



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

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**Judgment of the Employment Tribunal in Case No: 4107211/2022 Issued  
Following Open Preliminary Hearing Held at Edinburgh on the 2<sup>nd</sup> of May  
2023**

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**Employment Judge J G d'Inverno**

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**Ms B D Barisauskaite**

**Claimant  
Represented by:  
Ms Bowman, Solicitor**

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**Brewin Dolphin Limited**

**Respondent  
Represented by:  
Mr D Hay of Counsel  
instructed by  
Ms Ajimal, Solicitor**

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**JUDGMENT AND ORDERS OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is:-

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**(First)** That the Tribunal lacks Jurisdiction to Consider the claimant's  
complaints of Discrimination in terms of section 123(1)(a) of the Equality Act  
2010 ("EqA");

**(Second)** That it is just and equitable to extend, to the 7<sup>th</sup> of December  
2022, the time period within which the claimant be regarded as entitled to

present her complaints to the Employment Tribunal (Scotland) and that, in the circumstances pertaining as at 7<sup>th</sup> December 2022, the claimant had Title to Present and the Tribunal has Jurisdiction, in terms of section 123(1)(b) of the EqA to consider her complaints of Discrimination;

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### **Case Management Order of the Tribunal**

**(Third)** That the claimant's complaints, as currently presented, continue to lack specification such as to fail to give the respondent fair notice of the case which it has to meet;

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**(Fourth)** Orders the claimant's representative to write to the respondent's representative, within 8 weeks of the date on which this Judgment is sent to the parties ("the material date"), with Further Particulars of Claim being:-

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(a) Confirmation, by reference to statutory provision, of each of the claims which the claimant continues to give notice of as standing upon together with, in relation to each such confirmed claim,

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(b) Specification of the matters which, let it be assumed the same were proved, would constitute notice of a relevant claim under each statutory provision, such as to give the respondent fair notice of the case which it has to meet

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**(Fifth)** Allows to the respondent's representative a further period of four weeks thereafter, that is within 12 weeks of the material date, within which to adjust the paper apart to Form ET3 in response thereto, as advised;

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**(Sixth)** Orders parties' representatives to each write to the Tribunal, within a further two weeks thereafter, that is within 14 weeks of the material date, with their respective proposals for further procedure and to intimate the same to the other party.

(Seventh) Orders the claimant's representative to lodge with the Tribunal and intimate to the respondent's representative, an updated Report from Dr Fitzgerald as at August 2023 which includes his best prognosis, if any, in relation to the recovery by the claimant of her memory relating to the period of her employment up to and including 19 July 2022.

**Employment Judge: J d'Inverno**  
**Date of Judgment: 08 June 2023**  
**Entered in register: 09 June 2023**  
**and copied to parties**

**I confirm that this is my Judgment in the case of Barisauskaite v Brewin Dolphin Limited and that I have signed the Judgment by electronic signature.**

#### **REASONS**

1. This case called for Open Preliminary Hearing, In Person, at Edinburgh on the 2<sup>nd</sup> of May 2023. The claimant who did not appear, and did not give evidence, in consequence of being medically incapable of doing so, was represented by Ms Bowman, Solicitor. The Respondent Company was represented by Mr Hay, Advocate.
2. Evidence on behalf of the claimant was led from Ms Loreta Mikulyte the claimant's nominated next of kin, who, because of her home sharing with the claimant prior to the incident which resulted in her memory loss and in consequence of her most constant care of and support provided to the claimant following her traumatic experience, was uniquely well placed to do so.

3. Ms Mikulyte gave evidence in chief on affirmation, and answered questions put to her by the respondent's representative in cross examination and questions put by the Tribunal.
- 5 4. The Tribunal found Ms Mikulyte to be a credible, competent and wholly reliable witness and accepted her evidence on that basis.

### **The Issue**

- 10 5. The Preliminary Issue for determination at Open Preliminary Hearing was whether, in terms of section 123(1)(a) of the EqA 2010, the claimant had Title to Present and the Tribunal has Jurisdiction to Consider the claimant's complaints of Disability Discrimination, in so far as founded upon any alleged act or omission of the respondent said to have occurred prior to the 8<sup>th</sup> of  
15 September 2022.

### **Findings in Fact**

- 20 6. Parties were not in substantial dispute as to the timeline of events and applicable dates. On the basis of the same and on the oral and documentary evidence presented the Tribunal found the following facts, restricted to those relevant and necessary to determination of the Preliminary Issue, to be agreed or established on the evidence.
- 25 7. The respondent is a UK based provider of wealth management services.
8. The claimant has been employed as a Paraplanner by the respondent since 19<sup>th</sup> of April 2022. Her employment is continuing.
- 30 9. The claimant has been on sick leave since the 20<sup>th</sup> of July 2022.
10. For the purposes of establishing that she was a person possessing the protected characteristic of Disability, at the material times for the purposes of

her complaints, the claimant gives notice of relying upon the mental impairments of; “anxiety, depression and PTSD”.

