



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4106361/2022**

**Held via Cloud Video Platform on 20 April 2023**

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**Employment Judge S MacLean**

**Mrs S Cannon**

**Claimant  
Represented by:  
Mr M Cannon –  
Husband**

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**South Lanarkshire Council**

**Respondent  
Represented by:  
Mr S O'Neill –  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the claim is lodged within a period which the Tribunal finds just and equitable in terms of section 123(1)(b) of the Equality Act 2010.

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### **REASONS**

#### **Background**

1. The respondent, a local authority, has employed the claimant as a social worker since 15 April 2019. Early conciliation started on 18 July 2022 and ended on 28 August 2022. The claim form was sent to the Tribunal's office on 22 November 2022.
2. The claim is about the respondent's alleged disability discrimination by association in relation to the length of special leave it granted to the claimant. The respondent concedes that at the claimant cared for her son who was at the relevant time a disabled person under section 6 of the Equality Act 2010 (EqA).

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3. This preliminary hearing was arranged to determine whether the Tribunal has jurisdiction to consider the claim under section 123 of the EqA.
4. The preliminary hearing was conducted remotely by Cloud Video Platform. The claimant was represented by her husband, Mr Cannon. She gave  
5 evidence on her own account. The respondent was represented by Mr O'Neill, solicitor, instructed by Faye Meldrum, personnel advisor who observed the proceedings.
5. I received two sets of productions from the parties. Mr O'Neill provided me with a written submission and both representatives made closing  
10 submissions.
6. For the avoidance of doubt, the findings in this judgment relate only to the preliminary issue and do not bind a future Tribunal dealing with the merits of the claim.

### **The issue**

- 15 7. The preliminary issue to be determined was whether the discrimination complaint was made within the time limit in section 123 of the EqA?
8. It was agreed that I had to decide:
  - a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates? The  
20 claimant says that the claim was presented in time. The respondent asserts that the claim was presented out of time.
  - b. If not, was there conduct extending over a period? The claimant says that there was a continuing act as she was involved in the grievance process. The respondent asserts that the alleged discriminatory act  
25 was a one off act.
  - c. If there was a continuing act, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

d. If not, was the claim made within a further period that the Tribunal thinks is just and equitable? This involves deciding:

i. Why were the complaints not made to the Tribunal in time?

ii. In any event, is it just and equitable in all the circumstances to extend time?

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### The relevant law

9. A claim concerning work-related discrimination under Part 5 of the EqA must be presented to the tribunal within the period of three months beginning with the date of the act complained of or such other period as the Tribunal thinks is just and equitable (section 123 EqA).

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10. Section 18A of the Employment Rights Act 1996 requires the claimant to contact ACAS before instituting relevant proceedings.

11. Section 140B of the EqA provides the formulae around the extension of time limits where there has been ACAS conciliation.

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12. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to all the circumstances of the case; the prejudice each party will suffer as a result of the decision reached; 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 party sued has cooperated with any requests for information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action - *British Coal Corporation v Keeble and others* 1997 IRLR 336, EAT.

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### 25 Findings in fact

13. The respondent, a local authority, has employed the claimant as a social worker since 15 April 2019.

14. Early conciliation started on 18 July 2022 and ended on 28 August 2022. The claim form was sent to the Tribunal's office on 22 November 2022.
15. The claimant is married. She has two children. The claimant is the main carer of her son who is a disabled person in terms of section 6 of the EqA at the relevant time.
16. The respondent has a special leave policy which in the case of the emergency hospitalisation of a child or critically ill or injured relative, leave with pay for up to five days will normally be granted. Additional time off may be agreed at the line manager's discretion.
17. In August 2021, the claimant's son was diagnosed with a life-threatening illness. He was admitted to hospital for treatment.
18. On 23 August 2021 the claimant contacted her line manager (team leader) to advise her of the situation. The team leader reassured the claimant that she was not to worry. The claimant was not offered special leave.
19. Having heard no further the claimant contacted her trade union representative at the end of August 2021 who advised the claimant to request special leave. The trade union representative informed the respondent of the nature and severity of the claimant's son's illness and the treatment he was receiving.
20. In September 2021 the fieldwork manager, who was the team leader's line manager, informed the claimant in writing that she would be granted special leave from 23 August to 17 September 2021.
21. The claimant felt harassed by the field work manager who contacted her for weekly updates. Around 14 September 2021 the field manager telephoned the claimant who was unable to discuss the situation as she was at the hospital with her son and under significant stress. The fieldwork manager extended special leave until 26 September 2021.
22. The field manager sent a text to the claimant on 24 September 2021 advising that he would send an email the following week. The claimant asked that he text as she was at the hospital and not able to access email.

23. On 30 September 2021 the fieldwork manager sent a text to the claimant advising that the options going forward were working from home, which he acknowledged was unpractical given the claimant's situation; unpaid leave; or accessing an unfit to work note. The field manager offered to discuss this with the claimant on the telephone.
24. The claimant was concerned by the approach taken by the fieldwork manager. Her impression was that he was going through the motions; and continually asking how long it was going to take. The claimant considered that the fieldwork manager was not fully engaged in the process.
25. The claimant contacted her trade union representative for advice. The claimant understood from that advice that she required to undergo the grievance procedure.
26. With the assistance of her trade union representative, the claimant completed a grievance form on 19 December 2021. A grievance hearing was held on 26 January 2022 attended by the head of children and justice services. The outcome letter was issued on 3 March 2022.
27. Again with the assistance of her trade union representative, the claimant appealed that decision on 5 April 2022. The appeal hearing was conducted on 27 June 2022 at which the claimant was represented by her trade union representative. The appeal outcome letter was received by the claimant on 5 July 2022.
28. Having exhausted the internal grievance procedure, the claimant discussed with her trade union representative the lodging of a complaint with the Tribunal. The claimant was informed that she first required to participate in early conciliation with ACAS. The claimant understood that she should initiate this process. Her trade union representative was liaising with the union solicitors with a view to the claimant being legally represented.
29. The claimant started early conciliation on 18 July 2022. The claimant heard no further from ACAS but was proactive in making enquiries. The claimant was informed that there had been no contact from the respondent and that a

certificate was being issued. The early conciliation certificate was sent to the trade union representative on 29 August 2022. The claimant received the early conciliation certificate from ACAS on 5 September 2022. The claimant understood that from receipt of the ACAS early conciliation certificate she had three months minus a day to lodge her claim with the Tribunal.

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30. The claimant was still pursuing matters with her trade union representative and, in particular, whether her trade union representative and/or the union solicitors were going to send the claim form on the claimant's behalf or whether she would do so herself. In the absence of any response and as the time limit which the claimant understood was approaching, the claimant decided to present the claim herself (with the assistance of her husband) to ensure that the time limits were met.

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31. From 4 October 2021 until 31 July 2022, the claimant was absent to work owing to ill health due to the stress and anxiety associated with caring for her son. The claimant returned to work following annual leave on 12 August 2022.

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32. Throughout this period the claimant was caring for her son who was in hospital until January 2022 and continues to be admitted to hospital and receive weekly treatments. The claimant has additional caring responsibility at home with her husband's health condition as well as having another child.

#### 20 **Observations on evidence**

33. I consider that the claimant gave her evidence in a straightforward and dignified manner. She did not seek to embellish her evidence and endeavoured to answer questions in cross-examination as best she could.

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34. I did not understand it to be disputed that from August 2021 the claimant was the main carer for her son who was and continues to be admitted to hospital and receives weekly treatment for his condition. The claimant absence from work related to the stress and anxiety associated with her son's medical condition and caring for him. The claimant returned to work on 12 August 2022 but continues to have caring responsibilities which were further exacerbated by her husband's medical condition.

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35. Mr Cannon did not give evidence. It was put to the claimant that she had the benefit of independent advice from her trade union representative and her husband who is a depute clerk in the Scottish Courts and Tribunals Service (SCTS). The claimant could not comment on the experience of her trade union representative. She could only comment on the advice that she received at the time and her understanding of it. While she acknowledged that her husband worked for SCTS, he had no understanding or experience of Employment Tribunals and employment law.
36. From the correspondence, the trade union representative was a branch secretary. I considered that from the outset the claimant sought advice from her trade union representative. I was in no doubt that the claimant was guided by and sought to follow the advice he gave as she understood it.
37. There was no evidence to suggest that the claimant was advised that there was a one off act of alleged discrimination and/or she should be presenting a claim to the Tribunal in parallel with raising a grievance. My impression was to the contrary; the claimant was represented throughout the grievance procedure by her trade union representative. It was understandable that she should endeavour to resolve matters internally. She understood that any claim to a Tribunal could only be presented after the internal grievance and ACAS early conciliation procedures had been exhausted.
38. While I acknowledge that Mr Cannon is familiar with Sheriff Court proceedings, while acting as a representative in these proceedings he has candidly explained that while he has familiarity with criminal and civil proceedings in the Sheriff Court, he has no experience of the Employment Tribunals/employment law and that throughout the process the claimant was guided by her trade union representative. Mr Cannon's role appeared to be assisting the claimant presenting her claim form once the grievance and conciliation processes were exhausted and representing her in these proceedings.
39. During cross-examination, the claimant was also asked about the fieldwork manager's motivation when exercising his discretion; and that the

