



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4103371/2019**

**Preliminary Hearing Held at Edinburgh on 23 August 2019**

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**Employment Judge A Kemp**

15 **Mr A Orlik**

**Claimant  
No appearance**

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**NCR Financial Solutions Group Limited**

**Respondent  
Represented by:  
Mr A Munro  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The Tribunal does not have jurisdiction to consider the claim and the claim is dismissed.**

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**REASONS**

**E.T. Z4 (WR)**

## Introduction

- 5 1. This case was arranged for a Preliminary Hearing to determine whether the Tribunal had jurisdiction, and if so whether to strike out the claim as having no reasonable prospects of success, or alternatively to make a deposit order on the basis that the claim had little prospects of success. The Tribunal had earlier conducted a Preliminary Hearing for case management before EJ d’Inverno on 14 June 2019.
- 10 2. Notice of the present Hearing was given to the parties on 20 June 2019. The Tribunal also sent an email to the parties on 22 August 2019 to state that the start time was to be 10.30am, rather than 10am. The respondent appeared through Mr Munro, Solicitor, who attended with a witness Mrs Tough. The claimant however did not appear. Attempts to contact him were made by the clerk, both by telephone and email, to no avail.
- 15 3. At 10.52am in the absence of the claimant the Hearing commenced. Mr Munro was asked whether he had had any contact from the claimant, and he confirmed not. He stated that he had sent a further copy of the Bundle of Documents to the claimant by email on 15 August 2019, having done so after the last Preliminary Hearing, and had asked for an acknowledgement but had not had a reply.
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## 25 Evidence

4. The respondent had prepared a bundle of documents.

## Issues

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5. The Tribunal identified the following issues;
- (i) Did the acts of discrimination identified by the claimant take place outside the statutory time limits for raising such claims?
  - (ii) If so, was it just and equitable to permit the claims to proceed?

- (iii) Did the claim have either no, or little, prospects of success?
- (iv) If the former, was it in accordance with the overriding objective to strike out the claim?
- (v) If the latter, was it in accordance with the overriding objective to make a deposit order, and if so in what amount?

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## **Facts**

6. The Tribunal found the following facts to have been established, either on the basis of documents or undisputed matters from pleadings:

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7. The claimant is Adam Orlik. He is Polish.

8. The respondent is NCR Financial Group Solutions Limited.

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9. The claimant was employed by the respondent as a Senior Database Engineer.

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10. He was offered, and accepted, a starting salary of £47,000 per annum on 14 September 2015. When that offer was made to him he was resident in Edinburgh. He worked at the respondent's Edinburgh office.

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11. He worked with another Senior Database Engineer Mr Pankaj Sharma. Mr Sharma had been offered a starting salary of £60,000 per annum. He had started working with the respondent on or about 1 September 2015.

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12. Mr Sharma is of Indian nationality, and was resident in India before the role was offered to him. After accepting the offer Mr Sharma relocated to Scotland, and worked in the Edinburgh office of the respondent.

13. The levels of education and experience of the claimant and Mr Sharma are broadly equivalent.

14. The claimant was paid a salary throughout his employment with the respondent at a lower level than that of Mr Sharma. Latterly the claimant's salary was £49,600 per annum.

5 15. The claimant resigned his employment with the respondent with effect from 5 October 2018.

16. He received a final payment of salary on 15 October 2018.

10 17. The claimant commenced Early Conciliation with ACAS on 3 January 2019. The Early Conciliation Certificate was issued to him on 10 January 2019.

18. The claimant presented the present claim to the Tribunal on 4 April 2019.

15 **Submissions for respondent**

19. Mr Munro maintained his argument that the claim had been submitted out of time, and was in any event not a case of race discrimination.

20 **Law**

20. The law relating to discrimination is found in statute, case law, and (by way of guidance) in a statutory code.

25 (i) *Statute*

21. Section 4 of the Equality Act 2010 ("the Act") provides that race is a protected characteristic. Issues of race include nationality and national origins under section 9(1) of the Act.

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22. Issues of race include nationality and national origins under section 9(1) of the Act.

23. Section 13(1) of the Act provides that:

**“13 Direct Discrimination**

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

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24. Section 23 of the Act provides that

“(1) On a comparison of cases for the purposes of section 13..... there must be no material difference between the circumstances relating to each case.”

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25. Section 39 of the Act provides:

**“39 Employees and applicants**

.....

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;.....”

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26. Section 123 provides as follows:

**“123 Time limits**

(1) [Subject to section 140A and 140B] proceedings on a complaint within section 120 may not be brought after the end of—

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(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.....

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.....

(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;

- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

27. Section 136 of the Act provides:

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**“136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.”

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28. The provisions are construed against the terms of the Equal Treatment Framework Directive 2000/78/EC.

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*(ii) Case law on direct discrimination*

29. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed by the Supreme Court in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

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30. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the

assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of *Anya v University of Oxford* [2001] IRLR 377.

5 31. In *Glasgow City Council v Zafar* [1998] IRLR 36, also a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on. Lord Justice Browne-Wilkinson stated the following:

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“I cannot improve on the reasoning of Lord Morison who expressed the position as follows:

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‘The requirement necessary to establish less favourable treatment which is laid down by s.1(1) of the Act of 1976 is not one of less favourable treatment than that which would have been accorded by a reasonable employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the same employer in the same circumstances. It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances.’”