- 5 11. The material time for the purposes of the claimant’s complaints is the period 19<sup>th</sup> April up to and including the 19<sup>th</sup> of July 2022.
12. The extent to which the impairments relied upon impacted upon the claimant’s ability to carry out day to day activities, and issues as to the extent and timing of the respondent’s knowledge and thus, the issue of Disability Status at the material time, remain issues at large between the parties and still to be addressed.
- 10 13. The issue of Disability Status is one which was not before the Tribunal at the 2<sup>nd</sup> May Open Preliminary Hearing.
- 15 14. Consideration of the Preliminary Issue of want of Jurisdiction by reason of asserted Time Bar, being the issue which was before the Tribunal, was predicated upon an assumption, for the limited purposes of the Hearing only, that the claimant was a person possessing the protected characteristic of disability at the material time for the purposes of her claims.
- 20 15. The first three months of the claimant’s employment were subject to a probationary period.
- 25 16. In terms of its Grounds of Resistance the respondent offers to prove:-
- (a) That on 6<sup>th</sup> July 2022 the claimant had a telephone conversation with her Line Manager, Ms Morrison, in which the claimant informed Ms Morrison that “*she suffers from Post Traumatic Stress Disorder (“PTSD”) and that she was finding it difficult to work with one of her colleagues as a result.*”
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(b) That in the 6<sup>th</sup> July telephone conversation the claimant confirmed that *“she was taking medication to help with her mental health and that she had an appointment with her GP scheduled for that day.”*

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(c) That on 12<sup>th</sup> July 2022, Ms Morrison and the claimant had a follow up meeting during which the claimant informed Ms Morrison that *“she was suffering with anxiety in addition to PTSD.”*

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(d) That at the 12<sup>th</sup> July 22 meeting the claimant also informed Ms Morrison that:- *“she had in the past self harmed and had suicidal thoughts, though neither of these were happening at the time of the conversation.”*

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(e) That in the 12<sup>th</sup> July 2022 conversation the claimant said that she was taking prescribed medication for chronic depression.

17. In terms of her currently pled Particulars of Claim, the claimant offers to prove;

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(a) That during her probationary period she made a complaint to the respondent about one of her colleagues whose behaviour, the claimant asserted in terms of the complaint, had triggered an exacerbation of her symptoms of Post Traumatic Stress Disorder (PTSD).

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(b) That on 19<sup>th</sup> of July 2022 the claimant attended her probationary review.

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(c) That in the course of the review she was informed by the respondent that her probationary period was to be extended for a period of three months to allow her *“to decide if she really wanted to work for the respondents”*.

18. The claimant was distressed due to her probationary period being extended. She asked that she be allowed to work from home for the rest of the day.
- 5 19. As she appeared visibly shaken at the time of making the request the claimant's Manager asked her to report to management when she arrived home.
- 10 20. Prior to departing for home the claimant spoke with Ms Mikulyte by telephone. In the course of that conversation she informed Ms Mikulyte of the statement made to her at the Review, and further that she believed that her probation had been extended because of her disclosed impairments and or because she had made a complaint about her colleague.
- 15 21. Later that day and when in the garden of the home which she shared with Ms Mikulyte and another friend, the claimant attempted suicide by way of pharmaceutical overdose. In consequence, the claimant suffered a cardiac arrest and sustained significant brain damage.
- 20 22. The claimant was admitted to the Royal Infirmary Edinburgh at about 13:15 on the 19<sup>th</sup> of July 2022. She was retained in the Intensive Care Unit of the Accident and Emergency Department until the 3<sup>rd</sup> of August 2022 when she was moved to a general ward.
- 25 23. The claimant was in a medically induced coma until the 3<sup>rd</sup> of August 22.
24. The claimant suffered hypoxic brain injury.
25. The claimant's mother lives in Newcastle. Her father in Lithuania.
- 30 26. The claimant had nominated Ms Mikulyte as her next of kin.

27. The claimant was moved to the Astley Ainslie Rehabilitation Unit on or around the 30<sup>th</sup> of August 2022 where she remained as at the date of the Open Preliminary Hearing.

5 28. The claimant relies upon the Emergency Discharge Summary, In Patient Discharge Summary, Critical Care Admission Note, Critical Care Survivor Note, GP Reports and the Medical Report of Dr Alistair Fitzgerald, Brain Injury Consultant dated 2<sup>nd</sup> March 2023. Those documents are produced at pages 35 to 50 inclusive of the Bundle. They are referred to for their terms  
10 and are herein incorporated by reference, for the purposes of brevity. Relevant extracts from Dr Fitzgerald's Report are set out below.

29. In his Report of 2<sup>nd</sup> March 2023 Dr Alistair Fitzgerald, Consultant in the Department of Neuro Rehabilitation, makes the following statements as at  
15 that date:-

“(a) ..... Although I am aware that she [Ms Barisauskaite] has had some mental health issues prior to this recent hospital admission, the brain injury for which I am managing her is a new condition that arose  
20 from the circumstances that led to her hospital admission on the 19<sup>th</sup> of July 2022

#### **Nature of the physical and mental impairments suffered**

25 (b) .... Ms Barisauskaite was admitted to the Royal Infirmary of Edinburgh on 19<sup>th</sup> July following an ingested overdose Propranolol (a beta blocker medication used for anxiety) and Sertraline (an antidepressant). She had also had vodka at the time.

30 (c) Subsequent to admission she was identified as having Serotonin Syndrome, which is a life threatening drug reaction manifested by increased levels of Serotonin a mood stabilising chemical within the body.



(d) The primary long term complication arising from this episode is that of Anoxic Brain Injury. Anoxic Brain Injury is a condition of brain cells in what are defined as “watershed” area of the brain, particularly vulnerable either to low oxygenation or low blood pressure. The damage sustained during Anoxic Brain Injury tends to be permanent, although there can be some partial resolution of features in subsequent months. The primary impairments that she has experienced have been those of impaired memory and recall, impaired visual interpretation, impairments of coordination and praxis (which is the ability to interact with one’s environment in a way that requires a combination of physical coordination and cognitive planning skills. It relies on not just having the physical coordination to perform a task; but the cognitive ability to manage and sequence the task).

The practical consequences of her impairment include the following:-

### **Symptoms**

(i) An inability to recall any events in the weeks and months prior to hospital admission or in the weeks and months subsequent to admission. She is starting to develop an ability to recall recent information, or to recall information from the distant past but not for the interval in between.

(ii) Until recently she has been unable to read either in English or in Lithuanian. She is starting to regain the ability to read large print, simple text. ....

(e) .... As indicated above, the claimant’s impairments are mutually reinforcing and it’s difficult to describe prognosis in relation to each individual element

Her pattern of impairment is entirely consistent with what one expects in Anoxic Brain Injury in particular, the triad of recall impairments, visuo spatial awareness impairments and Dyspraxia is the most common pattern of

impairments seen in this condition, reflecting our understanding of which areas of the brain lie within the most vulnerable “watershed” area

The evidence base for predicting prognosis for recovery in these patients is relatively limited and my guidance in this regard is speculative. We know however that most of the anticipated recovery happens within the first six months or so. There can continue to be some improvement for a period of a year or longer after Anoxic Injury, but the rate of improvement is significantly slower in later phases. It is unlikely at this stage that she will make a full recovery in any component of her impairment pattern, though it is encouraging that she still is making some slow progress. My expectation is that future ambitions might be focused on establishing greater independence in her own home, but highly unlikely to be to an ability to return to employment. It’s very unlikely that she would be able to drive safely and even ambulant mobility in areas that she is unfamiliar with looks unlikely.

**Please confirm whether one of Ms Barisauskaite’s symptoms is memory loss and whether her memory is likely to be recovered and if so, within what time frame**

(f) As indicated above, memory loss is a significant challenge for her. She is able to recall new information provided to her, but not as effectively as she would have been able to do previously. Her working memory, her ability to retain the memory of competing acts or plans is more likely to be impaired. This has an impact in terms of following instructions, following recipes or multitasking in any other comparable way. There may be some minor improvements in this in the future, but memory is likely to be impaired permanently to some extent.

The other component of memory loss that she will experience is memory for events in the past. There appears to be a gap in her memory store in relation to the events in the lead up to her suicide attempt and in the period of weeks or months afterwards. There will always be an interval in her life that is lost to her, although the time span of this interval may reduce slightly with time. However at six months following on from her Anoxic Brain Injury, it is

doubtful that there will be much further reduction in that interval of lost recall.

5           **(g) Please confirm whether Ms Barisauskaite's cognition and understanding is affected and if so, whether this will improve.**

As indicated above, insight into her condition is improving. When not distressed or agitated she is able to understand the nature of her impairments and she has a relatively good understanding as to how this has occurred. However, her capacity for logical thought, deductive reasoning, for  
10           organisation and planning, remains impaired to an extent that she is reliant on one of her friends to support her in effective decision making and implementing any significant decisions that are made.

15           **(h) Please confirm whether Ms Barisauskaite's recovery will be hindered by participating in a Tribunal Hearing or discussing her case with us and if so what we can do to assist her participating in these proceedings.**

There are two components to consider here. The first relates to her reliability or validity as a witness. As indicated she will have a prolonged  
20           period of retrograde amnesia covering a significant time span prior to her suicide attempt. Therefore it is quite likely that she will have forgotten many of the incidents that relate to the Tribunal Hearing. Aside from having forgotten the detail, there is a possibility also that her recall might now be influenced by hearing more recent descriptions made by others, with  
25           a potential for her to confuse her own limited memory of events with her more recently overheard descriptions by others and create a memory that is inaccurate. For these reasons, her reliability as a witness, even if there was no emotional impact for her, would render her inappropriate as a witness.

