



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 8000081/2023 Preliminary Hearing by Cloud Video Platform (CVP)
at Edinburgh on 24 January 2024**

Employment Judge: M A Macleod

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Heather Hiram

**Claimant
In Person**

Obaseki Solicitors

**Respondent
Represented by
Ms J Obaseki
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of disability discrimination is dismissed for want of jurisdiction, being time-barred.

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REASONS

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1. In this case, the claimant complains of CONFIRM CLAIMS. The respondent resists the claimant's complaints.
2. A Preliminary Hearing was listed to take place on 24 January 2024 in order to determine whether the Tribunal has jurisdiction to determine the claimant's claims, on the basis that they may be time-barred.

3. The claimant appeared at the Preliminary Hearing, which took place by CVP, and acted on her own behalf. Ms Obaseki appeared for the respondent.
4. Parties each presented a bundle of documents which they wished to rely upon in the course of the Preliminary Hearing. They also provided skeleton arguments.
5. I noted in the respondent's skeleton argument that there was a section devoted to seeking strike out of the claimant's claims under Rule 37 of the Employment Tribunals Rules of Procedure 2013. I observed that that was not listed in the Notice of Hearing as an issue for determination at this Hearing, and accordingly I advised both parties that I would not be hearing submissions on this point.
6. The claimant gave evidence on her own account.
7. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

8. The claimant notified ACAS of her intention to submit a claim to the Tribunal against the respondent on 18 July 2022, and received an Early Conciliation Certificate from ACAS on 28 August 2022 .
9. She then presented her claim to the Employment Tribunal on 27 February 2023. In that claim she complained that she had been unfairly dismissed, discriminated against on the grounds of disability and unlawfully deprived of a redundancy payment.
10. On 27 May 2022, the claimant's employment was ended by an email from the respondent to the claimant (C64), in which they advised the claimant due to a reduction in the number of fee earners at the firm, (the respondent is a firm of solicitors) and ultimately a change of structure. As a result, they told the claimant that they would be unable to maintain her current part-time

salaried position, and that they were looking for a new accredited family supervisor for immediate start.

- 5 11. They said that they required to give notice to the claimant to end her employment in the current job role, and stated that based on her contract, they needed to give 3 months' notice so that her last date of work would be 27 August 2022.
- 10 12. At that date (27 May 2022), the claimant was absent from work on sick leave, starting in mid-April 2022. She commenced the ACAS Early Conciliation process during her notice period as she hoped not to have to leave the respondent's employment. She was advised by ACAS that it was up to her to present her claim in time.
- 15 13. The Early Conciliation Certificate, which did not appear to be lodged by either party but which was available on the Tribunal administration file, confirmed that she notified ACAS on 18 July 2022, and the Certificate itself was issued to the claimant by email on 28 August 2022.
14. The claimant was absent until her employment ended in August 2022. She was diagnosed, in approximately May or June 2022, with fibromyalgia.
- 20 15. Having checked the position online, the claimant understood that the ACAS process "stopped the clock" in relation to her deadline for presenting her claim to the Employment Tribunal, for the period 18 July until 28 August 2022. It was her understanding that she would have until approximately 15 January 2023 to present her claim, using an online tool to calculate the date.
- 25 16. The claimant calculated that she had 6 weeks from 28 November 2022 to present her claim.
- 30 17. She did not present her claim until 27 February 2023. The reason she gave before me was that she had been unwell. In evidence, she referred to her disability impact statement (C19ff). She said that she believed that she had a period of 6 months within which to present a claim for "unfair redundancy", which she said she understood was the claim she was intending to make to

the Employment Tribunal. The time limit for such a claim came from the Tribunal website, which was, she said, “official”.

5 18. The claimant said that by August 2022 her body had stopped working. She said that when she received notice of termination, she was extremely shocked and upset. Her symptoms fluctuated until August 2022, which represented the anniversary of her husband’s death on 20 August. She believes that she suffered a complete physical and mental breakdown at that point.

10 19. She also attributes her poor mental health in part to the diagnosis of her younger brother Larry with advanced bowel cancer in early summer, leading to his sad death on 4 July 2022. In addition, she said, the circumstances of his death have resulted in the breakdown of family relationships which have not yet been resolved.

