



# EMPLOYMENT TRIBUNALS

**Claimant:**

Miss N Khaliq

**Respondents:**

- (1) Secretary of State for Justice
- (2) Brook Street UK Limited
- (3) Julie Sayer
- (4) Michael Crowther
- (5) Glyn Pardoe

**Heard at:** Nottingham (in public; via CVP)

**On:** 17 August 2023

**Before:** Employment Judge Fredericks-Bowyer

**Appearances**

For the claimant:

In Person

For the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents:

Mr Allsop (Counsel)

For the 2<sup>nd</sup> and 5<sup>th</sup> respondent:

Mr S Maini-Thompson (Counsel)

## WRITTEN REASONS FOLLOWING ORAL JUDGMENT AT PRELIMINARY HEARING

**Introduction**

1. These reasons are produced at the claimant's request. That request was made in writing within 14 days of the judgment from this hearing being sent to the parties.
2. I listed this public hearing, following a case management discussion earlier in the year, because the claimant accepted that her claims had been brought outside of the primary time limit. A public hearing was required to decide whether or not it was just and equitable to extend time. This is the sole issue relevant to these written reasons.
3. The respondents also intended to make other applications or submissions in relation to the claims in the event I considered that time could be extended. Ultimately, for the reasons outlined below, I did not extend time to issue the claims. The claims were brought outside of the primary time period. Time was not extended.
4. Consequently, the claims were dismissed because the Tribunal does not have jurisdiction to hear them.

5. During the hearing, I heard evidence from the claimant about the reasons for the delay in bringing her claim. She provided a witness statement and was cross examined by both Counsel. I also had access to a bundle of documents which ran to 283 pages.

### The claims

6. The claimant worked in the clerking and administration teams, supporting HMCTS, in the North East of England. She was placed on assignment by the 2<sup>nd</sup> respondent at the 1<sup>st</sup> respondent between June 2020 and 8 September 2021, and between 13 September 2021 and 31 March 2021. The claimant and the 1<sup>st</sup> respondent agree that she was a worker for the purposes of Section 41 Equality Act 2010 in the first stint, and was an employee on a 12 month fixed term contract in the second stint.
7. The parties agree that the claimant is disabled by reason of stress, anxiety, depression and keratoconus. The claimant had previously withdrawn some of her claims. The claims that she continued to advance were found at paragraphs 31(b), 31(c), 31(d) and 31(e) of her Grounds of Claim. In summary, these are:-
  - 7.1. Section 26 Equality Act 2010 claim of harassment relating to disability against the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent, where the 3<sup>rd</sup> respondent is said to have made comments about the claimant's visual impairment (keratoconus) and then about the claimant's reasonable adjustments (on mental health grounds) for avoiding serious sex trials at work;
  - 7.2. Section 15 Equality Act 2010 claim of discrimination arising from a disability against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents relating to the withdrawal from the claimant of a job offer to work as a CVP clerk;
  - 7.3. Section 19 Equality Act 2010 claim of indirect disability discrimination against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents relating to the recruitment and interview process for the CVP clerking position mentioned above; and
  - 7.4. Section 13 Equality Act 2010 claim of direct disability discrimination against the 1<sup>st</sup> and 3<sup>rd</sup> respondents due to alleged less favourable treatment during the claimant's end of probationary review on 3 March 2023 where the claimant says the 3<sup>rd</sup> respondent referred to the CVP clerking role and her disabilities in a negative light (Dawn Loughran is named as a comparator without disabilities who was not subjected to the same treatment).

### Relevant background about the delay in issuing the claims

8. The matters complained of occurred in March 2022 and the claimant's employment ended on 31 March 2022. Early conciliation started on 14 November 2022 and ended on 25 November 2022. The claim form was presented on 15 December 2022. The claimant accepts that her claim is, on the face of it, out of time. However, her principal contention was that she was not aware that she had been the victim of discrimination until she received the outcome of a subject access request which she made in September 2022. In her view, that outcome confirmed to her that she had been discriminated against and she acted to bring her claim immediately thereafter.

