



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

5

**Case No: 4101753/2023 Preliminary Hearing at Edinburgh on 12 September  
2023**

10

**Employment Judge: M A Macleod**

**Loma O'Carroll**

**Claimant  
Represented by  
Mr K Bain  
Union Representative**

15

**Commissioners for HM Revenue & Customs**

**Respondent  
Represented by  
Mr R Ashmore  
Solicitor**

20

25

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The Judgment of the Employment Tribunal is that the Tribunal has  
jurisdiction to hear the claimant's claim of discrimination on the grounds of  
disability, and that her case should be allowed to proceed.**

30

**REASONS**

1. The claimant presented a claim to the Employment Tribunal on 17 February  
2023, in which she complained that she had been discriminated against on  
the grounds of disability.
2. The respondent submitted an ET3 in which they resisted all claims made by  
the claimant.

35

3. A Preliminary Hearing was listed to take place on 12 September 2023 in order to determine whether the Tribunal has jurisdiction to hear the claimant's claim, on the basis that it may be time-barred.
4. A Hearing on the Merits had been listed to take place on 12 to 15 September 2023, but was postponed in order to allow this preliminary issue to be addressed and determined by the Tribunal.
5. The claimant attended and was represented by Mr Bain, her trade union representative. The respondent was represented by Mr Ashmore, solicitor.
6. The parties presented a joint bundle of productions, which was in fact the joint bundle prepared for the Hearing on the Merits and thus, understandably, contained a considerable amount of material to which no reference was made by the parties in this Hearing. However, there was also relevant documentation to which both parties referred in the course of this Hearing.
7. A Statement of Agreed Facts was tendered to the Tribunal shortly before the start of the Hearing. However, on inspection, it turned out that against some of the paragraphs were notes marked "Claimant's position". As a result, it was clear that it was not a Statement of *Agreed Facts*, but a statement in which there remained some disputes as to fact. I placed no reliance upon this document in these circumstances.
8. The claimant gave evidence on her own account. No witnesses were called for the respondent.
9. Based on the evidence led and information presented, the Tribunal was able to find the following facts admitted or proved.

## 25 Findings in Fact

10. The claimant, whose date of birth is 18 December 1980, commenced employment with the respondent on 10 October 2012, and her employment continues to date.
11. She is employed as an Inheritance Tax Compliance Investigator.

12. The claimant presented a formal concern form, or grievance, dated 7 December 2022, to the respondent (221). In that, she complained about the way her direct line manager had behaved over a period of time, and complained of failures to make reasonable adjustments in respect of disability under the Equality Act 2010, bullying and harassment by her former and current managers, and a failure to comply with the respondent's duty of care towards her, which came to a head on 6 December 2022 in an "unexpected phone call" with her manager Trisha Ewing, which the claimant described as "extremely upsetting".
13. Her complaints to the Tribunal relate to the way in which she alleged she was treated by the respondent from March 2022 onwards. She had had an absence from work in September 2022 due to illness, had returned in October, but then required to absent herself again from 9 November 2022.
14. On 8 December 2022, the claimant notified ACAS of her intention to raise proceedings against the respondent, and on 19 January 2023, ACAS issued an Early Conciliation Certificate by email to the claimant (27).
15. She presented her claim to the Employment Tribunal on 17 February 2023 (1).
16. The claimant remained absent from work until the end of February 2023, and has been able to work since then to the date of this Hearing.
17. Following a Preliminary Hearing before Employment Judge M Sutherland in the Edinburgh Employment Tribunal on 21 June 2023, the claimant submitted further particulars of her claims (62).
18. Under section 15 of the 2010 Act, she identified the following acts as unlawful acts by the respondent:
- (1) Statements made by Ian Cameron to Andrew Young on 12 April 2022, of which she only became aware when she received information from the respondent as a result of a subject access request, on 11 January 2023;

(2) Statement by Ian Cameron to HR on 24 June 2022 (received on 11 January 2023);

(3) The terms of a call by Trisha Ewing with HR on 15 September 2022, of which she first became aware on 11 January 2023;

5 (4) The terms of a call by Trisha Ewing with HR on 16 August 2022, of which she first became aware on 11 January 2023;

(5) The terms of a call by Trisha Ewing with HR on 1 December 2022, of which she first became aware on 11 January 2023;

10 (6) Statement by Trisha Ewing to HR on 2 August 2022, of which she first became aware on 11 January 2023;

(7) Statement by Ian Cameron to Andrew Young and Trisha Ewing in October 2022, of which she first became aware on 11 January 2023;

(8) RTO (Return to Office) form which Trisha Ewing on 28 July 2022, of which she first became aware on 11 January 2023.

15 19. The claimant also complained (64) that the respondent ignored the "OH current adjustment" and recommendations from her GP.

