonable for him to delay a further six weeks beyond the initial period on the basis it accepted his evidence that he put in an application to the Employment Tribunal as soon as he felt able to do so.

**Discussion and Decision**

41. The ET1 in this case provided no particulars of the complaints brought at all. In the case of the unfair dismissal and sex discrimination complaints, I decided that these complaints could not sensibly be responded to. There was no basis in fact set out, to which a response could be made. In the case of the unfair dismissal complaint, the Claimant had not given a single reason as to why her dismissal might be unfair. In the case of the sex discrimination complaint, not a single act of sex discrimination was identified. A Respondent could not respond in any meaningful sense – any response would be based on guesswork as to what was being alleged.

42. By *r12 (2) ET Rules of Procedure 2013*, where the claim, or part of it, cannot be sensibly responded to, it “shall be rejected”. The provision is mandatory. I must reject the complaints. The defect cannot be cured by amendment, *E.ON Control Solutions Limited v Caspall* UKEAT/0003/19/JOJ. In this case, no amendment had been sought in any event.

43. The complaints of sex discrimination and unfair dismissal are rejected.

44. I did not order that the claim for a redundancy payment should be rejected. No further particulars are required, other than to say that a redundancy payment is claimed. It was presented within the 6 month time limit. That claim shall be listed for a Final Hearing.

45. To be clear, even if the sex discrimination and unfair dismissal complaints were not rejected under *r12 ET Rules of Procedure 2013,* they were presented out of time. I would not have extended time for them.

46. Regarding the unfair dismissal claim, the Claimant knew that she had been dismissed on 4 December 2020. She was aware of that she could contact ACAS in February 2020 and was able to research her rights on the internet by

February 2020. It was clearly reasonably practicable for her to contact ACAS to pursue a complaint to the Tribunal by 3 March 2021. There were no grounds for an extension of time under *s11 ERA 1996.*

47. *Norbert Dentressangle Logistics Ltd v Hutton* UKEATS/0011/13/BI does not assist the Claimant because there was no evidence that she "became unable to function properly and could not bring herself" to put in a claim.

48. Regarding the sex discrimination claim, the Claimant believed, in December 2020, that the Respondent had discriminated against her because of sex. She put this allegation in writing to the Respondent in December 2020. In January 2020, she became aware of other facts which reinforced her belief that she had been discriminated against on the grounds of sex. She was able to research her employment rights and did so by February 2021. She knew then that she could contact ACAS.

49. Taking into account all the relevant facts, the delay in this case was not insubstantial – at 6 weeks. The Claimant knew the facts of her complaint at least 2 months before the time limit expired. I did not accept that the Respondent's incorrect calculations of her termination payments materially confused the Claimant regarding the date of her dismissal. Nor did they impede the Claimant from bringing her claim – the majority of the correspondence between the Claimant and the Respondent took place in December 2020, long before the time limit expired. Ultimately, the Claimant could and should have brought her sex discrimination claim within the time limits. The Respondent would be prejudiced if time was extended, in that it would have to defend a claim. The Claimant, on the other hand, was the one who was responsible for the delay. Given that the Claimant did not plead any facts to support her claim, the merits of the potential claim of sex discrimination are not a factor which can be taken into account in the exercise of discretion.

50. *Robinson v Fairhill Medical Practice* UKEAT/0313/12 *(20 November 2013, unreported)* does not assist the Claimant because, in this case, the reason for the delay was not that the Claimant put her claim into the hands of an experienced representative, who was responsible for the delay.

51. While there is natural sympathy for the Claimant who has sadly been made redundant after many years of service, the relevant law dictates that an extension of time should not be granted.

Employment Judge Brown

Date 22 September 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

22/09/2021

FOR THE TRIBUNAL OFFICE