15 20. The claimant also made reference to “oppressive criminal proceedings which were ongoing for 3 years”.

20 21. She underwent therapy in December 2022 in an effort to recover from what she described as her trauma. She said that she had 6 dogs but was unable to walk them, and that she spent much of her time sleeping on her couch. Her son Ted came home from boarding school in December 2022, at which point she put on a brave face for him. She also said that there were issues relating to her son’s behaviour at school, which culminated in a diagnosis of Asperger’s Syndrome in December 2022.

25 22. The claimant said that she was unable to submit her claim to the Tribunal before she did, and described it as “not my best work”, which is understood to be a reference to the drafting of the claims set out in the ET1. She maintained that she was unable to present the claim before she actually did, as every time she did, it brought back the trauma she had experienced. She also found it difficult to deal with the school bursary application process she had to go through for her son’s education.

23. The claimant was unable to go out of the house, beyond her garden. She made reference to a very hot summer, though it was not clear whether she was referring to summer 2022 or 2023. She remembered being housebound; although she was able to get dressed some days, she did not go shopping on her own behalf. She also said that she was unable to correspond with anyone. She was engaged in a part time Masters degree at the Queen Mary University, remotely, and was on a leave of absence until she returned to her studies in January 2023. She also sat some exams in May 2023.
24. On 1 September 2022, the claimant's GP wrote a letter (C18) in which he described the claimant's symptoms, including chronic pain affecting her back and her four limbs, pervasive tiredness, severe anxiety (which could impede her ability to leave the house), long standing severe headaches and brain fog, amounting to a diagnosis of fibromyalgia. This was, he said, in the context of PTSD, and a diagnosis of ADD (attention deficit disorder).
25. She also produced a report by Lize Van Niekerk, Chartered Counselling Psychologist, dated 28 July 2019, in which the psychologist describes the ongoing effects of the trauma brought about by her bereavement following the death of her husband (16).
26. In September 2022, she was seen by a Clinical Psychologist, Dr Victoria Cochrane (15), who reiterated the ongoing effects of post traumatic stress disorder upon her, and of the ongoing legal case in which she faced an assault charge, which took some years to resolve.
27. The claimant maintains that the reason for the late presentation of the claim was a combination of fibromyalgia and PTSD.
28. She has law degrees from the Universities of London and Edinburgh, and practised as a solicitor for approximately 10 years.
29. Between August 2022 and February 2023, the claimant had a number of trips away, including a trip to Italy "for a few days" in October 2022, as well as "maybe the odd weekend away" in the UK, including a trip to Berwick-

upon-Tweed to celebrate her son's birthday on 26 August 2022. She was also able to go horse-riding, as well as dog-walking, activities she regarded as therapeutic.

5 30. The claimant gave assistance to another individual by representing a claimant in an Employment Tribunal, from October 2022. This involved written advocacy to the Tribunal.

31. She also represented herself in relation to a matter concerning dogs accessing public buildings, in January or February 2023.

10 32. It was put to the claimant in cross-examination that she had a website indicating that she continued to walk dogs and breed dogs, and that she was registered as a dog breeder, but she denied that her website was up to date, or that she had ever bred dogs.

Submissions

15 33. The claimant submitted that she really wanted to present her claim in time, and that it was never her intention to delay the claim, but that as time went on in July and August she became increasingly unwell. She referred to triggers she suffers personally in relation to her PTSD, which means she has to take things slowly.

20 34. The respondent submitted that the claim should not be allowed to proceed as it was presented out of time. Ms Obaseki described the claimant's evidence as "quite concerning". She was able to represent people during the period under examination. She was fully aware of the time limits, and was able to access support, go on holiday, attend events, walk dogs, ride her horse. She did not prioritise her claim. She was also able to attend court
25 and her GP during the relevant time, and was not lying on the sofa as she said in evidence.

30 35. Ms Obaseki argued that the claimant has sufficient means, time and resources to have presented her claim in time. If the claim were allowed to proceed, the respondent would be disadvantaged in seeking to defend it, and the prejudice would be significant for the respondent.