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32. In *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, a further House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

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33. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences

between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

(iii) *Guidance*

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34. The Equality and Human Rights Commission Code of Practice: Employment states this on the issue of the comparator:

“3.23

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The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

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**Example:** When an employer has a vacancy for an IT supervisor, both the senior IT workers apply for promotion to the post. One of them is Scottish and the other is English. Both are of a similar age, have no disability, are male, heterosexual, and are non-practising Christians. However, the English worker has more experience than his Scottish counterpart. When the Scottish man is promoted, the English worker alleges direct race discrimination because of his national origin. In this case, the comparator's circumstances are sufficiently similar to enable a valid comparison to be made.

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**Example:** The head office of a Japanese company seconds a limited number of staff from Japan to work for its UK subsidiary, alongside locally recruited UK staff. One of these local workers complains that his salary and benefits are lower than those of a secondee from Japan employed at the same grade. Although the two workers are working for the same company at the same grade, the circumstances of the Japanese

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seconded are materially different. He has been recruited in Japan, reports at least in part to the Japanese parent company, has a different career path and his salary and benefits reflect the fact that he is working abroad. For these reasons, he would not be a suitable comparator.”

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(iv) *Case law on what is just and equitable*

35. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***).

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36. Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14***. Although the EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that is contrary to the line of authority culminating in ***Rathakrishnan***.

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37. In that case there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

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“What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward***

*Television Ltd [1977] IRLR 69* involves a multi-factoral approach. No single factor is determinative.”

5 38. The factors that might be relevant include the extent of the delay, the reasons for that, the balance of hardship including any prejudice to the respondent caused by the delay, and the prospects of success of the claim, although all the facts are considered.

10 39. The claimant was not present to give evidence on such matters, however.

### Discussion

15 40. The Tribunal considered that the factors relevant to its consideration of the issue of what was just and equitable for the purposes of the present case were:

- (i) *Extent of delay*
- (ii) *Reason for delay*
- (iii) *Prospects of success*
- 20 (iv) *Prejudice*
- (v) *Other matters*

25 41. Firstly, the delay was not insignificant. The discriminatory act was when the employment commenced on 14 September 2015. There was no formal challenge at that time. The level of salary continued however to be less than that of the colleague said to be the comparator. The last act of payment of salary was following termination of employment, and took place on 15 October 2018. The three month period to commence conciliation commenced on that date. Early conciliation was in fact commenced on 30 3 January 2019. That was in time, assuming that the payment of salary is conduct extending over a period, for the purposes of section 123. The certificate was issued on 10 January 2019. That had the effect of delaying the last day to commence the claim timeously to 10 February 2019 (which was in fact a Sunday). The date of presentation was 4 April 2019. The delay

was therefore in excess of seven weeks. I was satisfied that the claim was presented out of time.

5 42. Secondly, the reasons for the delay were not stated in the Claim Form, nor addressed at the earlier Preliminary Hearing. The claimant not being present, there was no explanation for the delay.

10 43. Thirdly, the claim has limited prospects of success. There is no equivalent of an equal pay claim under the race discrimination provisions, as there is between men and women. The claim is for direct discrimination. That requires less favourable treatment, which here is less pay, that arises “because of” race. The fact of race and there being less favourable treatment is not sufficient. There must be something more. That must be something more than mere unreasonable or unfair behaviour – it must be something from which a Tribunal can infer that direct discrimination may have occurred, such that the burden of proof provision is engaged under section 136. The onus of pleading and proving that something more rests on the claimant.

15 44. The claimant in his pleadings has explained not what that something more is. He clearly considers the position unfair, but this is not a constructive dismissal claim and the issue of fairness does not directly arise. In any event he was not present to make any argument.

20 45. He identifies as comparator a colleague who was born and living in India. But that is not the correct comparator, in the Tribunal’s opinion, as it includes a distinction on a material and relevant matter. The correct comparator would be someone of Indian nationality living in Scotland. The requirement is for the material circumstances of the comparator to be the same, save for the protected characteristic. The second of the two examples given in the Code of Practice above is far closer to the present Claim than the first.

30 46. For those reasons it appeared to the Tribunal that the claim had at best little reasonable prospects of success.

47. Fourthly, the issue of balance of prejudice was considered. Clearly if the claim is dismissed that prejudices the claimant, but that prejudice is limited if there are little reasonable prospects of success with it (and less still as the claimant did not appear). On the other hand, if the claim does proceed there is  
5 prejudice to the respondent, at least as to the time and cost of defending that claim.

48. Finally, the Tribunal had regard to the fact that for the claimant English is a second language. He did however have sufficiently good English to set out  
10 the Claim, and it was also notable that he was employed in a senior role with a significant level of salary.

49. Taking all the matters together, the Tribunal concluded that the claim had been presented out of time by a period of in excess of seven weeks, and that  
15 it had not been shown by the claimant that it was just and equitable to allow it to be received. The Tribunal does not therefore have jurisdiction to consider the Claim.

## Conclusion

20 50. As the Tribunal does not have jurisdiction to consider the claim for direct discrimination it must be dismissed. The other issues as to strike out or deposit are not therefore engaged.

25 **Employment Judge: A Kemp**  
**Date of Judgement: 27<sup>th</sup> August 2019**  
**Date Entered in Register: 29<sup>th</sup> August 2019**  
**And Sent to Parties**