



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Miss I Sultana

AND

**Respondent**  
Welsh Ministers

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD REMOTELY AT** Plymouth **ON**  
**By Cloud Video Platform**

21 June 2024

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** In person  
**For the Respondent:** Mr J Edwards of Counsel

### JUDGMENT

**The judgment of the tribunal is that the claimant's claim for discrimination was presented out of time, it is not just and equitable to extend time, and the claim is accordingly dismissed.**

### RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claim was presented in time.
2. I have heard from the claimant, who gave evidence. I have heard from Mr Edwards on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The Facts:
4. The claimant Miss Irin Sultana describes herself Asian British Bangladeshi. At all material times she was employed as a Civil Servant by HMRC. During the Covid-19 pandemic the claimant was seconded to work for the Welsh Government, which is more accurately referred to as Welsh Ministers, and is the respondent to this claim. These secondment arrangements are more usually known as loan agreements and are common across the Civil Service. On 17 March 2021 the claimant started to work for the respondent under such a loan agreement, which was anticipated to last for two years until March 2023.

- However, the loan agreement was capable of termination either by the respondent or HMRC on four weeks' notice in the interim. The purpose of the loan was to assist the respondent which required a short-term increase in its staffing as part of its response to the Covid-19 pandemic. On 5 September 2022 the respondent notified the claimant that it intended to terminate the loan agreement in four weeks' time. After a slight delay the loan agreement was terminated, and the claimant returned to work to HMRC on 11 November 2022.
5. The claimant was dissatisfied at the termination of her loan agreement with the respondent. She raised a grievance against the respondent on 8 November 2022, which consisted of a letter which ran to six pages. There were two stated reasons for her grievance: first, she considered that she was due annual leave, and secondly, she asserted that there had been a breakdown in her relationship with her managers, and that she had been ostracised. The remedy which she sought was explained in her final paragraph headed "Next Steps" in which she stated: "Please note for the time being I have informed my HMRC manager that there is a dispute regarding my leave etc and therefore my transfer needs to be put on hold and therefore I wait for your instructions on how to move this forward and deal with this situation." The claimant's initial complaint at that time was therefore limited to her annual leave entitlement, and her relationship with her managers.
  6. The respondent held an investigation meeting into the matters raised by the claimant on 30 November 2022. The gist of the claimant's complaint was that she had been told on 5 September 2022 that the loan agreement was to be terminated when as recently as July or August 2022 it had been agreed that she would stay with respondent until March 2023. She was also concerned that she would be unable to take her annual leave which had accrued to her. In addition, the claimant complained that there was another colleague who was also on loan during the same time period who had been allowed to move to the food and agriculture department at the same time that she was given her notice. The claimant said that she did not understand why she was not given an equal opportunity to apply for other jobs when that other colleague in the same team had been allowed to apply for another job and to stay within the respondent organisation. The claimant supplied some further information to support her grievance shortly thereafter, and under the heading Equal Opportunity she identified Mr Richard Davis as having been allowed the opportunity to gain a new role in food and agriculture policy when she had not been. She complained that she was not given an equal opportunity to apply elsewhere when Mr Davis had been. There was no complaint that this alleged conduct amounted to unlawful discrimination.
  7. The respondent rejected the claimant's grievance and gave its decision with reasons in a detailed report dated 25 May 2023. The respondent decided that there were no substantive grounds to uphold the three areas of complaint pursued by the claimant which were the reason for the loan being terminated; the communication and handling of the termination of the loan; and the allegation that she had failed to take her annual leave.
  8. The claimant appealed against the grievance outcome on 2 June 2023. The claimant's detailed letter of appeal raised four grounds; (i) she had been unable to take her annual leave which was due to her; (ii) that she had been ostracised by her managers; (iii) that the respondent's actions had had an adverse effect on her mental and physical health; and (iv) that she had not been given an equal opportunity as Mr Davis to move elsewhere and to continue the loan agreement. There was no complaint that any of this conduct amounted to unlawful discrimination. There was a grievance appeal meeting on 4 July 2023. On 5 September 2023 the respondent notified the claimant that her appeal was not upheld.
  9. The claimant consulted solicitors on 21 September 2023, which she says was for the first time. She commenced the ACAS Early Conciliation process on 26 September 2023 (Day A) and ACAS issued the Early Conciliation Certificate on 10 October 2023 (Day B). The claimant presented this claim on 30 October 2023. The Grounds of Complaint were prepared by the claimant's solicitors. In conclusion they asserted that the claimant was a contract worker within the meaning of section 41(5) of the Equality Act 2010 (which has since been conceded by the respondent); and that she had suffered direct race discrimination in contravention of section 41(1) EqA, in three respects: namely (a) the termination of the loan agreement (with effect from 10 November 2022) before the expiry

- of the loan period; (b) not affording the claimant equal access to the opportunity to apply for vacancies within the respondent's organisation; and (c) subjecting the claimant to a detriment by not allowing her the opportunity to apply for available vacancies and/or terminating the loan earlier than the two-year period. No complaint has been brought in connection with the grievance process.
10. As noted by the respondent, each of these alleged acts must have taken place, at the very latest, on or before 10 November 2022, for the following reasons. In the first place the decision to terminate the claimant's loan agreement was notified to the claimant on 5 September 2022. Secondly, the claimant learned that Mr Davis had been offered a role elsewhere within the respondent's organisation on 2 September 2022. Thirdly, the claimant asked to be considered for other roles at her grade she says "shortly after" she was given her notice. The claimant's grievance letter also notes that she was told on 6 October 2022 that it was her last working day for the respondent, and that she had to return her IT equipment.
  11. The claimant asserts that she was unable to present these proceedings within the relevant time limit because of her mental health difficulties. She has disclosed extracts from her GP medical notes. She did consult with her GP about mental health difficulties on the following occasions.
  12. On 11 November 2022 the GP notes record that the claimant's loan agreement had been terminated "out of the blue" and that "the stress of all of this is catching up with her mental health". This referral was reported as: "Acute Stress Reaction (new)", and the GP prescribed propranolol. This was reviewed on 22 December 2022, and it was agreed that the claimant would stop taking propranolol, which was not helping enough, and she was prescribed citalopram, and she was also encouraged to adopt talking therapies. The claimant did not attend her GP again until 9 June 2023, which was described as a review of the Acute Stress Reaction, (and which followed notification of the rejection of the grievance on 25 May 2023). The claimant continued taking citalopram, with an agreement to review in two to three months. The matter was reviewed again on 30 June 2023, when the claimant reported that she was appealing against the grievance decision, but she asked to increase the dosage of citalopram. The claimant's grievance was rejected on 5 September 2023. The claimant says that by this stage her mental health had got worse, and because of this she agreed to commence a course of counselling, which commenced on 19 October 2023. There was a further review with the GP on 25 October 2023 which was referred to as "Anxiety Disorder (First)". This referred to "ongoing grievance issues and "going to court it seems", and it was reported as "work-related stress with ex-employer".
  13. However, the claimant has produced no medical evidence to suggest that she was precluded in any way from presenting these proceedings in time because of these mental health difficulties. It seems clear from the GP notes and the claimant's evidence that she had suffered stress as a result of the termination of the loan agreement, but that her mental health had recovered slightly by the early part of 2023 when she was still within the relevant time limit. It seems that mental health then got worse, such that she needed counselling as well as citalopram, but even at that stage in about October 2023 she was well enough to present these proceedings.
  14. There is no suggestion in the GP notes that the claimant was too unwell to attend work. On the contrary, the claimant continued to work, and she did not take certified sick leave from HMRC following the termination of her loan agreement, and her return to HMRC. During this time, not only was the claimant well enough to attend work, but she was well enough to prepare and submit a letter of grievance running to 6 pages on 8 November 2022; she was well enough to attend the grievance investigation meeting on 30 November 2022; she was able to provide further submissions in support immediately thereafter; and she was able to prepare a detailed letter of appeal running to four pages on 2 June 2023.
  15. Having established the above facts, I now apply the law.
  16. The Law:
  17. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges

- direct discrimination. The protected characteristic relied upon is race as set out in sections 4 and 9 of the EqA.
18. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
  19. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
  20. Section 140B EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) or section 129(3) or (4). (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when the time limit set by section 123(1)(a) or section 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by section 123(1)(a) or section 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exerciseable in relation to that time limit is extended by this section.
  21. The relevant law relating to Early Conciliation (“EC”) and EC certificates, and the jurisdiction of the Employment Tribunal to hear relevant proceedings is as follows. Section 18 of the Employment Tribunals Act 1996 defines “relevant proceedings” for these purposes. This includes in subsection 18(1) the discrimination at work provisions under section 20 of the EqA. Section 140B EqA sets out how the EC process is taken into account. Where the EC process applies, the limitation date should always be extended first by section 140B(3) or its equivalent. However, where this date as extended by section 140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate, time to present the claim is further extended under section 140B(4) for a period of one month (applying Luton Borough Council v Haque [2018] ICR 1388 EAT). In other words, it is necessary first to calculate the primary limitation period, and then add the EC period. Having reached that date, it is necessary to ask whether it is before or after one month after Day B (the date of issue of the EC certificate). If it is before then the limitation date is extended to one month after Day B. Otherwise, if it is after one month after Day B, then limitation will be extended to that later date.
  22. I have been referred to and have considered the following cases, namely: Riley v Tesco Stores [1980] ICR 323; Croydon HA v Jaufurally [1986] ICR 4 EAT; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23;
  23. The Normal Time Limit;
  24. In this case the matters giving rise to the claimant’s complaints took place largely during September and October 2022, and in any event must have taken place before 10 November 2022. The normal time limit of three months from that last date therefore expired at midnight on 9 February 2023. The claimant did not commence the Early Conciliation process with ACAS until 26 September 2023 (Day A). She does not enjoy any extension