36. She also referred to her skeleton argument.

Discussion and Decision

37. The claimant's claim is one of disability discrimination, and accordingly, the claim should have been presented to the Tribunal within 3 months starting
5 with the date upon which the act complained of took place (subject to any extension available through the Early Conciliation Scheme operated by ACAS) (section 123 Equality Act 2010), or within such period as the Tribunal considers just and equitable.

38. In this case, the claimant complains of discrimination in relation to the
10 termination of her employment, which took place on 27 August 2022 following a period of notice.

39. The claimant's claim should therefore have been presented to the Tribunal by no later than 26 November 2022.

40. However, the claimant notified ACAS of her intention to make a claim to the
15 Tribunal on 18 July 2022, and received her Early Conciliation Certificate on 28 August 2022. Given that the early conciliation period ended one day after the claimant's dismissal, the period during which the time limits were deferred was only one day. The claimant appears to suggest that the whole conciliation period should be taken into account and added back to the time
20 limit applicable in this case. However, the Early Conciliation Scheme provides that if a time limit is due to expire during the period beginning with the day ACAS receives the EC request (18 July 2022) and one month after the prospective claimant receives the EC certificate (one month after 28 August 2022, ie 28 September 2022), then the time limit expires at the end
25 of that period. In this case, the time limit was not due to expire within that period, and accordingly, the claimant does not benefit from the extension of time under the Early Conciliation procedure.

41. Accordingly, the claimant should have presented her claim by 26 November
30 2022. Her claim was presented on 27 February 2023, almost exactly 3 months later.

42. By her own calculation, the claim was presented some 6 weeks late.

43. The question, then, is whether the claim has been presented within such time as the Tribunal considers just and equitable.

44. The well-known case of **British Coal Corporation v Keeble and others**
5 **1997 IRLR 336, EAT**, provides guidance as to the factors to be taken into account by the Tribunal in determining whether or not to allow a claim to proceed though late.

45. The Tribunal must consider the prejudice which each party would face as a result of its decision, and to have regard to all the circumstances of the
10 case, and in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she
15 knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

46. I deal with the question of prejudice after considering the other factors.

47. The length of the delay in this case is 3 months, from 26 November 2022 to 27 February 2023.

48. The reasons for the delay are more difficult to define. The claimant plainly
20 suffered a degree of ill-health during the period from being notified that her contract was ending until the point when she submitted her claim to the Tribunal. She has presented medical evidence to the effect that she has, for some years, suffered from PTSD and severe anxiety, related to traumatic
25 events in her personal life affecting herself and her children. It is impossible not to be sympathetic to the claimant in all that she has gone through, which is well documented.

49. The Tribunal must deal, however, with the facts before it. The claimant
30 asserted in evidence that she was so badly affected by the events relating to the termination of her employment, and other difficulties ongoing in her

life, that she was, for a time, unable to get off her sofa. However, she accepted in cross-examination that she had, during the period up until the end of November 2022, been able to enjoy horse-riding, dog-walking, weekend breaks in Scotland with her family and a trip to Italy in October 2022. In addition, she was able to provide assistance to another person in pursuing legal proceedings during that time, though to what extent was not made clear. It appears that some reference was made to Employment Tribunal proceedings, but I have not pursued this matter in any way and am not able to take into account any facts beyond what was said by the claimant in her evidence.

50. I have concluded that the claimant's evidence about the impact of these and other events upon her cannot be entirely relied upon. There is sufficient inconsistency between her version of events and the admissions she made in cross-examination as to call into question her basic assertion that she was physically and mentally unable, throughout the period between 27 August and 26 November 2022, to put together a claim to the Employment Tribunal for herself, when she was able to leave the house and be active in a number of other spheres, including assisting another person in court proceedings. I appreciate that the claimant said that horse-riding and dog-walking are therapeutic activities, but her initial position was that she was unable to walk her dogs because of her physical and mental state.

51. The claimant also maintained that she had been given no advice by ACAS as to the operation of time bar rules in the Employment Tribunal. That evidence only takes the claimant so far. The claimant has law degrees from universities in Scotland and England, and has practised as a solicitor for some time. She is plainly an intelligent and articulate individual, well capable of carrying out research into legal matters. While the ACAS Early Conciliation scheme may have some complexity, it is unclear how the claimant was unable to establish for herself the correct time limit for presenting her claim.

