



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mrs C Conde

AND

**Respondent**  
Cornwallis Care Services Ltd  
Trading as Addison Park Centre

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Bodmin

**ON**

30 September 2021

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** In person, assisted by Mrs M McGuire, Friend  
**For the Respondent:** Mr S Clarkson, Managing Director

### JUDGMENT

**The judgment of the tribunal is that the claimant's claim of race discrimination was presented out of time, but it is just and equitable to allow it to proceed.**

### RESERVED REASONS

1. In this case the claimant is Mrs Cristina Conde and her remaining claim is that she has been directly discriminated against on the grounds of her race. The respondent denies the claim and asserts that it was presented out of time.
2. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claim was presented in time, and if not, whether it would be just and equitable to allow it to proceed.
3. I have heard from the claimant, and I have heard from Mrs McGuire on behalf of the claimant. I have heard from Mr Clarkson, the respondent's managing director, on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company Cornwallis Care Services Limited is a care provider and the claimant was employed as a Senior Care Assistant at the respondent's premises Addison Park Care Home in Callington in Cornwall. The claimant's continuous period of employment commenced on 24 October 2013, and she moved to the Callington premises in December 2016. An incident took place between the claimant and a resident JB on 20 April 2018 which led to the claimant's dismissal. In short, another employee namely Jemma

- Scott reported that when JB was demonstrating challenging behaviour, the claimant pushed a plastic nappy sack in JB's face and then put a pillow across her face. The claimant has always denied these allegations.
5. This was reported during the following week and on 29 April 2018 the claimant was suspended on full pay. This was confirmed by Mr Anstis of the respondent in a letter to the claimant on 30 April 2018. The respondent informed the Police and the relevant care authorities. The Police requested that the respondent should not carry out its own investigation. On 8 June 2018 Mr Anstis wrote to the claimant confirming that the Police were taking no further action and that the respondent could now proceed with its own investigation, and that the claimant was required to attend an investigation meeting.
  6. Meanwhile the claimant had attended a Police interview and had been advised by a criminal defence solicitor, namely Mr Spencer. Mr Spencer wrote to the claimant on 27 June 2018 informing her that the Police had decided not to prosecute, and he informed the claimant that he could not advise on her employment position, but he suggested that she should seek advice from an employment lawyer.
  7. In fact, the claimant had access to advice and representation from her trade union Unison. The respondent held an investigation meeting on 14 June 2018 at which Mrs Palmer of Unison represented the claimant. The matter proceeded to a formal disciplinary hearing on 6 July 2018. This had been rearranged to accommodate Mrs Palmer, but at short notice she was unable to attend and the claimant and Mrs Palmer confirmed that the meeting could go ahead and the claimant was accompanied by a companion namely Lisa Phillips.
  8. The respondent decided to dismiss the claimant summarily, and this was confirmed by letter dated 16 July 2018 from the operations director Mrs Varney. The effective date of termination of the claimant's employment was 16 July 2018.
  9. Mrs Palmer of Unison then advised the claimant on an appeal against the dismissal, and she helped the claimant to prepare the appeal letter. The appeal hearing took place on 16 August 2018, and it was chaired by Mr Stuart Clarkson the respondent's Managing Director. By letter dated 28 August 2018 Mr Clarkson confirmed that the claimant's appeal was unsuccessful, and that her dismissal stood.
  10. It seems that Unison declined to support the claimant further, and at some stage after her dismissal she sought advice from Citizens Advice. The claimant was unable to confirm exactly when that happened, or what advice she had received.
  11. Some months later the claimant decided to issue these proceedings. The claimant commenced the Early Conciliation process with ACAS (Day A) on 25 March 2019. The Early Conciliation Certificate was issued on 2 April 2019 (Day B). The claimant issued these proceedings on 29 April 2019.
  12. Other than suggesting that she felt stressed after her dismissal, the claimant was unable to explain why she had failed to issue these proceedings within the original three months' time limit. The claimant was also unable to explain while she waited a further five months or so before making contact with ACAS and issuing these proceedings.
  13. Having established the above facts, I now apply the law.
  14. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
  15. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
  16. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

17. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
18. I have considered the following cases, namely: British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23;
19. In this case the claimant's effective date of termination of employment was 16 July 2018. The normal three months' time limit therefore expired at midnight on 15 October 2018. The claimant commenced the Early Conciliation process with ACAS (Day A) on 25 March 2019. The Early Conciliation Certificate was issued on 2 April 2019 (Day B). The claimant issued these proceedings on 29 April 2019. The claimant approached ACAS after the expiry of the initial three months' time limit, and for this reason she does not enjoy any extension of time under the Early Conciliation provisions.
20. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that he felt upset and distressed following her dismissal and that she was unable to concentrate on the process sufficiently promptly in order to issue proceedings within time.
21. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are 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 parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
22. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular ... "The length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."
23. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] ... It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained

- such a list ... [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."
24. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds 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 discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
  25. This case has a long and unfortunate history in that there have been a number of postponements which were caused by events which were entirely out of the control of either party. In addition, it was only fairly recently that it became clear that the claimant's claims might have been presented out of time. This matter was also listed to be heard this morning by way of its full main hearing and the parties were present willing and able to proceed with that hearing. I had to consider the balance of hardship and prejudice between the parties in deciding whether to exercise discretion to allow the full main hearing to proceed.
  26. On the one hand to determine that the claimant's race discrimination claim was out of time and could not proceed would have deprived the claimant from having her case heard before the tribunal, in circumstances where her unfair dismissal claim has already been dismissed as being out of time, and this would have provided the respondent with a windfall. On the other hand, although the passage of time has deprived the respondent of the opportunity of calling two key witnesses (Mrs Varney who made the decision to dismiss, and Ms Scott who had raised the initial allegations against the claimant, each of whom has left the respondent's employment and could not be present), nonetheless the respondent agreed that it was able to proceed based on the contemporaneous documents and Ms Scott's signed statement. Mr Clarkson conceded that the respondent was not sufficiently prejudiced to deprive the claimant of the right to have a claim is determined by this tribunal.
  27. I therefore decided that the balance of hardship and prejudice favoured the claimant and that it was just and equitable to allow an extension of time so that her race discrimination claim could be heard. This is dealt with in an attached judgment of today's date.

Employment Judge N J Roper  
Dated: 30 September 2021

Judgment sent to parties: 14 October 2021

FOR THE EMPLOYMENT TRIBUNAL



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19. In this case the claimant's effective date of termination of employment was 16 July 2018. The normal three months' time limit therefore expired at midnight on 15 October 2018. The claimant commenced the Early Conciliation process with ACAS (Day A) on 25 March 2019. The Early Conciliation Certificate was issued on 2 April 2019 (Day B). The claimant issued these proceedings on 29 April 2019. The claimant approached ACAS after the expiry of the initial three months' time limit, and for this reason she does not enjoy any extension of time under the Early Conciliation provisions.
20. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that he felt upset and distressed following her dismissal and that she was unable to concentrate on the process sufficiently promptly in order to issue proceedings within time.
21. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are 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 parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
22. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular ... "The length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."
23. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] ... It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained

- such a list ... [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."
24. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds 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 discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
  25. This case has a long and unfortunate history in that there have been a number of postponements which were caused by events which were entirely out of the control of either party. In addition, it was only fairly recently that it became clear that the claimant's claims might have been presented out of time. This matter was also listed to be heard this morning by way of its full main hearing and the parties were present willing and able to proceed with that hearing. I had to consider the balance of hardship and prejudice between the parties in deciding whether to exercise discretion to allow the full main hearing to proceed.
  26. On the one hand to determine that the claimant's race discrimination claim was out of time and could not proceed would have deprived the claimant from having her case heard before the tribunal, in circumstances where her unfair dismissal claim has already been dismissed as being out of time, and this would have provided the respondent with a windfall. On the other hand, although the passage of time has deprived the respondent of the opportunity of calling two key witnesses (Mrs Varney who made the decision to dismiss, and Ms Scott who had raised the initial allegations against the claimant, each of whom has left the respondent's employment and could not be present), nonetheless the respondent agreed that it was able to proceed based on the contemporaneous documents and Ms Scott's signed statement. Mr Clarkson conceded that the respondent was not sufficiently prejudiced to deprive the claimant of the right to have a claim is determined by this tribunal.
  27. I therefore decided that the balance of hardship and prejudice favoured the claimant and that it was just and equitable to allow an extension of time so that her race discrimination claim could be heard. This is dealt with in an attached judgment of today's date.

Employment Judge N J Roper  
Dated: 30 September 2021

Judgment sent to parties: 14 October 2021

FOR THE EMPLOYMENT TRIBUNAL