of time under the Early Conciliation provisions because the time limit had already expired some seven months earlier than the commencement of Early Conciliation on Day A. The presentation of these proceedings on 30 October 2023 was therefore approximately eight months out of time.

25. Discrimination Claim
26. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that the events surrounding the cancellation of her loan agreement had an adverse effect on her mental health such that she could not present these proceedings within time.
27. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are 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 parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
28. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "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 the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."
29. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] ... It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list ... [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."
30. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important 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 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". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
31. This strictness of approach was approved by the Court of Appeal in Adedeji, a case in which the Court approved a refusal to extend time where the originating application was presented just three days out of time. Underhill LJ approved the assertion that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals.
32. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

33. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”
34. In exercising its discretion, the Tribunal should consider all the factors in the particular case that it considers relevant on the facts before it, including, in particular, the length of, and the reasons for, the delay in bringing proceedings: see Adedeji per Underhill LJ (at paragraph 37).
35. In addition, in Jones v Secretary of State for Health and Social Care [2024] EAT 2, the EAT cautions Tribunals against quoting in isolation what was said in paragraph 25 of Bexley, and a more nuanced summary is to be found in Caston.
36. There are two types of prejudice that a respondent may suffer if a limitation period is extended: the prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and forensic prejudice caused by fading memories, loss of documents and losing touch with witnesses if the limitation period is extended by many months or years: see Miller and Others v Ministry of Justice [2016] 3 WLUK 394 EAT par Laing J (as he then was) at paragraphs 10 to 13). Both are relevant to the exercise of the tribunal’s discretion to extend.
37. Judgment:
38. In my judgment the claimant has not shown any sound reason as to why these proceedings could not been issued within the relevant limitation period. She was fully aware of all matters arising from the termination of her loan agreement during September, October and early November 2022. The cancellation of the loan agreement did have an impact on her mental health, but this had recovered slightly by early 2023. The claimant’s health got gradually worse until she needed counselling in October 2023, but despite the fact that her mental health had regressed to this worse position at that time, this was when she was well enough to present these proceedings. In the meantime, the claimant had been well enough to return to work with HMRC without taking any sickness absence. She was able to prepare detailed correspondence in connection with her grievance process. In my judgment there is no good reason why the claimant could not have presented these proceedings earlier, and she certainly could have done so within the limitation period.
39. I have considered the balance of prejudice between the respective parties. The respondent does not suggest that there is any particular key witness who is now unavailable after this passage of time. Nonetheless the respondent will suffer some forensic prejudice for two reasons. In the first place the gist of the claimant’s grievance was clearly a complaint about accrued holiday pay and being ostracised by her managers. Although she mentioned the lack of “equal opportunity” in the sense that Mr Davis had been retained by the respondent, the claimant did not at any stage suggest that she had suffered any unlawful discrimination. The respondent did not investigate the claimant’s complaints against the background of a complaint of discrimination. In addition, there will have been the expiry of at least two years before any such claim could be brought to hearing.
40. On the other hand, the prejudice to the claimant in refusing the extension of time is limited to denying her the opportunity to pursue a late claim of discrimination which only seeks an award for injury to feelings. She is not reliant on any tribunal award to compensate her for any loss of earnings, because her employment has continued with HMRC. The claimant does not claim any pecuniary loss or any personal injury claim.
41. In conclusion the claimant has not persuaded me that there is any good reason as to why these proceedings could not have been presented within the relevant time limit, and she

has not persuaded me that it would be just and equitable to extend the relevant time limit and to allow the claim to proceed. For the reasons set out above the claimant's application is refused; the claim was presented out of time; and the claimant's claim is hereby dismissed.

42. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 15; a concise identification of the relevant law is at paragraphs 17 to 36; how that law has been applied to those findings in order to decide the issues is at paragraphs 38 to 41.

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Employment Judge N J Roper  
Dated 21 June 2024

Judgment sent to Parties on  
13 July 2024 By Mr J McCormick

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