20 20. The OH (Occupational Health) recommendation in relation to adjustment to which she referred was contained in a report dated 12 April 2022 (112ff). Her GP recommendations were made in March 2022, though no copy of a GP report was produced for this Hearing.

25 21. The claimant had the benefit of representation from her trade union representative, Robert Napier, from approximately 11 March 2022, when she first consulted the trade union. Her evidence was that she received no advice from the outset about the time limits within which she required to raise Tribunal proceedings, as she and her representative took the view that the dispute about her being allowed to work from home would be easily resolved.

22. She said that there was no thought of raising Tribunal proceedings prior to December 2022, and that she and her representative had taken the view that it would be possible to resolve the dispute informally.

5 23. Mr Napier advised her that he required to communicate with ACAS prior to raising Tribunal proceedings, and that once he had done that, they had a limited period of time within which to submit an ET1 claim form to the Tribunal.

10 24. The claimant said that her physical and mental health was not good up to the point when she submitted her claim to the Tribunal. She said that her anxiety, arising from stress, was affecting every aspect of her life, to the extent that she could not sleep. By September 2022, she said that she was upset, tired and worried all the time, and frustrated that nobody could see what pain she was enduring. She received a lot of support from her husband and 14 year old daughter at home, and throughout this period was  
15 able to be "out and about". She felt that she was simply getting nowhere with her management team.

20 25. The claimant could not recall precisely why she and her representative had presented the claim to the Tribunal on 27 February 2023 but it followed a grievance call which she found upsetting in January 2023. A new manager took over the management of the grievance, and met with her in February 2023, from which she received confirmation that a temporary arrangement would be put in place to allow her to work from home for 6 months.

26. She submitted an appeal against the grievance outcome, and received the decision from her appeal on 23 July 2023.

25 27. She said that she only became fully aware of the Tribunal time limits during the course of the telephone conference call Preliminary Hearing before Employment Judge Sutherland.

## Submissions

30 28. Mr Ashmore made an oral submission in support of his assertion that the claimant's claims were out of time, and should not be allowed to proceed on

that basis. Similarly, Mr Bain made a short oral submission in which he urged the Tribunal to permit the claims to proceed even if late. Reference is made to the submissions as relevant in the decision section below.

### The Relevant Law

5 29. Section 123(1) provides that:

*“Proceedings on a complaint within section 120 may not be brought after the end of -*

- 10 *i. the period of three months starting with the date of the act to which the complaint relates, or*
- ii. such other period as the employment tribunal thinks just and equitable.”*

15 30.1 was referred to the well known case of **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**, in which the court confirmed that it is of importance to note that time limits are exercised strictly in employment and industrial cases. *“When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to*  
20 *exercise the discretion. Quite the reverse, A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”*

25 31.1 also took into consideration the decision in **British Coal Corporation v Keeble and Others [1997] IRLR 336**, in which the EAT set out the factors which the Tribunal should consider in determining whether or not to exercise its discretion, namely 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 had cooperated with any requests for  
30 information, the promptness with which the claimant acted once she knew of the facts giving rise to the action and the steps taken by the claimant to obtain advice once she knew of the possibility of taking action.

32.1 also had regard to the authorities to which parties referred me during the course of submissions.

### **Discussion and Decision**

5 33. The first issue to determine is: to what extent are the claimant's claims presented out of time?

34. The claimant remains in employment with the respondent, and only claims discrimination on the grounds of disability.

10 35. She notified ACAS of her intention to raise proceedings against the respondent on 8 December 2022, and on 19 January 2023, ACAS issued an Early Conciliation Certificate by email to the claimant (27).

36. She presented her claim to the Employment Tribunal on 17 February 2023 (1).

15 37. Mr Ashmore submitted that insofar as any act took place prior to 9 September 2022, it was out of time, and "many if not all" of the claims related to the period prior to that date.

38. In his submission, he helpfully sought to identify the particular acts which appeared to comprise the allegedly unlawful actions of the respondent under sections 15 and 20 of the 2010 Act:

- 20 i. The threat of disciplinary action on 9 May 2022;
- ii. Increased pain - 17 June 2022;
- iii. The requirement to use sickness and holiday pay entitlement when absent from work;
- iv. Requiring staff to work from the office and the threat of action against her if permission to do this was refused;
- 25 v. From May 2022 onwards, failing to take the reasonable step of allowing the claimant to work from home.

