



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 800053/2022**

**Hearing held in Edinburgh  
on 10 May 2023**

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**Employment Judge Jones  
Tribunal Member Ward  
Tribunal Member Chalmers**

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**Ms T Nelson**

**Claimant  
In person**

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**City of Edinburgh Council**

**Respondent  
Represented by:  
Mr Gibson, counsel  
instructed by  
Ms Thomson, solicitor**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the Tribunal did not have jurisdiction  
30 to consider the claimant's claim and that in any event the claimant was not  
discriminated against by the respondent.

#### Background

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1. The claimant presented a claim on 5 September 2022 alleging that she had been subjected to discrimination on the ground of sex and that she had been subjected to detriments because she made a protected disclosure. The majority of the claimant's claim was struck out and the remaining aspect of the claimant was an allegation that the claimant had been discriminated

against because of her sex in that she was refused a day's annual leave when male colleagues were granted the day in question.

2. The claimant has continued to represent herself throughout these proceedings. The respondent was represented at this hearing by Counsel, Mr Gibson who was instructed by Ms Thomson.
3. A joint bundle of documents was produced for use at the hearing. The claimant sought to lodge additional documents on the morning of the hearing, but after discussion accepted that these were not relevant to the issues to be determined.
4. The claimant gave evidence and the respondent led evidence from Mr Calder who was alleged to have refused the claimant's leave. The claimant made a short oral submission and the respondent made oral submissions supplemented by a written submission on the Law and Application to the facts.

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### **Findings in fact**

5. Having listened to the evidence, considered the documents to which reference were made and submissions of the parties, the Tribunal made the following findings in fact.
6. The claimant was employed by the respondent at its Seafield Depot as a driver and team leader.
7. The claimant and her colleagues worked in two shifts, a red shift and a blue shift. The claimant worked on the blue shift. Each shift worked 4 days on and 4 days off, from 6am until 5.08pm. Around 15 people worked on each shift. The claimant was the only woman who worked on the blue shift.
8. On 17 March 2022, Mr Calder informed the blue shift that they should make any request for annual leave if they wished to attend the semi-final of the Scottish Cup at Hampden in April.
9. Two male members of staff requested and were granted annual leave for 17 April. Mr Calder did not understand the claimant to have asked for leave for that day.
10. Mr Calder provided those who had asked for leave with a copy of their updated leave sheets. The claimant was unhappy that she had not been

provided with any documents and left the workplace. She was then off sick and has not returned to work.

5 11. On 21 March 2022, the claimant sent an email to the respondent entitled 'work related stress'. In that email she said that she had been off work on 18 and 19 March with work related stress. She went on to say "I had asked Gavin before at lunchtime could I put in for a days holiday on 16 April? When I finished my shift Gavin came into the depot with a piece of paper and told the guys that had applied for holidays that there dates where in he also gave a few guys how many days holiday they had left and when he told me he hadn't  
10 put in my holiday request as there was no paperwork for me whatsoever within council computer.'

12. The claimant was not due to be working on 16 April.

13. The Scottish cup semi-final took place on 17 April.

15 **Observations on the evidence**

14. The claimant's evidence was confusing and contradictory. The Tribunal had understood her claim to be that she had asked on 16 March if she could have a day's leave on 16 April. However, in evidence before the Tribunal, she said that in fact she asked for leave on 17 March. When it was highlighted to the  
20 claimant that she was not due to be working on 16 April, she then said that it was 17 April that she had requested as leave.

15. The Tribunal had also understood that her position was that she had requested leave because she wished to attend the match. However, her evidence before the hearing was that she had requested leave as she had  
25 principal care for her niece and nephew and because her husband wished to attend the match, she required leave for child care.

16. The claimant also said that all the male colleagues on the shift had asked for leave for the day, and were granted it, but when questioned further only named two individuals she knew had taken leave and then named two other  
30 individuals she thought might have been granted leave. The Tribunal formed the view that the claimant did not know who had been granted leave at all and was simply speculating.