comparators she had mentioned were from different departments and the decisions may have been made by different managers. The claimant, who had not anticipated giving evidence about the substantial merits of her claim, endeavoured to answer these questions as best she could. I considered that it was difficult for the claimant to comment about the motivation of the fieldwork manager. She readily conceded that the text exchanges were polite, but her impression was that the fieldwork manager was going through the motions. It was unclear to her why in terms of the special leave policy the decision was not being taken by her line manager who knew her best and what was the involvement/influence of the HR department.

40. While various outcome letters were produced, I did not have sight of the special leave policy or the grievance policy. While I understood that line managers had discretion, there was no evidence before me of management guidelines setting out factors which line managers should take into consideration when exercising their discretion under the special leave policy.

41. In the documentation there was no explanation why the fieldwork manager had exercised his discretion in the manner that he did. From the claimant's perspective the fieldwork manager's decision was based on her son's disability; the ongoing hospitalisation; and treatment that he was to receive. The claimant was contacted frequently regarding this during the five/six week period she was on special leave. She is aware that others have been granted special leave for extended periods. She considers that she was not offered special leave in the first place and/or given extended special leave because of her son's disability.

### **Deliberation**

42. I first considered what was the act to which the complaint relates. The act was the fieldwork manager's decision not to exercise his discretion and extend the period of the claimant's special leave beyond six weeks.

43. On the evidence before me it was unclear when the claimant became aware of this decision. The claimant ceased to be on special leave on 4 October 2021. On this basis I agreed with the respondent's submission that a timely



claim ought to have been presented by 3 January 2022, being three months less one day from the date when the alleged discrimination took place. On that calculation the complaint was out of time.

44. I then turned to consider whether there was conduct extending over a period.  
5 The claimant's position was that there was as she raised a grievance in relation to the decision not to extend her special leave beyond 4 October 2021. There was no dispute that the claimant did raise a grievance and that those internal proceedings were not finalised until the claimant received a copy of the appeal outcome letter on 5 July 2022.
- 10 45. The claimant's argument was that the discrimination ended when she returned to work on 31 July 2022. By that stage she had returned to full time employment and therefore the effect of the decision not to extend her special leave stopped on that date. I did not consider that this was the correct approach.
- 15 46. I did, however, ask whether the claimant's involvement in the grievance process was conduct extending over a period. The respondent's position was that the claimant's continuing sense of grievance did not mean that the act claimed of was continuing conduct. It was taken at a single point in time, albeit that a sense of grievance over it continued.
- 20 47. While the claimant had referred me to the case of *Secretary of State for Work and Pensions v Jamil* UKEAT0097/13 the respondent said that this case could be distinguished because there was no continuing duty to keep either the special leave request or its refusal under review.
- 25 48. The respondent also argued that the decision to refuse the claimant's special leave request and the grievance procedure which followed did not create a continuous state of affairs as in *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/16 which involved instigation of disciplinary procedures which was held to be the discriminatory act complained of and the discriminatory act was held to be continuous until the  
30 disciplinary procedures had concluded. In this case, the respondent said the decision was a one-off act of refusing a request to further extend a period of

paid special leave. The raising of the grievance some months later did not mean therefore that the act became a continuous act.