39. The “threat of disciplinary action” was contained in a document issued by the respondent’s Chief Executive, sent to all staff, in the form of a directive about returning to a mix of home and office working. “In cases where this doesn’t happen, we may consider formal action under our Upholding Our Standards of Conduct Policy” (108/9). The document was issued on 9 May 2022.
40. Of itself, Mr Ashmore submitted, that act was not an ongoing act, but a one-off, and had no connection with any subsequent alleged act of discrimination.
41. With regard to the issue arising on 17 June 2022, this related to the claimant’s attempt to attend work. Again, the respondent argues that this is was a one-off incident.
42. The third act related to her being signed off sick from 22 to 29 August 2022. Again, this claim was said by the respondent to be out of time, and not a continuing act.
43. In this case, the claimant would only benefit from the extended time within which to present her claim, if she submitted her ACAS notification within 3 months of the unlawful act complained of, or if a series of continuing acts, the last of those acts.
44. The claimant’s submissions were essentially that all of the ongoing issues, up until the point in February 2023 when she was granted the temporary permission to work from home, related to the grievance which she had submitted but which had not been dealt with by the point at which she notified ACAS under the Early Conciliation Scheme.
45. The issue of whether or not the claims were made out of time is complicated by the fact that the claims made in the ET1 have been supplemented by further and better particulars submitted by the claimant. Those complaints relate to allegations arising from communications made by certain managers and HR in correspondence and calls, the details of which the



claimant only became aware of in January 2023, when she received the response to her subject access request.

46. As is established in **Barclays Bank pic v Kapur and ors 1991 ICR 208, HL**, there is an important distinction between a continuing act and a single act with continuing consequences. In that case, the court found that the ongoing operation of a pension scheme amounted to a disadvantage continuing throughout the employment of the affected employees.

47. **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA** was a case in which the Court of Appeal found that the employer could be found liable for an ongoing state of affairs in which female ethnic minority officers of the force were treated less favourably. The Court suggested that Tribunals should not become too focused on the question of whether or not an overall "policy" existed.

48. In this case, it is correct to say that there are a number of issues which arise, apparently individually, on different dates outwith the 3 month statutory time limit. However, it is plain that these issues all related to the same complaint being made by the claimant, that she could not return to work full time to the office, which was the subject of her grievance. Her grievance was lodged on 7 December 2022, and the claimant notified ACAS of her intention to claim the following day. While the events which have been identified - the issuing of the directive, the difficulty experienced in attending at the office in June and the need to take sick and holiday leave due to the ongoing dispute - were all part of a single ongoing conversation between the claimant and her trade union representative with the respondent.

49. Accordingly, with some hesitation, it is my conclusion that the claim was not, ultimately, presented outwith time, as it all related to the same essential complaint, and the failure, in the claimant's allegations, to address that complaint properly and fairly over a lengthy period of time.

50. If I am wrong about that, it seems to me, in any event, that the claim was presented within such time as the Tribunal regards as just and equitable,

and that the extension of time required should be granted. This is a matter for the Tribunal's discretion, and the following considerations must be taken into account.

51. The nature of and reason for the delay must be considered. In my judgment, the claimant, who had access to professional support in the person of Mr Napier, was entitled to seek an informal internal solution to the problems she encountered, and to await the respondent's formal response to her approaches. She was being seen by Occupational Health, whose recommendations of April 2022, she complains, were not being implemented, despite repeated attempts to persuade management to agree. The claimant was referred to Occupational Health on a number of occasions, and reports were issued to the respondent by that department on 23 November 2022 (214) and 9 December 2022 (239). It is plain that she was continuing her dialogue with the respondent about the need for her to return to the office, in the context of her illness, and the respondent continued to engage with her about this.

52. As a result, it appears to me that it was eminently reasonable for the claimant to continue to seek a solution through that dialogue, harnessing what she saw as the help of Occupational Health, and that it would be just and equitable to consider that the delay, if any, was caused by the need to try to resolve this matter internally without proceeding to the Tribunal.

53. It does not appear to me that there will be a significant impact on the cogency of the evidence to be led in this case, given the passage of time. It is plain that there is a large amount of contemporaneous written material which will lay out for the Tribunal the factual narrative.

54. The claimant did have the benefit of her trade union advising her, and on that basis relied upon them to ensure that her claim was presented in time. She did not seek separate advice, nor did she conduct any researches of her own on the internet, to which she had access and the ability to use.

55. Overall, in my judgment, there is no prejudice to the respondent in allowing the claimant's claim to proceed. It is clear that this issue - about whether or

not she should be allowed to work from home, and if so, to what extent =-  
has been a live issue for many months, and continued up until at least  
February 2023. The claimant did not know about some of the acts of which  
she now complains, in her further and better particulars, until she received  
5 the response to her subject access request, and if she were not permitted to  
proceed with her claim, she would lose the right to pursue a complaint about  
discrimination which she has been persistently addressing with her  
employers.

10 56. In my view, it is just and equitable, in all the circumstances, to allow the  
claimant's claims under section 15 and 20 of the Equality Act 2010 to  
proceed, and therefore that the Tribunal has jurisdiction to hear them.

15 **Employment Judge: Macleod**  
**Date of Judgment: 29 September 2023**  
**Entered in register: 29 September 2023**  
**and copied to parties**

20