The second issue is her ability to describe her circumstances. Due to the  
30           combination of her cognitive impairments and associated emotional and behavioural manifestations, it's more difficult for her to describe her circumstances in a balanced and structured manner. Some of her communications can still be a bit inappropriate or disinhibited. As a consequence, she is likely to present in a Tribunal setting as seeming

inappropriately flippant, or conversely to inappropriately exaggerate. This is potentially likely to lead to an unfair misinterpretation of any statements that she makes.

5 In addition to all this, there is the issue for her as to how effectively she would be able to tolerate the circumstances of any Hearing. She would struggle to concentrate on statements made by others, she would be unduly sensitive to statements made by others and in particular she is very likely to be upset by statements made that relate to events about which she has no recall. She is already struggling to cope emotionally with her current  
10 circumstances and has had emotional responses of such intensity that have resulted in her needing to flee the environment in which she is on occasions. For this reason I think attendance at a Tribunal Hearing would be too emotionally distressing for her and given my view that her reliability as a witness would be limited, I have to question whether there is any value in  
15 her being able to attend.”

30. The position reported, and the matters opined on by Dr Fitzgerald in his Report which is produced at page 50 to 54 of the Bundle, record the position as at the 2<sup>nd</sup> of March 2023, that is some 7% months after the claimant  
20 sustained Anoxic Brain Injury and some three months prior to the Open Preliminary Hearing.

31. As at the date of the Open Preliminary Hearing, on the oral evidence presented, the claimant had made some further progress. The claimant has  
25 recovered her ability to take decisions and give instructions, the latter limited only by the extent to which her memory permits her.

32. In the three months which has elapsed since the date of Dr Fitzgerald's Report, the claimant, as predicted by him, has seen some improvement to  
30 her ability to recall recent matters and some improvement in her ability to recall matters which preceded the traumatic episode which led to her Anoxic Brain Injury.

33. As at the date of the Open Preliminary Hearing, 2<sup>nd</sup> May 2023 the claimant is still unable to recall anything about the period of her employment with the respondent including, in particular the material time for the purposes of her complaints.

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34. As at the date of the Open Preliminary Hearing the claimant had commenced, and had had the first session of a six session course of hypnotherapy treatment with a view to assisting her recollection of events at the material time.

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35. In the same period the claimant's solicitors have recovered certain documentary evidence by means of a data subject request some of which, in their assessment when combined with the hearsay evidence of the *de recenti* statements made by the claimant to Ms Mikulyte, has the potential to allow them to provide some further specification of the claimant's complaints now that the claimant has recovered her capacity to give instructions.

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36. In the assessment of those charged with her care the claimant is ready for discharge from the Astley Ainsley Hospital subject to the identification and securing of suitable accommodation to which she can be discharged.

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### **The Timing of the Presentation of the Claimant's Initiating Application ET1**

37. In the period 19<sup>th</sup> July to in or about mid October 2022 the claimant, due to her state of health, was physically unable to process information about, effectively engage with and or communicate her views in relation to, any potential right of action arising from the circumstances surrounding her Anoxic Brain Injury.

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38. In the period October to December 2022 the claimant's ability to engage and interact improved to the extent that she began to recover the ability to understand what was being said to her and, given time to process information, was able to respond, but with the requirement that Ms Mikulyte act as an interpreter on her behalf.

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39. In that same period the claimant's closest friends and former house companions began to consider whether some contact should be made with the claimant's Trade Union with a view to protecting her position.

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40. At that time, Ms Mikulyte had no access to the claimant's telephone or computer the claimant being unable to recall the security pins by which these could be unlocked.

10 41. In or about the middle of October, in the course of discussion, the claimant confirmed that she would like Ms Mikulyte to make some contact with her Trade Union on her behalf.

15 42. Ms Mikulyte spoke with Carrie Binnie of the claimant's Trade Union on the 20<sup>th</sup> of October 2022. In the course of that conversation, the claimant's Trade Union representative expressed the view that the claimant might well have the right to complain of discrimination and that she would seek to take legal advice. To enable that to take place, she would send forms to Ms Mikulyte which would require to be completed with various aspects of the claimant's personal information. The issue of time limits was also identified.

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25 43. On the 23<sup>rd</sup> of October Ms Mikulyte received forms from the claimant's Trade Union and was asked to fill out those forms on behalf of the claimant and return them as soon as she was able. Some of the information required to complete the forms was stored on the claimant's telephone and or computer, for neither of which she could remember the password pins.

30 44. In so acting the claimant was dependant upon Ms Mikulyte for assistance. Ms Mikulyte for her part was relying upon the claimant's Trade Union representative. The claimant was herself incapable of taking any such steps.

45. Ms Mikulyte checked with a computer shop as to whether the devices could be unlocked but was told that they could not. She also wrote to the

claimant's email and telephone providers, without success, before being able to complete the forms.

