



# EMPLOYMENT TRIBUNALS

**Claimant:** John Ferguson

**Respondent:** Sir Robert Woodard Academy

**Heard at:** Southampton      **On:** Tuesday, 10<sup>th</sup> August 2021  
Employment Tribunal  
via CVP

**Before:** Employment Judge Mr. M. Salter

**Representation:**

Claimant: In person

Respondent: Mr. T. Brown, counsel.

## JUDGMENT

It is the judgment of the tribunal that the Claimant's claim of a failure to make reasonable adjustments was presented out of time in circumstances that make it not just and equitable to extend time.

## REASONS

*References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.*

*References in round brackets are to the paragraph of these reasons or to provide definitions.*

### INTRODUCTION

1. These are my reasons for the above reserved decision. As mentioned to the parties at the hearing, the Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to

place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

## **BACKGROUND**

### The Claimant's case as formulated in his ET1

2. The Claimant's complaint, as formulated in his Form ET1, presented to the tribunal on 11<sup>th</sup> October 2020, is in short, he was discriminated against because of his disability. His claim is not particularly clearly set out in his claim form.
3. Upon receipt of the claim form the Employment Tribunal ordered the claimant to provide further details of his claim [14]. To an extent this was done, however the Claimant's claim was still unclear.

### The Respondent's Response

4. In its Form ET3, the Respondent denied the claimant was discriminated against, noting that the Claimant's claim appeared to be one of a failure to make reasonable adjustments.

### Relevant Procedural History

5. The matter came before E.J Cadney on 7<sup>th</sup> July 2021 for a Preliminary Hearing during which E.J. Cadney:
  - (a) gave the claimant a further opportunity to clarify his claim [27];
  - (b) Identified the claim as a failure to make reasonable adjustments being the failure to implement the OH report [28 §4.2]; and
  - (c) listed the matter for a Preliminary Hearing to determine whether the tribunal had jurisdiction to hear the claim on ground it had been presented outside of the statutory time limits, and whether the tribunal should exercise its discretion to permit the claim to be presented out of time; further the hearing would consider whether the matter should be struck out as demonstrating no reasonable prospect of success or made the subject of s deposit order having little reasonable prospect of success.

TODAY'S HEARING

General

6. The Preliminary Hearing listed by E.J. Cadney:

- (a) had a three-hour time estimate. The Claimant represented himself, and the Respondent was represented by Mr. T. Brown, of counsel.
- (b) was a remote hearing which was not objected to by the parties. A face-to-face hearing was not held because it was not practicable and no-one requested the same it was conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.

7. The participants were told that it was an offence to record the proceedings.

Particular Points that were Discussed

*Litigant in person*

- 8. As the Claimant was representing himself I took time to explain to him that he would get an opportunity at the end of the hearing to make submissions, if he wanted to, to tell me why he should be permitted to proceed with his claim if I found the claim had been presented in time.
- 9. In response to the Order of Employment Judge Cadney the Claimant provided the document I have before me at [31]. He confirmed that this was his case and that the discrimination takes the form of a failure to make reasonable adjustments arising from the failure to implement the recommendations of an occupational health report.

DOCUMENTS AND EVIDENCE

Witness Evidence

I heard evidence from the Claimant, as is usual for this type of hearing I did not hear evidence on behalf of the Respondent. Evidence was heard from the Claimant via video link. I was satisfied that he was not being coached or assisted by any unseen third party while giving his evidence.

Bundle

- 10. To assist me in determining the matter I have before me today an agreed bundle consisting of some 39 pages. prepared by the Respondent. Key documents were not included in this bundle (e.g. the Claim form, Particulars of claim or the Grounds of Resistance, and so I obtained those from the tribunal separately).

11. My attention was taken to a number of these documents as part of me hearing submissions and, evidence and as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

