



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Hancock

**Respondent:** The Manor House Tamworth Limited

**Heard at:** Birmingham by Cloud Video Platform  
**On:** 25 February 2022

**Before:** Regional Employment Judge Findlay

## Representation

**Claimant:** Self represented  
**Respondent:** Mrs Thompson, Director

# JUDGMENT

The claimant's claims of unauthorised deduction of wages and of disability discrimination are dismissed.

# REASONS

The Issues:

1. On 18 February 2021 the tribunal received a claim from the claimant. She said that her employment was continuing and made claims of disability discrimination and of unauthorised deduction of statutory sick pay. There was also a dispute about holiday pay which has now been resolved.
2. 16 July 2021 Employment Judge Wedderspoon conducted a preliminary hearing and identified the issues and gave directions for the hearing today. The purpose of the hearing was said to be to determine whether any of the claimants discrimination claims have been brought in the primary limitation period and or whether it is just and equitable to extend time. The order went on to say that if the claimant was still bringing an unauthorised deduction's complaint the issue would be whether or not it was reasonably practicable to bring the complaint within time and whether the claim had been brought within a further reasonable. If time was not extended for both or either of the claim I will have to decide whether the relevant claims should be dismissed.

3. Judge Wedderspoon identified the claims as being direct or indirect disability discrimination, or or failure to make reasonable adjustments, all arising out of the same situation. Briefly, the claimant had been diagnosed with cancer of the duodenum in September 2019 and as a result needed to attend a number of hospital appointments on Tuesdays. Tuesday was one of her contracted working days. The claimant's case is that she requested to swap her shifts on Tuesday to another day in the week to enable her attendance at hospital, but that the respondent simply removed her from the rota on Tuesdays if she needed to attend an appointment, or left her on the rota that day and caused her to take unpaid leave to attend the hospital if she had an appointment.
4. The claimant says that as a result when she had to go on sick leave from 20 November 2019 she was unable to claim statutory sick pay because her earnings had fallen below the relevant threshold.
5. At the preliminary hearing, Judge Wedderspoon alerted the claimant to case law which indicates that statutory sick pay may only be claimed as an unauthorised deduction under section 23 of the Employment Rights Act 1996 if the employer agrees that statutory sick pay is due and has not been paid. In this case, the respondent disputes the claimant's entitlement to statutory sick pay. However, at the hearing before me, the claimant indicated that she did wish to pursue a claim for unauthorised deduction statutory sick pay rather than simply leaving it to be claimed as a loss consequent on alleged disability discrimination.
6. The hearing: at the hearing before me I checked whether the claimants required any reasonable adjustments due to her condition. She said that she did not, but I explained that she could ask for a break if she required it. The claimant was accompanied on this occasion by her daughter Ms Kate Smith. On one occasion when the claimant was giving evidence Ms Smith prompted her. I explained that this was not appropriate and it did not recur. I did not draw any conclusions from it as I was satisfied that Ms Smith had simply not understood that her mother could not be prompted during her evidence.
7. **Relevant law:** as Judge Wedderspoon had already set out in her order, different time limits apply to the claims for unauthorised deduction statutory sick pay and for disability discrimination.
8. In the case of unauthorised deduction, under section 23 of the Employment Rights Act 1996, a worker may present a complaint to an employment tribunal that her employer has made a deduction from her wages in contravention of section 13 of that act, but an employment tribunal shall not consider a complaint under that section unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made.
9. Under subsection 3, where there is a complaint regarding a series of deductions the reference to a deduction is to the last deduction in the series. Under subsection 4, where the employment tribunal is satisfied that it was not reasonably practicable for a complaint 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.
10. By contrast, under section 123 of the equality act 2010, proceedings on a complaint within section 120 (including disability discrimination) may not be brought after the end of the period of three months starting with the date of the