9. The claimant accepts that she was a party to the meetings which form the bases for the claims outlined at paragraphs 7.1 and 7.4 above. It is a fact that she had all of the material required to determine whether or not she had been the victim of discriminatory treatment within those meetings because she was there and her claim relies on what she says was said to her *at the time of the meetings*.
10. The claimant also accepts that something felt 'not right' about the matters outlined at paragraphs 7.2 and 7.3 above at the time they happened, although she was not sure why.
11. The claimant relies upon her disabilities to explain the delay between the dates of the alleged discrimination and her decision to make a subject access request. She told me, in this hearing, that she knew she would not be able to deal with pursuing the complaint within time because of her mental health and the trauma of her experience working at the 1<sup>st</sup> respondent. I consider it relevant that I had witnessed elements of this trauma response in the previous telephone preliminary hearing, where the claimant had been unable to speak due to the level of her anxiety. I could also see the claimant's obvious discomfort during this hearing, and we made an adjustment so that those not speaking to her switched off their cameras so she was not overwhelmed with faces on the CVP.
12. The claimant admits that she has successfully held a job between leaving the 1<sup>st</sup> respondent and submitting her claim. She accepts that this meant she was able to apply for and secure work and to then do that work. She says she now works in a role akin to a receptionist in a medical research organisation. She says that she was unable to return to the vicinity of the workplace because of the stress it caused her. It seems to me that the claimant takes great care to manage her 'load' as a result of her disabilities.
13. The claimant accepts that she is educated and able to research the matters required to discover time limits and bring her claim. She accepts she was aware of the time limit, but that she was too unwell to comply. She accepts she had family support. She admits that she did not ask for anybody to help her to bring her claim or do it for her, even though in practice she could have done.

## Relevant law

14. The claimant had three months within which to bring her claim and have it accepted without asking for judicial discretion to extend time. Having failed to bring her claim in time, she requires the Tribunal to decide that her claim was within a time frame which make it just and equitable in the circumstances to extend time (*section 123(1) Equality Act 2010*).
15. The parties accept that the primary time limit in this case expired by the end of June 2021, and so the claim can only be considered in time if I consider it just and equitable to extend time (*Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298*). That discretion is wide, and is to be exercised in response to the particular facts or circumstances of the case in question (*Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 CA; University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*).

16. In the usual way, considering what is 'just and equitable' to extend time involves balancing various factors which are common to situations where a Judge must consider whether to waive a breach of a time limit or some other order. This includes the length and reasons for the delay and, perhaps most importantly when considering fairness, where the balance of prejudice lies between the parties. This, in turn, includes considering factors such as the merits of the claim should it continue and whether the delay has resulted in any material degradation to the principles enshrined by the overriding objective.

### Discussion and conclusion

17. The length of the delay is significant. The claimant's case is that she did not have confirmed that she had been the victim of the claims alleged until she saw the outcome of the subject access request. This might be persuasive had she made that request within the primary time limit but, due to delay, the outcome was not received until after the time limit. That is not the case here. The claimant did not make her subject access request until six months after her employment ended, and so not until the passing of the whole limitation period and then the length of time which is that whole period again. Time is not paused by ACAS where ACAS begins out of time, and so the claim is brought some eight months late. I do not consider there is any weight to the claimant's argument that the discrimination was only known or confirmed to her when she received the outcome of her subject access request. She was in the meetings that bring forth the claims. I do not see what the documents disclosed add which ought not to have been known to the claimant in March 2021. The claimant knew of the facts which give rise to her claim at the time, and she had the means to put her claim together at that point with some thought and research (even assuming she did not realise she was discriminated against at the time).

