



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss B P Alam  
**Respondent:** Ms E Boer  
**Heard at:** Cardiff, by video                      **On:** 20 February 2023  
**Before:** Employment Judge S Jenkins

**Representation:**  
Claimant: In person  
Respondent: No response received

**JUDGMENT** having been sent to the parties on 21 February 2023, and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the reasons are as follows:

## REASONS

### Background

1. The hearing was to consider the matters identified by Employment Judge Ryan at an earlier preliminary hearing on 27 October 2022, principally whether the Claimant's complaint had been presented out of time, but there was also a secondary issue of whether to permit the Claimant to add her former employer, MPW (Swansea) Limited, as an additional respondent.
2. With regard to the time limit issue, it was clear that the claim had been presented out of time, by some six and a half months if the incident of alleged discriminatory behaviour on 8 August 2021 was taken to be the latest act complained of, or by some five months if the act complained of extended to the date of termination of employment on 26 September 2021.

3. Those dates required the Claimant to make contact with ACAS for the purposes of early conciliation in relation to her claim by 7 November 2021 or 25 December 2021 respectively. However, contact with ACAS was not made until 19 May 2022, with the early conciliation certificate being issued the following day, and the claim form being submitted on 24 May 2022.
4. Section 123(1)(a) of the Equality Act 2010 provides that claims may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. Effectively, that means that contact with ACAS for the purposes of early conciliation must be made within three months of the act complained of. That did not happen in this case, and, on the face of it therefore, the claim was brought outside the specified time limit.
5. My focus then was on section 123(1)(b) of the Act, which gives me discretion to allow a claim to proceed, notwithstanding the fact that it was brought out of time, where I considered it just and equitable to do so.

### Law

6. There have been a number of appellate court decisions on the issue of extending time in discrimination cases over the years. The Court of Appeal, in ***Robertson v Bexley Community Centre* [2003] IRLR 434**, noted that, whilst the test is not as strict as that for the reasonable practicability test for unfair dismissal, there is nevertheless no presumption in favour of extending time in discrimination claims and it is for the Claimant to convince the tribunal that it is indeed just and equitable to extend time.
7. The Employment Appeal Tribunal, in ***British Coal Corporation v Keeble* [1997] IRLR 336**, noted that the provisions of section 33 of the Limitation Act 1980, which apply to civil claims, should also be applied in relation to tribunal claims. That involves an assessment of the prejudice to each party and an assessment of all the circumstances of the case which include: the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected, the extent to which the party sued has cooperated with requests for information, the promptness with which the Claimant acted once he knew of the facts and the steps taken by the Claimant to obtain advice. It is clear however that an assessment of all the circumstances is to be undertaken.
8. I also noted the recent guidance provided by the Court of Appeal in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23**, that the guidance provided in the Keeble case should not be treated as a checklist, as that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The Court of Appeal's guidance was that the best approach for a Tribunal in considering the

exercise of its discretion 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.

9. The Court of Appeal had also previously noted, in ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194, that factors which are almost always relevant to consider when considering the discretion are the length of and reasons for the delay, and whether the delay has prejudiced the Respondent.

### **Findings**

10. The Claimant in her Claim Form advanced two issues as having impacted on her ability to submit the claim in time, her ill-health and the fact that she feared a backlash from the Respondent and the potential second respondent. The Claimant did not provide a witness statement or documentary evidence to me, but I took evidence from her under affirmation by way of answers to questions from me. I was satisfied that the Claimant gave her evidence genuinely, and that it could therefore be accepted.
11. The Claimant's evidence indicated that she was someone who has suffered from physical and mental ill-health for many years. With regard to mental ill-health, she has suffered from PTSD for some 20 years, and this impacts on her ability to process events, which she contends occurred in this case.
12. As I have recorded, the Claimant's employment ended on 26 September 2021. However, she obtained an alternative job whilst working her notice period, and started that job on 1 October 2021, i.e. some five days after her employment with MPW (Swansea) Ltd ended. She had worked for MPW (Swansea) Ltd for two days a week, and works for her current employer for the same period. She also undertakes the same sort of role with her new employer, which operates a similar restaurant business.
13. The Claimant had some sickness absence in January 2022, due to a stomach hernia, but otherwise has worked in her new job consistently since October 2021. She had no additional medical treatment for any of her conditions in the period September 2021 to May 2022, other than taking a course of hypnotherapy in February 2022.
14. With regard to the Claimant's fear of a backlash, she referred to the way she had been treated whilst working out her notice, and also to how other employees had been dismissed, or had been effectively forced to leave. However, other than referencing comments which continued to be made about her in work-related WhatsApp groups, she provided no evidence of any specific retaliatory action having been taken against her.
15. The only other finding I needed to record was that the Claimant's claim

principally relates to a racist comment alleged to have been made to the Claimant by the Respondent on 8 August 2021, and the way her complaint about that had been dealt with. Evidence about those matters was therefore already some 18 months old.

### **Conclusions**

16. I noted the guidance provided by the Court of Appeal in **Robertson** that the exercise of discretion to extend time is the exception rather than the rule. I also noted in this case that the delay was a lengthy one, of some five or six months.
17. I noted the Claimant's consistently poor health, but noted that it did not seem to have been any worse following the termination of her employment. I also noted that the Claimant's health had not prevented her from continuing to work, in a customer-facing role, at any time. She had started work virtually seamlessly following the cessation of her employment with the proposed second respondent, and she has continued to work in that role throughout the period from September 2021 to the current time.
18. I noted that there had been no change in the Claimant's medication during this period, and overall I was not satisfied that the Claimant had made out that her ill-health had been a compelling reason for the delayed submission of the Claim Form.
19. I was also not satisfied that there had been any material fear of retaliation on the part of the Claimant which had justified the delayed submission of the claim form.
20. I noted however that the length of, and reason for, the delay is only part of the assessment to be undertaken, albeit, as noted by the Court of Appeal in **Morgan** and **Adedeji**, those are factors to be assessed in particular.
21. In addition to the length of, and reasons for, the delay in submitting the Claim Form, I considered the relevant prejudice to the parties. At one level, this was balanced in each direction, as either the Claimant would be unable to pursue claims she wished to pursue, or the Respondent would have to defend claims that she otherwise would not. Broader than that overarching prejudice, I noted that the evidence in this case will turn on recollections of a verbal comment which took place some 18 months ago. Recollections may already be less than clear. In my view, that was an additional factor weighing against the extension of time, in addition to the fact of there having been a lengthy delay without, in my view, there being a compelling reason for it.
22. I therefore concluded that that the claim should be dismissed as having

been brought out of time, in circumstances where it was not just and equitable to extend time.

23. I did not then need to go on to consider the question of whether to add the Claimant's former employer as a second respondent.

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Employment Judge S Jenkins  
Dated: 10 March 2023

REASONS SENT TO THE PARTIES ON 13 March 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche