



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000116/22

**Preliminary Hearing held in Edinburgh on the 16 March 2023 and the 11 May
2023**

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Employment Judge Porter

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Lorna Finlay

**Claimant
In Person**

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Fife Health Board

**Respondents
Represented by:
Mr Watson, solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal to strike out the claimant's claims of age discrimination and unpaid wages (in respect of the ANNP banding shortfall) as these claims are time-barred.

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Introduction

1. In these proceedings the claimant brings multiple claims arising from her employment with the respondents as a nurse as specified in her ET1 which
ETZ4(WR)

was received on the 19 October 2022. The claimant's claims are resisted and there was a Preliminary Hearing ("PH") before EJ d'Inverno on the 16 December 2022.

2. At the PH the claim was set down for a PH on the issues of:
5 (i) Jurisdiction/Time Bar in respect of age discrimination, notice pay, holiday pay and arrears of pay and the making of a deposit order in respect of these jurisdictions; and (ii) Jurisdiction in respect of the claimant's claim of unfair constructive dismissal, with reference to the provisions of s95(2) of the Employment Rights Act 1006.
- 10 3. The PH took place on the 14 March 2023 and the 11 May 2023. On both occasions the claimant represented herself and the respondents were represented by Mr Watson, solicitor.
4. The claimant alone gave evidence. The parties initially produced 3 Bundles of Documentation; however, by the 11 May 2023 a Joint Bundle of
15 Documentation had been produced and was referred to in evidence. The Joint Bundle was numbered **1-257**. The parties intimated a Joint Statement of Facts in advance of the continued PH on the 11 May 2023.

Age Discrimination

20 **The Facts**

5. In the Joint Statement of Facts (paragraph 13) the claimant's claim of age discrimination was identified as arising from an interview on the 12 February 2021 and an offer resulting from that interview on the 3 March 2021.
6. In evidence the claimant admitted that she was late in presenting her claim.
25 She stated that the reason for this was that she suffered from stress and anxiety and had a terrible time in what she described as a toxic environment. It was noted, however, that the claimant's absence record revealed that she was not absent due to stress until May 2022 (**255-257**).
7. The claimant also stated in evidence that she did not submit a claim
30 timeously as at the relevant time she was fearful of being bullied by Lynette McKenzie, her manager.

8. In evidence the claimant admitted that she had been in touch with ACAS in late February/early March 2022. She acknowledged that at the material time she had access to RCN officers who could advise her and, further had access latterly to legal advice via the RCN and did discuss issues with Rhona Wark, solicitor, of BTO. She also acknowledged that she had access to resources online, and that in the period February 2021 to October 2022 she had knowledge of the Equality Act 2010.

The Law

9. Time limits in discrimination are determined with reference to the provisions of s123 of the Equality Act 2010 which provides: “723 *Time Limits 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.*”
10. The ‘just and equitable’ extension of time in discrimination cases affords Tribunals a wide discretion. Although Tribunals have a wide discretion to allow an extension of time under the ‘just and equitable’ extension in s123, it does not necessarily follow that the exercise of the discretion is a forgone conclusion. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA** the Court of Appeal re-iterated that the onus remains on a claimant to convince the Tribunal to extend the time limit. Indeed, it is an unexceptional point that time limits are construed strictly in Employment Tribunals.
11. The scope of the discretion was considered recently in the case of **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23, CA**, which considered the guidance in the earlier case of **British Coal Corporation v Keeble & Ors (1997) IRLR 336**. At paragraph 37 of **Adedeji** Lord Justice Underhill stated: “*The best approach for a tribunal in considering the exercise of the discretion under s123(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 reasons for the delay.”

Discussion and Decision

5 12. The Tribunal considered the law against the background of the facts as found. The Tribunal concluded that the delay in this case is substantial, being a delay of some 15 months from expiry of the time limit in presentation of the claimant’s claim of age discrimination. In these circumstances the Tribunal was of the view that the delay in time may have an effect on the cogency of the evidence. The Tribunal considered that the prejudice to the respondents
10 in meeting a claim of age discrimination received in October 2022 which arose from a single meeting in February 2021 and its consequences to be greater than the prejudice to the claimant in not being able to advance this head of claim.

15 13. The Tribunal found the explanation given for the claimant for the delay not to be credible for the reasons that at the material time the claimant was aware of the Equality Act 2010 had access to resources online and, further, had access to advice from union officials and a solicitor through her union. The Tribunal also noted that the claimant was not absent from work due to stress
20 until May 2022. In these circumstances the Tribunal found there to be no cogent explanation for the claimant’s delay in submitting her ET1.

14. In all these circumstances it is the decision of the Tribunal not to extend time in respect of the claimant’s claim of age discrimination. This claim is accordingly dismissed.

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Holiday Pay

15. It was agreed with the parties that the issue of holiday pay would be reserved for determination at the Hearing on the Merits.