- 5 46. In November the claimant remembered the password which allowed access to her telephone, it being one which had been set prior to the trauma of the 19<sup>th</sup> of July.
- 10 47. Ms Mikulyte, while balancing that course of action with her care of the claimant and the responsibilities of her own life which including finding alternative accommodation to which she required to remove with her own and the claimant's possessions on 7<sup>th</sup> November 2022, accessed and searched the claimant's telephone, progressively extracting the necessary information in the course of November and managing to complete and return the forms to the claimant's Trade Union in mid November 2022.
- 15 48. The claimant's Trade Union instructed her now acting law agents on the 6<sup>th</sup> of December who immediately engaged with ACAS Early Conciliation.
- 20 49. The Early Conciliation Certificate, produced at page 1 of the Joint Bundle was issued on the 7<sup>th</sup> December and the claimant's law agents first presented her initiating Application ET1 that same day.
- 25 50. On the application of the provisions of section 123(1)(a) of the EqA timeous presentation of the claim should have occurred not later than 18<sup>th</sup> October 2022. Early conciliation, on the claimant's behalf, was not engaged with until after the expiry of that time period. The claimant accordingly cannot benefit from any extension of time by operation of section 140B of the EqA.
- 30 51. The claim was first presented 7 weeks and 1 day after the expiry of the statutory period specified in section 123(1)(a) of the 2010 Act.
52. On the Findings in Fact made, an exculpatory explanation as to why the claim was not presented sooner has been established in respect of the period 19<sup>th</sup> July up to and including 17<sup>th</sup> November that being the date on which

Ms Mikulyte completed and returned to the claimant's Trade Union the forms necessary to enable them to instruct solicitors to raise proceedings.

53. No explanation is presented to the Tribunal for the delay which occurred in the period from 18<sup>th</sup> November to 6<sup>th</sup> December 2022 on which latter date the claimant's Trade Union instructed solicitors to present a claim on the claimant's behalf.

54. The claimant's solicitors acted immediately upon receipt of instruction presenting a complaint the following day 7<sup>th</sup> December being the date upon which the ACAS Early Conciliation Certificate was issued.

### Summary of Submissions

55. Parties had exchanged and each lodged a skeleton argument in which their submissions, full specification of relevant statutory provisions and full citation of case authority relied upon were set out. Accordingly, parties' submissions are not here repeated at length but rather, are summarised below.

### Summary of Submissions for the Claimant

56. Under reference to the provisions of section 123(1)(a), and (1)(b) of the Equality Act 2010 (the just and equitable test) and to; Leggatt LJ in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 at 17, **Hawkins v Ball and Barclay Pic** [1996] IRLR 258 para 193, **Chief Constable of Lincolnshire Police v Caston** [2009] EWCA Civ 1298 per Seddley LJ, and **Adedeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23 ICR D5, the Claimant's representative made the following submissions:-

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- (a) In terms of section 123(1)(b) of the Equality Act 2010 "the Tribunal has power to grant an extension of time if it considers it *"just and equitable"* to do so.



- (b) The Tribunal has the widest possible discretion in its application of the just and equitable test and that discretion is to be given a *“liberal interpretation in favour of the employee”*.
- 5 (c) Whether an individual party succeeds in persuading a Tribunal to grant an extension of time *“is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer if*
- 10 (d) The burden of persuading the Employment Tribunal to thus exercise its discretion sits with the claimant.
- (e) 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 reasons for the delay.
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- 20 57. The claimant’s representative invited the Tribunal to hold, on the oral and documentary evidence presented, that the predominant reason for the claimant’s failure to lodge her claim in time was that she was incapable of doing so on her own behalf or of seeking to instruct others to do so on her behalf, because of the nature of her impairments.
- 25 58. The claimant’s friends including in particular Ms Mikulyte were managing her affairs and providing emotional and practical support for her as the claimant’s immediate family (her mother and father) were located remotely from her.
- 30 59. Improvement in the claimant’s ability to comprehend, process information and communicate improved, resulted in the claimant’s close friend and nominated next of kin Loreta Mikulyte making contact with the claimant’s Trade Union on 19<sup>th</sup> of October and having a telephone discussion with them on 20<sup>th</sup>.

Ms Mikulyte subsequently received forms from the claimant's Trade Union for completion and return on or about the 23<sup>rd</sup> of October.

5 60. Ms Mikulyte was unable to source the information necessary for completion of the forms and to complete and return them until mid November for a number of reasons:-

10 (a) Part of the personal information required by the Trade Union was stored on the claimant's telephone/computer to neither of which she could recall the access pins

(b) Ms Mikulyte required to move both her own and the claimant's belongings to a new flat on 7<sup>th</sup> of November

15 (c) Ms Mikulyte was physically and emotionally drained and distressed following the claimant's suicide attempt and what then became her daily care of and attendance on the claimant which she required to balance with the responsibilities of her own life. Ms Mikulyte had written to both the claimant's email  
20 providers and telephone providers in an attempt to gain access to the electronic equipment and also took advice from a computer shop, all unsuccessfully. She required to await the claimant's recollection of the access pin to her telephone, before being able to progress completion of the forms.

25 (d) Ms Mikulyte sent the completed forms to the claimant's Trade Union on the 17<sup>th</sup> of November.

30 (e) The claimant's Trade Union sent the forms and instructed the claimant's current legal advisors on the 6<sup>th</sup> of December 2022.