act which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

11. Under subsection 3, conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided upon it. In the absence of evidence to the contrary a person is to be taken to decide on failure to do something when they do act inconsistent with it, or on the expiry of the period in which they might reasonably have been expected to do it.
12. I have had regard to the relevant case law relating to the just and equitable and reasonable practicality tests. In particular in relation to whether it is just and equitable to extend the time limit, I consider the cases of *Robertson v Bexley and Keeble*.
13. **Relevant Facts:** the claimant has remained employed by the respondent at all material times. She worked as a care assistant from 26 June 2017. Having been diagnosed with cancer in September 2019, she went off sick on 20 November 2019 and has not returned to work thereafter. The claimant accepts that even if the respondent had swapped her shifts to enable her to attend hospital appointments on Tuesday without affecting her earnings, she would not have been able to continue working after 20 November 2019 because of her disabling condition. In her statement she says that her cancer was not controlled and stabilised until September 2020.
14. Statutory sick pay is payable for a period of 28 weeks. Had the claimant qualified, she would have received it, therefore between 20 November 2019 and 4 June 2020. Therefore the last in the series of deductions would have occurred on the nearest date of payment to 4 June 2020. Even if I was to assume that the latest payment would have been made at the end of June 2020, that means the limitation period would have expired, at the latest, by the end of September 2020.
15. The claimant agreed that she had been able to contact the citizens advice bureau in May 2020, when a number of letters were sent to the respondent on her behalf. She accepted that the citizens advice bureau adviser had told her in May 2020 that at least some of her claims appeared to be out of time but she was apparently told at that stage that the time for claiming can sometimes be extended due to extenuating circumstances such as her ill-health.
16. At paragraph 16 of her statement, the claimant says that it took until mid September 2024 the chemotherapy and hormone treatments to take effect and to stabilise her cancer. She says that the chemotherapy and hormonal treatments which she is still receiving leave her fatigued for three or four days afterwards, but the cancer -related fatigue symptoms began to gradually decrease. She says that it was then that she felt well enough to address the unfair treatment she felt she had received from the respondent.
17. The claimant seems to have contacted the citizens advice bureau again in mid-to-late September 2020, and raised a grievance which had been replying to by the respondent by 5 October 2020. The claimant says that at that stage she felt it necessary to escalate matters consult a solicitor's advice.
18. The claimant seems to have received advice from the solicitor by 12 November 2020, when the solicitor wrote to the respondent. Having spoken to the citizens advice bureau, she had applied for her ACAS certificate, and she received the certificate on 6 November 2020.

19. The claimant accepts that the solicitor again advised her about time limits for employment tribunal claims, but apparently told her that it “might be worth a shot” in terms of extending the time limits if she applied at that time.
20. Unfortunately, the claimant did not make her claim in November 2020, waited until 18 February 2021 to do so. The claimant does not detail in her statement why she delayed after speaking to the solicitor in November 2020, although she does say that on 12 December 2020 she received a letter from Mrs Thompson requesting access to her medical records. The claimant accepts that she did not respond immediately, because she wanted to seek professional advice before handing the documents over. She says that the lockdown and the Christmas holiday period caused the delay in doing so. Eventually, on 13 January 2021 Mrs Thompson re-sent the letter requesting access to medical records on behalf of the respondent. The claimant notes that she felt that the demand she puts it for medical records was a stalling tactic.
21. **Application of Law to facts:** so far as the unauthorised deduction from wages claim is concerned, I have first consider whether it was reasonably practicable for the claim to be presented before, at the latest, the end of September 2021.
22. I am prepared to accept on the balance of probabilities that, due to the fatigue related to her cancer, although the claimant was able to get some advice from the citizens advice bureau in May 2020 and was well aware of the time limits as a result, it was not reasonably practicable for her to make a claim to the tribunal for unauthorised deductions before the end of September 2020. I am satisfied that she was still too unwell and that it took until then for her condition and the fatigue related to it to be properly under control.
23. I do consider, however, that having had the benefit of advice from the citizens advice bureau, it would have been reasonable for the claimant to have brought her claims by early November 2020, and certainly no later than 12 November 2020 when her solicitor wrote to the respondent.
24. By that time, she not only knew about the tribunal’s time limits, she had received more advice from the citizens advice bureau and had obtained her early conciliation certificate. She knew everything she needed to know in order to bring her claim, and she had sources of advice in order to go about it.
25. The claimant mentions the fact that she had to “shelter” (due to her vulnerability) as a result of the pandemic and that delays may have been caused by the pandemic, but even before she spoke to her solicitor, the citizens advice bureau were advising her on how to make a claim to the extent of encouraging her to obtain an ACAS early conciliation certificate and she ought to have known that she could make a claim online. She had access to advice over the telephone and is able to access the Internet, where a simple search would have told her how to make the claim.
26. So I would have been willing, had she brought her claim for unauthorised deduction of wages no later than 12 November 2020, to have extended the time for her to bring it until that date. The claim would have been no more than two months or so out of date at that time, and I considered that this would have given her a further reasonable period in which to bring it. She did not, however decide to bring it within that period and the tribunal has therefore no jurisdiction to consider it and it is dismissed.
27. Turning to the disability discrimination claims, Mrs Hancock accepted that she could not have continued to work after 20 November 2019. Whichever way one looks at it, this means that the time limits for bringing disability discrimination