17. Mr Calder's evidence was straightforward and credible. He had no recollection of the claimant asking for leave and said he had never refused the claimant leave.

He said if she had asked for leave for 17 April, he would have granted it. He said the claimant couldn't have asked for leave for 16 April as she wasn't working that day. The Tribunal accepted his evidence.

## 5 **Issues to determine**

18. The Tribunal was required to determine whether the claimant had asked for leave on the date specified, if so, whether she had been refused the leave and if she had been refused leave, whether this was because of her sex. In addition, as the allegation related to events on 16 or 17 March and the claimant's claim was not lodged until 5 September, the Tribunal had to determine whether it had jurisdiction to consider the claimant's claim.

## **Relevant law**

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19. Section 13 Equality Act 2010 ('EA') provides that direct discrimination arises when, because of a protected characteristic a person is treated less favourably than someone without that protected characteristic was or would be treated. Sex is a protected characteristic for those purposes.

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20. Section 123 EA provides that any claim should be brought within the period of three months after the act complained of, or such other period as the Tribunal considers to be just and equitable.

## **Discussion and decision**

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21. Until the hearing today, the Tribunal had understood the claimant's claim to be that on 16 March 2022 her request to take leave on 16 April 2022 was refused. The position had been referred to on a number of occasions by the Tribunal in the notes of various preliminary hearings. It was only during the course of this hearing that the claimant said that the request was not made on 16 March, but 17 March. In addition, the claimant accepted that she was not on the rota to work on 16 April and therefore there was no need for her to take leave on that day. She said in fact she must have intended to ask for leave on 17 April.

22. In any event, the Tribunal found that Mr Calder did not understand that the claimant had asked for leave on either 16 or 17 April. It may be that the claimant did ask for leave and intended to do so for 17 April, but the Tribunal finds as a matter of fact, that Mr Calder was not aware that she was seeking  
5 leave on either date and that had he been aware of this he would have granted leave.

23. The claimant's evidence was confusing. She said that all her male colleagues asked for and were granted leave for 17 April. The Tribunal found that to be highly improbable, given that only the claimant would have been left to cover  
10 a shift when there were normally 15 people on duty. The Tribunal also noted that the claimant left work on the day she says her request was refused and did not ever follow this up. She did not in fact return to work. There is no suggestion in the email she sent on 21 March that all the claimant's colleagues were granted leave for a day she had requested. Indeed she  
15 refers in that email to having asked for leave on 16 April, a day she was not due to work.

24. The Tribunal therefore had no hesitation in finding that the claimant failed to establish that she had been treated less favourably. In so far as she did make any request for annual leave and understood it to have been refused, that  
20 was a misunderstanding. Had she sought to clarify the situation, the Tribunal accepted that the claimant would have been granted leave. It accepted Mr Calder's evidence that he was surprised at how few of the shift had asked for the day off to watch the football match.

25. Having failed to establish that she was treated less favourably, the claimant's  
25 claim fails.

26. In any event the Tribunal was of the view that it did not have jurisdiction to consider the claimant's claim. The relevant date was 17 March 2022, the claim form was not lodged until 5 September. The claimant did not contact ACAS until 9 July. Therefore, her claim was lodged more than three months  
30 after the act complained of. The Tribunal considered whether it would have been just and equitable to consider the claimant's claim. It was not satisfied that it was just and equitable. The claimant accepted that she was aware of the relevant time limits. She also accepted she had previously lodged proceedings at the Employment Tribunal. While it was true that the claimant

was not professionally represented, and that the claim lodged originally included other heads of claim, it was clear that she was aware of the procedure of the Tribunal and relevant time limits. The claimant did not advance any cogent reason for the delay in lodging her claim and in the  
5 circumstances, the Tribunal concluded that it did not have jurisdiction to consider the claim.

**Employment Judge: A Jones**  
**Date of Judgment: 16 May 2023**  
**Entered in register: 17 May 2023**  
**and copied to parties**