(f) The claimant's current legal advisors immediately engaged with ACAS Early Conciliation and the following day, upon issue of the ACAS Certificate, presented the claimant's initiating

Application to the Employment Tribunal (Scotland) on 7<sup>th</sup>  
December 2022.

- 5 61. The claimant's representative urged the Tribunal to hold the explanation for the delay up to on or about the 17<sup>th</sup> of November 2022 to be sufficiently exculpatory such as to render it just and equitable in the circumstances that time be extended.
- 10 62. While recognising that no explanation was placed before the Tribunal for what was an approximately two weeks delay between the completed forms being sent to the claimant's Trade Union and their instruction of the claimant's solicitors, the claimant's representative submitted that it would not be just and equitable for the claimant to be prevented from raising a claim due to delay on the part of her Trade Union.
- 15 63. While recognising that any delay in the raising of proceedings has the potential to prejudice a responding party and or the Tribunal's ability to conduct a fair Hearing, in the claimant's representative's submission no such "forensic prejudice" resulted in the instant case in consequence of a delay of  
20 seven weeks. Nor would such a delay, of itself, operate to prevent a fair Hearing.
- 25 64. While accepting that the claimant's claims as presently presented required to be further specified with a view to providing the respondent with fair notice of the case which it has to meet, and while further accepting that as matters presently stood there continued to be a real difficulty with the claimant's ability to provide that specification arising from her persisting memory loss relating to the material time, the claimant's representative submitted that, in  
30 terms of the medical report relied upon, the claimant was not yet at a stage where it could be said there was no prospect of her recovering her memory to an extent that would allow for that specification to be provided.

65. The claimant had recently commenced a course of hypnotherapy which had the possibility of assisting in that regard.
66. The hearsay evidence of Ms Mikulyte, of the *de recenti* statement made by the claimant to her on the 19<sup>th</sup> of July, was available and, in addition, recovery of some documentary evidence which had the potential to provide some further specification had now been made.
67. The claimant's representative reminded the Tribunal that while there may well be difficult issues to be contended with if the claimant's memory did not improve in the relatively near future, for the purposes of the Open Preliminary Hearing the Tribunal was principally concerned with whether or not it would be just and equitable in the circumstances to extend the time for presentation of the claimant's complaints by the 7 weeks and 1 day period over which there had been delay.
68. That delay had not been caused by the claimant; the claimant had been incapable of comprehending the process. The claimant's friends had supported her taking such action as they might reasonably be expected to in the circumstances with a view to protecting the claimant's interests. In all the circumstances, the claimant's representative urged the Tribunal to exercise its discretion by extending time in terms of section 123(1)(b) of the EqA.

### Summary of Submissions for the Respondent

69. Under reference to section 123 of the Equality Act 2010 and the just and equitable test incorporated in section 123(1)(b), and to **Virdi v Commissioner of Police of the Metropolis** [2006] IRLR 24 (EAT) **Abertawe Bro Morgannwg Health Board v Morgan** [2018] ICR 1194 at paragraphs [18]-[20] per Leggatt LJ, **Robertson v Bexley Community Centre** [2003] IRLR 434, **British Coal Corporation v Keeble** [1979] IRLR 336 and **Malcolm v Dundee City Council** [2012] SLT 457, per Lord Malcolm at paragraph 8, Counsel for the respondent made the following submissions:-

- (a) The test to be applied in terms of section 123(1)(b) of the EqA is whether the Tribunal is satisfied that it would be “just and equitable” in the circumstances to extend time
- 5 (b) That time runs from the point when an allegedly discriminatory decision was made by the alleged discriminator
- (c) That in applying the just and equitable test the Tribunal had the widest possible discretion to extend time
- 10 (d) That whilst there were no prescribed factors to which a Tribunal is enjoined to have regard in determining whether to exercise its discretion in favour of allowing a late claim to proceed, the length and reasons for the delay and the prejudice to the respondent will almost always be relevant
- 15 (e) That one consideration almost always of relevance is the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice
- 20 (f) That “The key consideration for the exercise of just and equitable discretion is whether a fair trial remains possible” (see Lord Malcolm in **Malcolm v Dundee City Council** [2012] SLT 457 at paragraph 8 (Decision of the Inner House of the Court of Session))
- 25 (g) That the instance of discrimination in the instant case had occurred at the latest on the 19<sup>th</sup> of July 2022 whereas the engagement with ACAS Early Conciliation commenced on the 6<sup>th</sup> of December 2022 with the Conciliation Certificate issued on the 7<sup>th</sup> and the claim form first presented on that same day (with the consequence of section 140B of the EqA not being
- 30

engaged), and thus, that the claim was seen to be presented some 7 weeks and 1 day after the expiry of the limitation period