49. My understanding of the special leave policy was that the decision to grant special leave was at the discretion of a line manager with no right of appeal. While the claimant raised a grievance about the application of the special leave policy and the manner in which the fieldwork manager's discretion was exercised, I did not understand the grievance process to involve a reconsideration or review of the decision. That said, my understanding was only based on the outcome letters. From the information before me I considered that it was not conduct extending over a period but rather a one-off discriminatory act.
50. Having concluded that the application was out of time, I then went on to consider why the complaint was not made to the Tribunal in January 2022.
51. I was satisfied that the claimant had sought advice from her trade union representative in September 2021. He interceded on her behalf and then advised her to raise a grievance.
52. The respondent argued that between January and July 2022 the claimant was engaged in the grievance process and attending two meetings. By comparison lodging the claim form was less of an undertaking and she could have raised proceedings.
53. The claimant followed the advice of her trade union representative and raised a grievance with a view to resolving matters. Given the circumstances, including the ongoing working relationship, it was in my view understandable that the claimant sought to resolve matters internally rather than litigating.
54. I considered that it was highly unlikely that in late 2021 the raising Tribunal proceedings was at the forefront of the claimant's mind. There was no evidence that at that stage the trade union representative was giving advice to the claimant about time limits and the need to raise proceedings before January 2022. Indeed, the claimant's understanding from his advice was that

she required to go through the grievance procedure and ACAS conciliation before raising any Tribunal proceedings.

55. My impression was that she was advised and assisted in the grievance process by her trade union representative who accompanied her at all the meetings. The internal process took a significant amount of time. The claimant was not working and focussing on the care of her son.
56. Once the grievance process concluded the claimant's understanding was that her trade union representative or the union's solicitors would be dealing with matters on her behalf. She was aware that she required to instigate ACAS conciliation which she did. The ACAS conciliation appeared to take a significant amount of time which was surprising given that the claimant understood that the respondent had not engaged in the process. On receipt of the early conciliation certificate, the claimant was aware that there were time limits. However, she thought that there was a continuing act and appeared to be under the impression that she had three months less one day from the date of receipt of the ACAS early certificate in which to send the claim to the Tribunal. She did not do so immediately because she was still waiting to hear from her trade union representative. Eventually, because she thought that the time limit was about to expire, she submitted the claim form herself.
57. In my view the claimant has tried throughout to obtain appropriate professional advice and has followed that advice to the best of her understanding. It may be the claimant has been under such significant stress and anxiety that she has perhaps misunderstood the situation. That was not, however, the impression that I had which was that she genuinely believed that the claim had been presented on time because she had followed the advice that she had been given.
58. There was no suggestion that she had been advised to raise proceedings prior to January 2022 in order to protect her position notwithstanding the ongoing grievance proceedings. There was no suggestion that when the grievance proceedings terminated that she had been given any advice to suggest that her claim may be out of time. To the contrary, she had been

advised that her trade union representative would be in touch and, for reasons that were not entirely clear to me, no further advice or support was provided by him. While Tribunal claim forms are designed for completion by unrepresented parties, I do not underestimate how challenging this can be, particularly in a period where the claimant was trying to return to work full-time and had ongoing caring commitments to her son who remains in a critical condition.

59. There was no evidence before me to suggest that the cogency of the evidence had been affected by the delay. The respondent alluded to the fieldwork manager retiring in the summer. However, he currently remains an employee and is aware of these proceedings. The claimant's team leader and those involved in the grievance process are still employed by the respondent. Indeed, Ms Meldrum who conducted the grievance appeal was observing the preliminary hearing. The respondent accepted that this was not a case where there is a myriad of facts to be considered.

60. The respondent said that there was no obvious direct discrimination claim. The claimant accepted in cross examination that the comparators to which she alluded had different line managers from her; the texts from the fieldworker manager expressed sympathy for the claimant's son.

61. If the comparators are not in similar circumstances to the claimant the Tribunal may consider a hypothetical comparator. The fieldwork manager's interaction with the claimant was not restricted to texts. The claimant described the frequency and manner of his requests for updates and information about the length of time her son would be in hospital. The claimant has not been provided with an explanation why the fieldwork manager exercised his discretion in the manner that he did. Having gone through the grievance process the claimant still believes that the decision was because of her son's disability. Although during the grievance process the head of children and justice services considered that the decision was a reasonable one, it is unclear from the outcome letter the basis upon which that assessment was made.

62. Weighing all these factors I concluded that, notwithstanding that the claim was out of time, it was just and equitable to allow the claim to proceed.

5 **Employment Judge: S Maclean**  
**Date of Judgment: 16 May 2023**  
**Entered in register: 17 May 2023**  
**and copied to parties**

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