## SUBMISSIONS

### Respondent

12. In submissions Mr Brown:

- (a) Suggested that the relevant limitation period commenced in November 2019 when the Respondent received the Report, and he suggested the 19<sup>th</sup> November;
  - (b) highlighted that Clearly the claim was therefore presented out of time;
  - (c) said I can consider the factors in the limitation act 1980, but am not bound to consider them, provided I do not exclude any relevant fact;
  - (d) identified that the steps needed to be taken by the claimant to commence proceedings or research the process, were quick and easy, the claimant stated it took him about 10 minutes to understand the process he had to follow
  - (e) raised that The Claimant waited until August 2020 to commence ACAS conciliation and then a further month after that ended to present his claim;
  - (f) Identified the prejudice to the Claimant is minor:
    - (i) The adjustments were in place by February 2020;
    - (ii) there being no financial loss;
  - (g) asked me to weigh that prejudice against that of the Respondent who from February 2020 took no steps to safeguard their position facing litigation: they did not obtain witness statements or accounts from those involved nearer the time, nor did they preserve documents as they considered the matter was sufficiently resolved and behind them;
  - (h) Went through the section 33 criteria:
    - (i) The Claimant did not act promptly or reasonably when he was aware of the complaint: here the claimant did not, he delayed
    - (ii) There was no attempt to mislead the Claimant by the Respondent;
  - (i) Addressed me on the test for me to apply when considering whether to make a deposit order:
    - (i) One of the recommendations of the OH report was for a discussion to be had with the Claimant, this is a preparatory step and is not an actionable as an adjustments claim; but in any event the Respondent did attempt to have that discussion with the Claimant but he declined it
    - (ii) The Respondent adopted a gradual approach of following OH advice and seeing if that worked and then increasing the adjustments if those original adjustments were not effective;
- As such there is little prospect of success in showing that between November and December 2019 and January 2020 there is any reasonable adjustment claim

Claimant

13. The Claimant made oral submissions which I have considered with care but do not rehearse here in full. The Claimant's submissions included new evidence which had not been presented at the relevant time, I therefore reminded the Claimant of what I had told him at the outset of the hearing that I would only consider evidence provided to me at the appropriate stage and that submissions were an opportunity for him to tell me why, on the basis of the evidence I had heard, he should be successful. In essence, the claimant's submissions repeated what I had heard in the course of the hearing, it was submitted that:

- (a) During the relevant period his personal situation was such that he was unable to properly engage with matter was =, as he described it, "staggering through" until August;
- (b) Various parts of the time he had taken to present his claim namely in December, the weeks to August 2020 and then three weeks in October should be discounted for the reasons identified in his evidence.

**MATERIAL FACTS**

General Points

14. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant in evidence, both in his statement and in oral testimony.

15. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the Claimant in evidence and the consistency of their accounts with the rest of the evidence including the documentary evidence.

16. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Claimant

17. Is employed by the Respondent. He is a teacher.
18. The Respondent has an informal support programme (IFSP) which the claimant was made subject of in October 2019 [31]. This was commenced as the Respondent had performance concerns.
19. The IFSP involved extensive observation of the Claimant's teaching. The Claimant's first observation under the IFSP was on 24<sup>th</sup> October 2019, this was the day after the Claimant had attended an OH review.
20. The Respondent received the OH report over the half-term break. Unbeknown to the Claimant the Respondent sought clarification of some points in the report from the author.
21. The Claimant received the OH report on 29<sup>th</sup> November 2019
22. The Claimant sets out what he says are the adjustments the Respondent should have adopted on [32] and told me that he considered these should have been implemented by December 2019. There was some contact between the Respondent and Claimant seeking to arrange a date to discuss the report but this did not take place as the Claimant declined to meet as he had entered a grievance about the Respondent's failure and did not feel it appropriate to meet the person he had complained about.
23. By the end of December adjustments had been put in place but were what the Claimant describes as "too little, too late". He was signed off work unwell from late December 2019 for three weeks. This was then extended another week. he returned to work on 30<sup>th</sup> January 2020.
24. By the end of January 2020 the Claimant confirmed that the adjustments had been agreed, and by the 4<sup>th</sup> February 2020 the Claimant described to me that there had been a "huge change" in what the school was doing and the adjustments were in place.
25. The Claimant was at work from this point, and I find that from this point on the Respondent was unaware the Claimant was aggrieved by what he

considered to be their failures: the Claimant accepted there was no complaint from him concerning this situation.

26. Between January and July 2020 the Claimant's daughter had a series of admissions into hospital owing to her serious health condition. As this judgement is to be made public I do not set out the details of the condition here, suffice it to say that her admissions often resulted in stays in hospital, and are detailed in the Claimants statement [34-35]. During the period January to July:

- (a) 13<sup>th</sup> January until the 26<sup>th</sup> January;
- (b) 6<sup>th</sup> February until the 11<sup>th</sup> February;
- (c) 7<sup>th</sup> March;
- (d) 9<sup>th</sup> to 22<sup>nd</sup> April;
- (e) 29<sup>th</sup> April to 22<sup>nd</sup> May;
- (f) 3<sup>rd</sup> to 6<sup>th</sup> June; and
- (g) 17<sup>th</sup> July procedure under general anaesthetic.