- 5 (h) The burden rests with the claimant to establish that it is just and equitable to extend time, by reference to the explanation for delay
- (i) If the evidence does not establish an explanation for the delay time should not be extended
- 10 (j) A delay of seven weeks, by reference to a limitation period of three months was a substantial delay
- (k) The claimant's Trade Union could be seen to have been first  
15 contacted on the 19<sup>th</sup> of October and have provided some advice in respect of proceedings which were thereafter not raised until after the elapse of a further five weeks or so.
- (l) In particular no explanation was before the Tribunal for delay in  
20 the period from 17<sup>th</sup> November 2022, when the claimant's friend returned the completed information forms to the Trade Union, and the instructing of solicitors by the Trade Union on the 6<sup>th</sup> of December 2022
- 25 (m) While the respondent was not in a position to dispute the outline of events provided by the claimant's solicitors in their answers to written questions produced at page 45 of the Joint Bundle, he submitted that the Tribunal may wish to consider whether that document, even if taken pro veritate and as supplemented by  
30 Ms Mikulyte's oral evidence, "truly provided an explanation for the delay in presentation of the claim form prior to 7<sup>th</sup> December 2022".

70. Under reference to the evidence presented as to the claimant's current impairments and or prognosis, Mr Hay submitted that the position remained unclear, thus begging the question of whether "a fair trial remains possible" in consequence of the circumstances giving rise to the delay in this case?

5

71. Was the claimant currently in a position to provide her solicitors with proper instructions as to the progressing of her claim? If not what is the prognosis of when she would be in a position to do so and, in more general terms what is the claimant's prognosis?

10

72. While recognising that it was a matter of agreement between parties that the question of the claimant's ability to pursue her claim be considered separately from the issue of limitation (see paragraph 25 of the Employment Tribunal's written Orders at page 30 of the Joint Bundle), the two issues did, in his submission, overlap to some extent.

15

73. Mr Hay submitted that in the event that the Tribunal was satisfied that there was no prognosis of any substance as to the claimant being able to pursue her claim, the Overriding Objective may favour the Tribunal not extending time in exercise of its just and equitable discretion.

20

74. In Mr Hay's submission, the respondent would separately be prejudiced in a claim that is out of time and, as at today's date at least, one unable to be pursued, being permitted to proceed. That prejudice would arise in respect of the respondent losing the benefit of the statutory time limit and in the associated potential costs entailed in the defence of a claim. On the material submitted he urged the Tribunal to reach that conclusion and to decline to exercise its discretion by extending time.

25

### 30 **Discussion and Disposal**

75. Neither the relevant and material facts, nor the applicable law, insofar as both relate to the Preliminary Issue of a section 123(1)(b) EqA extension of time, were ultimately in dispute between the parties. The Tribunal accepts and

adopts the summation of the applicable law both statutory and case authority which was placed before it by each of the parties' representatives.

5 76. On the documentary and oral evidence presented, and on the facts which, on the evidence, it has found established and or to be not in dispute between the parties and thus taken pro veritate, (answer 3 JB p45), the Tribunal was satisfied that the claimant had discharged her burden of proof in truly providing an explanation for the delay in the presentation of her claim form prior to on or about the 17<sup>th</sup> of November 2022, the date upon which  
10 Ms Mikulyte returned the completed information forms to the claimant's Trade Union representative. By reason of her impairments, the claimant was not capable of understanding, engaging with or communicating anything in relation to a possible right of action, or as to steps to be taken in that regard, prior to, at the earliest, on or about the 19<sup>th</sup>/20<sup>th</sup> October. Her friends, upon  
15 whom she was relying entirely at that time, could not reasonably be expected to have taken steps on her behalf without some indication from the claimant/understanding on their part of her desire that they do so, or of her agreement to their doing so. Having obtained that understanding on or about 19<sup>th</sup> October 2022, they made contact with the claimant's Trade Union  
20 representative speaking with her by telephone on the 20<sup>th</sup> of October 2022. In the course of that conversation the Trade Union representative appears to have confirmed that the claimant was likely to have a potential cause of action about which the Trade Union, for its part, would take or seek to take legal advice and that to enable them to do so they would send to Ms Mikulyte,  
25 information forms relating to the claimant which would require to be completed and returned to them.

30 77. For the reasons set out in the Findings in Fact, Ms Mikulyte was not able to source all of the necessary information and complete and return the forms to the Trade Union until the 17<sup>th</sup> of November 2022. In her efforts to do so, in particularly demanding and trying circumstances, Ms Mikulyte is not to be criticised in her only achieving the same by that date. She was under no proactive obligation to seek to take the steps which she did, nor could she have reasonably been expected to do so in the particular circumstances with



which she was contending both in respect of her care of the claimant and the challenges, including the requirement to find and to remove with her own possessions and those of the claimant's to alternative accommodation in early November, which were concurrently arising in her own life. Nor would it  
5 be just and equitable that the claimant be penalised in that regard.