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Arrears of Pay

The Facts

16. The claimant identified the arrears of pay she seeks in these proceedings is to be found specified at **69**. For the respondents Mr Watson submitted that the claimant's claim of arrears of wages in respect of the ANNP banding shortfall dated back to 2012 and 2013 is time-barred.

17. In evidence the claimant admitted that by 2013 she knew she was being underpaid. The claimant stated in evidence that by 1997/1998 she was aware of the existence of the Employment Rights Act 1996 as she then undertook Quality and Development Training. The claimant submitted that the ANNP banding shortfall should be considered alongside a collective grievance brought by nurses which raises similar historical issues and which remains unresolved.

The Law

18. The law insofar as arrears of pay is contained within s13 and s23 of the Employment Rights Act 1996.

S23 (4) of the Employment Rights Act 1996 states: "*Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*"

19. The onus of proving that presentation in time was "*not reasonably practicable*" lies on the claimant. What is "*reasonably practicable*" is a question of fact, and a matter for the Tribunal to decide. Lady Smith in **Asda Stores v Kauser EAT 0165/07** explained the test in the following way: "*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.*"

Discussion and Decision

20. The Tribunal considered the factual position against the legal test. In determining that the claimant's claim of arrears of pay in respect of the ANNP banding is time barred the Tribunal had regard to the fact that by 2013 the claimant knew she was being underpaid and that by 2013 the claimant was aware of the Employment Rights Act 1996. Against this, the Tribunal concluded that it could not be said that it was *'not reasonably practicable'* to have intimated this claim timeously. Further and in any event the Tribunal did not consider that presenting the complaint 9 years after the event was "*within such further period as the Tribunal considers reasonable.*"
21. It is for these reasons that the claimant's claim of arrears of pay in respect of her ANNP banding shortfall is dismissed.

Unfair Constructive Dismissal

22. The respondents' argument in respect of the claimant's claim of unfair constructive dismissal is based upon the provisions of s95(2) of the Employment Rights Act 1996 which provides: "(a) *An employee shall be taken to be dismissed by his employer for the purposes of this Part if-The employer gives notice to the employee to terminate his contract of employment, and (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.*"
23. The respondents' argument is, in summary, that a dismissal letter was issued to the claimant on 12 April 2022 advising her that if she did not obtain an alternative post prior to the end of her notice period then her employment would be terminated on 30 April 2022. The end date of the claimant's fixed term contract was extended to 5 June 2022 to enable her to remain on the redeployment register. The claimant then resigned from her post on the 20 May 2022.

24. At the Hearing on the 14 March 2023 the claimant accepted the respondents' argument in respect of her claim of unfair constructive dismissal in respect of one contract of employment but submitted that she was, in fact, employed under 4 separate contracts of employment by the respondents. However, in
5 the Joint Statement of Facts submitted prior to the Hearing on the 11 May 2023 the claimant agreed (at paragraphs 7 and 8) that:*"7 From 5 October 2019 until the end of the Claimant's employment in mid-2022 the Claimant had worked successive/separate fixed term contracts with the respondents for over 2.5 years 8 The claimant had no dismissal meetings with the*
10 *respondent in her successive/separate fixed term contracts until the final fixed contract which covered maternity leave."*
25. Against that background the Tribunal requested clarification of the position at the outset of the Hearing on the 11 May 2023, in response to which both parties made detailed submissions on the structure of the claimant's rolling
15 contracts of employment. It became apparent to the Tribunal that a true understanding of the claimant's contractual position with the respondents would involve parole evidence of the same which, in turn, would impinge upon the fact-finding exercise to be undertaken at the Hearing on the Merits.
26. In these circumstances it was decided to reserve the respondents' arguments
20 under s95(2) for determination at the Hearing on the Merits.
27. The Tribunal proceeded to hear evidence and arguments on the making of a Deposit Order under Rule 39 in respect of the claimant's claim of unfair constructive dismissal. To this end, the Tribunal noted that although the claimant has limited free income she does have savings in a sum of around
25 £100,000. In submissions, Mr Watson asked for a Deposit Order in respect of this claim in the maximum sum of £1,000.
28. The Tribunal considered the application for a Deposit Order. In doing so, the Tribunal had regard to the terms of the Notice of Hearing of the 29 December 2022 which does not provide for consideration of the making of a Deposit
30 Order in respect of the claimant's claim of unfair constructive dismissal. The Tribunal considered the terms of the overriding objective contained in Rule 2 (and in particular the need to ensure that parties are on an equal footing) and

the fact that the claimant is unrepresented. Against that background the Tribunal refused the application for a Deposit Order under Rule 39 as it is not in the interests of justice to issue the same.

5 **Future Procedure**

29. This case will now be listed for a Preliminary Hearing on Case Management at which the Hearing on the Merits on the issues of the claimant's claim of unfair constructive dismissal, holiday pay and the claimant's remaining claims of arrears of pay will be listed.

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15 **Employment Judge: J Porter**
Date of Judgment: 17 May 2023
Entered in register: 19 May 2023
and copied to parties