27. From February onwards the Claimant's own health was not such that he was incapable of engaging and was at work, albeit during lockdown his teaching work had changed considerably because of the pandemic, and he was able to prepare his work at times that suited him and when he was unable to sleep.

28. After conducting, what he described as "10 minutes of research" the Claimant commenced early conciliation on 19<sup>th</sup> August 2020, and he received his certificate by email on 19<sup>th</sup> September 2020 [2]. He then presented his claim form on 11<sup>th</sup> October 2020. The Claimant told me he became aware of time limits to present tribunal claims when he contacted ACAS in August 2020.

#### THE LAW

##### Statute

29. So far as is relevant the Equality Act 2010 states:

##### **123 Time limits**

- (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.

- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
  - (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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;
  - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
  - (a) when P does an act inconsistent with doing it, or
  - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

## CONCLUSIONS ON THE ISSUES

### General

30. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

### Findings on the Issues

#### *Issue 1: was the Claim Presented in Time?*

31. The events the Claimant refers to occurred up to December 2019, taking the date most favourable to the Claimant would mean limitation began to run at the end of December 2019 when the Claimant was aware of the adjustments the Respondent was prepared to implement. The Claimant would then have three-months less one day to commence ACAS conciliation. This should have been done by the end of March 2020. It was not.

32. Clearly his claim has been presented out of time by some 7 months.

#### *Issue 2: If not, is it conduct extending over a period?*

33. I do not consider that this is the sort of case where it is being argued that the failures were acts are conduct extending over a period. The case law would be against this, even if it had been advanced. Indeed, if the argument had been advanced then that period would have ended at the start of February 2020 when the Claimant accepts the adjustments had been implemented, so limitation would have been the beginning of May 2020,



and so the claim would have been still have been presented some 5 months late.

*Issue 3: if not, was it presented within such other period as the employment tribunal considers just and equitable?*

34. I am, therefore in situation where I must consider the discretion contained within s123 of the Equality Act 2010.

35. Whilst Employment Tribunals have a wide discretion to allow an extension of time under S.123, this does not however mean that the extension is automatic. The Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that:

*'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'*

36. I remind myself that it would be wrong to think that exceptional circumstances are necessary before the discretion can be exercised; all that is required is that it is just and equitable to extend time: Pathan v South London Islamic Centre EAT 0312/13.

#### Factors in General

37. In s123 Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list, and whilst a useful guide of some factors can be found in s33 of the Limitation Act 1980— British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT: for tribunals, however, this is only a guide to some potentially relevant factors: Southwark London Borough Council v Afolabi [2003] ICR 800, CA. These include:

- (a) the length of, and reasons for, the delay;
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued has cooperated with any requests for information;
- (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- (e) the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Particular factors

38. There is no set list of factors that should be considered, however the following appear relevant to me:

*Disability*

39. In Department of Constitutional Affairs v Jones [2008] IRLR 128, CA, the Court of Appeal highlighted the fact that in disability discrimination cases the effect of the disability itself is a factor to consider. On the basis of the material I have heard, I accept the Claimant was at work, albeit he was able to prepare his material at times that suited him best, and this was not the same as attending physically attending work as he would have done when fit pre-lockdown.

40. However, there are periods of time when the claimant was at work, pre-lockdown, had the benefit of the adjustments and his daughter was not in hospital. I have heard no detailed evidence of the Claimant's state of health during these periods beyond the claimant stating that he may have had to have been signed off work if lockdown had not commenced in March 2020.

41. That said, I can see no reason why, therefore he could not address his application to the tribunal during this time, nor when he had altered his working pattern during lockdown. he is an intelligent and candidly accepted it took him a matter of minutes to research the relevant area of law and procedure.

*Incorrect advice/ignorance of Rights*

42. It is not in dispute the claimant was aware of his rights as a person covered by the Equality Act 2010. The Claimant told me he was aware of this legislation and had raised it with the Respondents.

43. I did not find the Claimant a convincing witness when he sought to explain his understanding of the tribunal process and limitation period.

44. The claimant explained to me that ACAS told him his claim had been presented late. The Claimant did not appear to question ACAS further on this issue and ask what he could do. He still waited a number of weeks from the end of ACAS conciliation, which itself took a month, before presenting his claim.