52. In addition, the claimant sought to argue that the time limit should have been extended until mid-January 2023. However, by that stage, she

confirmed that she had resumed her studies for a Masters degree, being carried out remotely. She has not explained satisfactorily why she was able to engage in advanced study but could not present her claim until the end of February 2023. Her mental health appears to have improved by January 2022 to enable her to resume her studies.

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53. I considered next the cogency of the evidence likely to be affected by the delay. It is perhaps trite to say that the longer time passes, the greater the likely effect upon the memories of those involved. An additional 3 months passed beyond the statutory time limit and accordingly it is clear in my judgment that the cogency of the evidence was likely to be affected adversely by that further delay.

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54. There is no suggestion that the respondent did not cooperate, or acted obstructively, in the claimant's preparations of her claim.

55. The claimant acted promptly once she knew of the facts giving rise to the cause of action in this case, by contacting ACAS and commencing early conciliation prior to the expiry of her notice. She was aware that she required to do this as a pre-requisite of raising Tribunal proceedings. It is therefore inexplicable that she left it until February 2023 to have presented her claim.

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56. Although the claimant did not seek advice, she could have clarified matters with ACAS, and in any event, she has the legal knowledge and skills to enable her to carry out the necessary research and analysis to determine the appropriate time limits.

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57. The claimant also suggested that she believed that she had 6 months within which to make a claim related to unfair redundancy. Again, this was not a clear or helpful position to adopt. The claimant appeared to conflate two different claims: unfair dismissal on the grounds of redundancy, and failure to pay a redundancy payment, the latter of which would attract a 6 month time limit, but the former a 3 month time limit. In any event, she accepted that she had not made a claim in relation to a redundancy payment and so the extended time limit simply did not apply to her.

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58. I turn then to considering the relative prejudice to the parties in the decision made in this matter. The claimant clearly suffers from great prejudice if she is unable to pursue her discrimination claim before the Tribunal; the respondent also suffers from prejudice if the claims require to be defended, given the nature of the claims and the number of witnesses who may be required. Prejudice is a factor, though not determinative, but on balance it is my view that the claimant would suffer greater prejudice if the claim were not allowed to proceed.

59. Finally, I take into account the case of **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, in which the court affirmed that time limits are to be adhered to unless there are good reasons to extend them, in the just and equitable jurisdiction, and that there is no presumption that time will be extended. The exercise of the discretion is still the exception rather than the rule.

60. Taking all of these factors together, I have come to the conclusion that this is not a case where it would be just and equitable to extend the time limit for presenting this claim. The length of the delay was significant, and the claimant has failed, in my judgment, to present adequate reasons to explain the delay. The claimant is legally qualified and capable, in my judgment, of researching and ensuring that she takes the necessary steps to ensure that her claim is presented in time. She was able to act promptly in contacting ACAS. The subsequent delay could not in its entirety be explained by the claimant's evidence about her illness and the effect upon her, in which she contradicted herself and undermined her assertion that for some time she was unable to contemplate these proceedings. I have no doubt that the claimant has suffered significant trauma in the past, and that she suffers some ongoing symptoms of that trauma, but she has not persuaded me that that trauma was so significant throughout the limitation period as to prevent her taking the necessary steps to present her claim in time.

61. While the balance of prejudice falls on the claimant's side, I am satisfied that in all the circumstances it would not be just and equitable to extend the

time limit in this case and accordingly the claimant's claim of disability discrimination is dismissed for want of jurisdiction.

5 62. What is unclear, however, is whether or not any other claims remain. The claimant was not employed for 2 years continuously by the respondent, and accordingly no unfair dismissal claim arises. However, the claimant appeared in her claim form to refer to other claims, and it is unclear to me whether, following the Order by the Tribunal on 26 April 2023, the claimant provided the further specification required.

10 63. The claimant is, accordingly, required to provide in writing to the Tribunal confirmation as to whether she wishes to pursue any other claims in these proceedings, and if so, which claims; and then, on what precise basis she seeks to do so. She must do so by no later than **20 March 2024**.

15 **Murdo A Macleod**
Employment Judge

20 **6 March 2024**
Date of Orders

Date sent to parties 07/03/2024

25 I confirm that this is my Note and Orders in the case of Hiram v Obaseki Solicitors and that I have signed the Note and Orders by electronic means.