claims began to run no later than 20 November 2019 as I have indicated above the nature of the disability discrimination claims are that the respondent discriminated against her by refusing to allow her to have paid time off or to roster her on a day when she did not have a medical appointment so that her earnings would stay at the same level. To put it another way, she complains that the respondent obliged her to work on Mondays and Tuesdays and Fridays or take unpaid leave to accommodate her appointments. This is the basis of all three disability discrimination claims – indirect and direct discrimination and failure to make a reasonable adjustment.

28. I did not have evidence about specific refusals to change the rota, but on the claimant's case they must have occurred before 20 November 2019. Even if there was conduct extending over a period, in the sense of repeated failures are refusals to change the rota, this could not have continued after the claimant went on long-term sickness absence on 20 November 2019. If there was no specific refusal to change the rota, but simply a failure to do so, the respondent must have acted inconsistently by leaving the claimant on the rota on days when she had hospital appointments before 20 November 2019. Time would therefore run from the last occasion when the claimant asked for the rota to be changed before she went off sick, but the respondent failed to change it.
29. As the last possible date for time to start running in respect of the allegations of disability discrimination under section 123 subsections 1, 3 and 4 is 20 November 2019, the three months primary time-limit would expire on 19 February 2020. As the claim was not brought until 18 February 2021, it has been brought a full year out of time.
30. As noted above, the claimant had been advised about the time limits in May 2020 by the citizens advice bureau. She had a response to her grievance from the respondents by 5th of October 2020. In November 2020, she had advice from a solicitor, who also told her about the time limits, and that her claim was as she put it "worth a shot" at that stage. She had her early conciliation certificate by 6 November 2020. For whatever reason (the claimant told me that she was hoping that the respondent would settle the claim) the claimant failed to lodge her claim for a further 3.5 months after receiving her conciliation certificate.
31. I have considered the case law surrounding just and equitable extensions of time, including *British Coal Corporation v Keeble* 1997 IRLR 336 EAT, *Afolabi and Morgan*. I have taken account of the prejudice to the claimant of not being able to pursue her claim; however, in my view she had ample opportunity to do so in October and November 2020, when she had largely recovered from the fatigue related to her condition and was actively seeking advice from both the citizens advice bureau and a solicitor.
32. On the other hand, if I allow the case to proceed, the respondent will be forced to deal with a claim in respect of which the time limit expired more than two years ago. Although it is not the claimant's fault that this preliminary hearing could not take place in October 2021, because she was hospitalised due to Covid, there has now been substantial delay and it was obvious from the claimant's answers to questions put by the respondent today that her own recollection of events is imperfect. The same must be true of the respondent's witnesses, who were unaware that the claimant would bring a claim until many months after the events in question.

33. I have had regard to all the circumstances, including the length of delay in bringing the claim, and the reasons for that. The claimant did not act promptly once she knew of all the facts relevant to her claim nor indeed after she knew that her claim was likely to be out of time (in May 2020 when she was told by the citizens advice bureau and again when that was repeated by a solicitor in November 2020).
34. Although the claimant says that she was hoping that the respondent would settle the claim, there does not seem to have been any encouragement for that view by the respondent (at least not on the evidence placed before me), and the respondent did not even ask to see the claimant's medical records until December 2020. Indeed, the claimant says that it was the respondent's refusal of her grievance which spurred her on to seek a solicitor's advice in early November 2020. She says in paragraph 21 of her second statement that the solicitor wrote to the respondent on 12 November 2020 but no response was received.
35. In those circumstances, I do not consider that it would be just and equitable to extend the time for bringing the disability discrimination claims beyond the end of November 2020. If the claimant had brought the claims by that time I would have extended time and allowed the claims to proceed. By 6 November 2020 she had everything she needed to bring the claim and had access not only to advice from citizens advice bureau but also from a solicitor. She had been aware of the tribunal time limits from May 2020 at the latest.
36. It follows that I do not consider that it would be just and equitable to extend time for bringing the disability discrimination claims until the date that the claim was actually lodged on 18 February 2021, so the tribunal does not have jurisdiction to consider those claims and they are dismissed.

**Regional Employment Judge Findlay**  
**Date 25 February 2022**