45. The Claimant contends that he understood he had one-month from the ending of ACAS conciliation to commence his claim. He was unable to explain adequately to me how he arrived at this explanation, at one point he said that ACAS told him this, whilst at another he said that he had read it on the certificate. When it was pointed out to him by Mr. Brown that the certificate did not contain any such instruction, the claimant was unable to say where, therefore he had read it.
46. This confusion does not assist the claimant, and to receive such advice from ACAS would be incredibly surprising. I am not prepared to accept, therefore, that the claimant received any incorrect advice nor that he was ignorant of his rights for the period from August 2020 until he presented his claim in October of that year.
47. Indeed, I do not accept the Claimant's account that he was unaware of how to enforce Equality Act complaints before August 2020, he had clearly undertaken research into the Act, and was fully aware of the concept of disability discrimination. I do not consider that an intelligent man that the Claimant clearly is, would not look into how to enforce these rights.

*Explanation for the delay*

48. The Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA held there is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant.
49. The lack of a reason may, however, be a factor to consider. From August 2020 the Claimant was, I find aware of the time limit and process necessary to present a claim. He has not provided any explanation for his delay for the period from August to October 2020. This failure is a factor I consider it is appropriate for me to consider.
50. The period from January to July is more troubling for me as the Claimant's personal circumstances are clearly worthy of the upmost sympathy and understandably his focus was elsewhere with the health of his daughter. But

the Claimant was working (albeit in a different way to if lockdown was not in effect), so the Claimant was not incapable of focusing on other matters which required attention albeit he was under stress and pressure outlined above. On balance I would not accept that there is an explanation for the Claimant's delay here either.

*Misleading the Claimant/Failing to co-operate with the Claimant*

51. I accept Mr. Brown's submission that there has been no misleading of the claimant or failure to co-operate with him by the Respondent, indeed I did not understand the Claimant to be alleging this, but should address it as it was raised in submissions.

*Strength of case:*

52. I have heard submissions on this point from both parties, but not unsurprisingly any evidence. I therefore make no findings of fact on the matters that underlie this case, however, and taking the claimant's case at its highest, I do not consider the Claimant's case is an obviously strong one:

- (a) The alleged window of failure is relatively short;
- (b) Prior to the Christmas holiday the parties agree that the Respondent sought to discuss the OH report and adjustments with the claimant but he was not willing to do so;
- (c) The claimant was not at work for most of January on ground of ill health;
- (d) That from the end of December adjustments were in place and by February the Claimant appeared to be content with the adjustments that were in place.

53. However, this is not necessarily a definitive factor: even if the claimant has a strong case, time may not be extended for it to be heard. Equally, whilst the claimant's case is not obviously strong I cannot say it has little prospect of success or is an obviously weak case, albeit the factual scope of the dispute is somewhat limited, there is a period of time in which if the claimant's account is accepted could have been a failure to make adjustments.

54. This point therefore, appears to me to be evenly balanced and I don't think assists me in the exercise before me.

*Balance of prejudice*

55. Whatever my decision prejudice is caused to one or other party: if I reject the Claimant's application then his claim ends here, if I permit it to proceed then the Respondents will have to face a claim that is out of time. This sort of general prejudice to a respondent is not sufficient however for me to attach any weight to as otherwise all claims presented out of time would be prevented from processing and the discretion contained within the Act to extend time undermined. I consider the prejudice caused needs to amount to more than simply that.
56. I am told that the Respondent had moved on from this dispute with the Claimant, having, since February 2020 considered the matter closed, and that no accounts or statements were obtained or preserved.
57. Against this I do weigh the loss to the claimant if his claim was not able to proceed, and whilst I consider Mr. Brown to be correct when he says there is no financial loss to the claimant, and so the Claimant's losses are minimal, the claimant would be deprived of the declaratory effect of a tribunal judgment the claimant would be deprived of as well as any award for an injury to feelings, albeit this appears to me, and I make no findings of this, to potentially be a very modest amount.
58. On balance, and bearing in mind the not inconsiderable period of time the claim is out of time, I am prepared to accept the balance of prejudice is in favour of the Respondent, namely I accept that the prejudice to them in defending such a claim outweighs the prejudice to the Claimant.

**Conclusion**

59. Bearing in mind all these factors I consider that the Claimant has not satisfied me that I should exercise my discretion and that it would be just and equitable for time to be extended in this matter. The tribunal, therefore, has no jurisdiction to hear the claimant's complaints.

60. The Case Management Orders I made at the end of the hearing and the Final Hearing date, will therefore be discharged and vacated.

Employment Judge Salter  
Date: 18 August 2021

Judgment and Reasons sent to the Parties: 08 September 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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