78. The one period of the delay in respect of which it may be said an explanation is not provided, is that between on or about the 18<sup>th</sup> of November, the day after the day on which Ms Mikulyte returned the completed forms to the  
10 claimant's Trade Union, and on or about the 6<sup>th</sup> of December the date on which they instructed solicitors on the claimant's behalf. While that is an unhelpful position for the Tribunal to find itself placed in, there is equally no information before the Tribunal which would allow it to determine whether the Trade Union representative with whom the claimant's friends made contact  
15 was a full time representative or a voluntary representative, it not being appropriate, in the case of the latter, that they be held to the same standard of conduct such as that applicable to a legally qualified agent. In these circumstances and bearing in mind the dicta of Leggatt LJ that "*the Tribunal's discretion is to be given a liberal interpretation in favour of the employee*", the  
20 Tribunal is, on balance, satisfied that it would otherwise be just and equitable to extend time by reference to the explanation for delay.

79. In exercising its discretion the Tribunal should also take account of any real prejudice to the respondent associated with an extension of time and, as  
25 made clear by the Inner House of the Court of Session in **Malcolm v Dundee City Council**, the key consideration of whether "a fair trial remains possible". Regarding prejudice, the Tribunal was not persuaded that any "forensic prejudice" has arisen from the delay of 7 weeks or would arise in consequence of an extension of time by 7 weeks and 1 day to the 7<sup>th</sup> of  
30 December 2022. It is apparent from the averments contained in the Response Form ET3 that the respondent's witnesses clearly recollect what they believe transpired between the claimant and her Line Manager, Ms Morrison, on the material dates of the 6<sup>th</sup>, 12<sup>th</sup> and 19<sup>th</sup> July 2022 and while it is certainly the case that an extension of time will result in the

respondents losing the benefit of the statutory limitation period and thus the avoidance of a claim without any need to defend it on the merits, that of itself and along with the potential associated costs, is insufficient, in the circumstances, to result in it not being just and equitable for the Tribunal to allow an extension of time by the 7 week period with which it is concerned at this Open Preliminary Hearing.

80. Mr Hay's submission that there exists some overlap between this issue of jurisdiction on the one hand and the consequences for any litigation of the claimant's continuing memory loss, is one deserving of consideration. The Court's statement, in **Malcolm v Dundee City Council**, that a key consideration for the exercise of just and equitable discretion is whether "a fair trial remains possible", is predicated upon an assumption that a fair trial was previously and would have continued to be, possible but for the delay in the presentation of the claim. The situation pertaining in the present circumstances is not that normally encountered. Rather the question begged, or to be more accurate to be begged, at some point in the future in the instant case, is whether a fair trial was ever possible and or ever will be possible, standing the impairment of the claimant's memory. The Tribunal recognises that a point may be reached in the future where absent a clear prognosis as to the claimant's recovery of her memory of the material time, there may arise the issue of whether the claims, as presently presented, should be struck out on the grounds that they enjoy no reasonable prospect of success, variously for want of specification and for want of the claimant's ability to offer to prove facts upon which their success would depend. The test to be applied in such circumstances is, however, a different test from that which falls to be applied in the context of this Open Preliminary Hearing; and that day, if it comes, is not this day.

81. Notwithstanding, the residual submission of Counsel for the respondent, was whether it falls to be regarded as inconsistent with the Overriding Objective of the Tribunal, to deal with cases fairly and justly, for it to extend time for the presentation of claims at a juncture in proceedings when it is not clear whether the claims, as currently presented, are capable of being meaningfully

pursued. That submission is certainly one worthy of consideration and, if made at a point when the Tribunal could be satisfied that all potential, in terms of the claimant's prognosis, for recovery of her memory relating to the material time was at an end, it is a submission which would command substantial merit. However, on the evidence presented the Tribunal was not  
5 satisfied, as at the 2<sup>nd</sup> of May 2023, that the period of time during which some recovery might still be expected, albeit at a slower pace than initially, was yet at an end. The claimant had commenced a course of hypnotherapy which it was hoped might assist her recall. The claimant's representatives had also  
10 received certain documentation in respect of a Subject Access Data Request which might allow them to provide some further specification of some of the claims currently presented.

82. In these circumstances the Tribunal concludes that it is just and equitable that  
15 time be extended and it does so.

83. Having extended time, and with a view to addressing potential prejudice to the respondent by placing some time frame on matters, the Tribunal has Ordered the claimant's representatives to review matters and provide such  
20 specification as they may now be able to, within a period of 12 weeks from the date upon which this Judgment is issued to parties. The Tribunal has allowed a further period thereafter for the respondents, if so advised, to adjust Form ET3 in response thereto while also requiring each party thereafter, to focus with the Tribunal the question of further procedure in the light of an  
25 updated Medical Report which it has also Directed be produced.

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84. While no question of the making of an “Unless Order” arises at this juncture, it will be a matter for the respondents to consider if and when any Application for Strike Out on the grounds of no reasonable prospect of success be brought forward.

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**Employment Judge: J d'Inverno**  
**Date of Judgment: 08 June 2023**  
**Entered in register: 09 June 2023**  
**and copied to parties**

**I confirm that this is my Judgment in the case of Barisauskaite v Brewin Dolphin Limited and that I have signed the Judgment by electronic signature.**