18. I do not accept that the claimant's reason for the delay is a good reason. Although I understand and have sympathy for the health points raised by the claimant, I do not consider that they stopped her from initiating her claim herself or asking someone else to help her do it, or asking someone else to do it for her. The claimant's disabilities are not unusual features of employment tribunal proceedings. Other proceedings are brought in time. I do not mention this to make a direct comparison, but simply to note that it must have been possible for the claimant to seek help if she was struggling. I also note that the claimant did not say that her condition has vastly improved since the time window where her claim would have been in time, only that now she was motivated to bring the claim. It is not the case that the claimant was unable to litigate or was incapacitated after leaving the 1st respondent – indeed, she has found alternative work and continues to do that work. I am conscious that the claimant might consider these remarks to be unsympathetic. I am indeed sympathetic, but time limits are in place for a good reason and extending them is an exception and not the rule.

19. I turn next to consider the impact on the proceedings which have arisen because of the delay. The section 26, 15 and 19 Equality Act 2010 claims all centre around comments said to have been made during interviews or meetings, which were not written down. The respondents note, correctly, that this means that those witnesses (the subject of serious allegations) are being asked to recall details of meetings

which might not have been particularly memorable to them until the claimant brought these claims some 9 months after they had taken place. The claimant accepts that the comments, if made, would not be written down. Given the nature of these claims, I consider it likely that essential primary evidence has been lost in the time since those key events occurred. This puts those witnesses, and the respondent, of being put into the position of being asked about comments they might not remember making, even if they did. Similarly, it puts them at risk of denying something they consider they would not have said, with the obvious additional weakness of being compelled to admit they could not remember. Where the claimant says she can remember the conversations directly, there would be an imbalance in the evidence which prejudices the respondents' ability to properly defend the claims.

20. Similar, although less forceful, considerations apply to the section 19 Equality Act 2010 claim. The respondents do not accept that the claimant was discriminated against in an indirect fashion because of her disability. To the extent the complaints rely upon factual differences from memory (as, in my view, they must to a significant degree), the respondents would be similarly prejudiced. These elements of degradation of evidence would, in my judgment, place the claimant at an evidential advantage when compared to the position if she had brought her claim in time. The claimant should not benefit from her delay.

21. I balance these considerations against the prejudice visited upon the claimant where time is not extended. First, the delay to these proceedings is not entirely as a result of the claimant issuing her delay out of time. There is a backlog in claims in the Employment Tribunal. There was one hearing that was aborted because of the claimant's anxiety and it took time to get re-listed. I do not take these elements of delay into account. Additionally, there is an obvious prejudice which results from the claimant being unable to advance claims which she considers are good claims because she has been unjustifiably exposed to discrimination. In circumstances where I have concluded that the claimant could have brought her claim with assistance during the primary time limit, and certainly sooner than she did, then the impact of that prejudice is to greater extent self-inflicted. It does not justify visiting prejudice upon the respondents by forcing them to defend the claims from an evidentially weakened position.

22. I now balance these considerations. The evidence has been degraded by the delay of the claimant bringing her claims. The delay is significant and I do not consider that there is a justifiable reason for the delay, even accepting the claimant's disabilities and their impact. The degraded evidence affects the respondents' ability to defend the claim, and so it goes right to the fairness of the hearing. The claimant suffers from a decision not to extend time but, in the context of my findings, that suffering is self-inflicted and should not be used as a reason to undermine the respondents position.

23. Consequently, I do not consider it just and equitable to extend time and I do not. The Tribunal does not have jurisdiction to hear the claim and so it is dismissed.

## Withdrawals

24. The claimant intended to withdraw claims against some of the respondents. I have not dealt with these points because I have concluded that I have no jurisdiction to deal with the claim as a whole and so the claim against all respondents have been dismissed as a result of this judgment.

**Employment Judge Fredericks-Bowyer**

Dated: 10 October 2023

Sent to the parties on:

.....24<sup>th</sup> November 2023....

For the Tribunal Office:

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