



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L. Mckay

**Respondents:** (1) London North Eastern Railway  
(2) Ms J. Slater

London Central by CVP

Employment Judge Goodman

12 July 2024

**Representation**

**Claimant:** in person

**Respondents:** Mr William Lane, solicitor

## PRELIMINARY HEARING IN PUBLIC

## JUDGMENT

1. The claim against the second respondent is dismissed for want of jurisdiction.
2. The claim against the first respondent is to be heard together with claim number 2215676/23 in October 2024

## REASONS

1. This preliminary hearing was listed to decide whether the claim against the 2nd respondent, Jodie Slater, was presented in time.

### **Background facts and procedural history of claims**

2. The claimant was employed by the first respondent, LNER as a customer assistant in the first class lounge at Kings Cross. There was friction between him and another employee there, Ms S. Begum. There were unsuccessful attempts at mediation. In February 2023 the claimant alleged that she had failed to assist her disabled passenger onto a train. He also complained of bullying and harassment. On 9th April 2023 the claimant was suspended from work after he sent Ms Begum what he described as “communications in a compromised state of mental and physical health” and the respondent says were abusive texts which among other things called her a Paki.
3. The claimant lodged a grievance about bullying by Ms Begum which went through procedure, while the respondent investigated the a disciplinary issue

(which now included a link to a YouTube video he sent to his line manager on 1st May 2023). On 13th September 2023 the claimant was dismissed. On 25th September 2023 he was sent a written outcome to the grievance.

The Tribunal Claims

4. On 15th September 2023 he approached ACAS for early conciliation and a few days later obtained a certificate.
5. On 18<sup>th</sup> October 2023 he presented a claim to the employment tribunal, case number 2215676/ 23. The sole respondent to this claim is his employer, LNER. He complained of discrimination because of disability and sex, and sought notice pay, holiday pay and arrears of pay. It is accompanied by a separate particulars of claim document which narrates the history of events from January 2023n in some detail but does not mention the dismissal, although it refers to notice pay on holiday pay.
6. On 26th December 2023 he presented a second claim, this claim, case number 2219219/23, naming two respondents, his employer, LNER, and Ms Slater, the LNER employee appointed to investigate his grievance. This identifies claims for unfair dismissal, sex discrimination and “public interest disclosure as per public interest disclosure Act 1998”. On this claim he formally identified a representative, Jennifer al-Janabi, a solicitor.
7. The issues in the 1st claim were initially discussed at a case management hearing before employment judge Hodgson, and a list of issues in that claim was settled by Employment Judge Bunting at a further hearing on 14 May 2024.
8. The issues in the second claim were settled and listed by Employment Judge Jack at a case management hearing on the 12th of April 2024.
9. The protected disclosures were identified as the complaints about Ms Begum and the disabled passenger, made on 25th February, 2023, 28 June 2023, 7th August 2023 and 9th of August 2023.
10. The detriments said to have been caused by the those disclosures comprised two general allegations against the first respondent and then three specific ones against Ms Slater. As listed, 6.1.3 is that Ms Slater said she would investigate his complaints, but failed to do so, 6. 1.4 is that she failed to provide the outcome of the stage two meeting within seven days, and 6.1.5 is that she asserted that no bullying had taken place and no details had been provided. This decision was made known to the claimant on 25th September 2023, and so that is the operative date when considering whether claims against her have been brought in time. I add that insofar as the first two allegations of detriment on her part are failures to act, a tribunal would have to decide when he should have appreciated there was delay, but that date cannot be later than the 25th of September 2023, when it was clear that she had acted (albeit with delay).
11. As for the rest of the claims on this claim form, there was an “ordinary” unfair dismissal claim against the first respondent, and the claim of public interest detriment identified at 6.1.1 and 6.1.2, and a claim against the first respondent

for sex discrimination, comparing how his complaints have been treated compared to how Ms Begum's complaints were treated. I was told today that the unfair dismissal claim is in fact an automatically unfair dismissal claim related to the making of public interest disclosures.

**Matters for this Hearing**

12. As listed by Judge Jack, this hearing was held to decide:

(1) whether the tribunal had jurisdiction to hear the detriment claims against the 2nd respondent, and

(2) whether the two claims should be heard together, as the respondent asks, and the claimant opposes. The first claim is listed for an eight day hearing starting 16 October 2024.

13. I was asked not to determine any time limit issue against the first respondent at this hearing.

**Conduct of the hearing**

14. The claimant had explained in earlier hearings and in writing his health difficulty relating to earlier pancreatic surgery, such that he needs to take time to eat during the day. He had also explained that he could not stand up for long. This was a remote hearing, so standing was not a problem. He was able to sit throughout (as he would have been at an in person hearing). At the start of the hearing I discussed with the claimant what breaks he would need today and when. He explained that due to lack of sensation of appetite he might not know until 5 or 10 minutes before that he would need a break to eat something, but he did not expect any break to take more than 10 minutes. It was agreed that we would take breaks when he asked for them, and we did. He also said that he could not manage a whole day's hearing. He must stop by at 1:30 pm, even when I said we would normally stop for an hour around 1 pm.

15. Due to both administrative and technical difficulties, the hearing did not open until 11:00 am, and the effective hearing did not begin until 11:25 am. It concluded at 1:29 pm. During this time the claimant was initially able to access documents in the hearing bundle and from his own e-mail, but as the hearing went on he became unable to find or open documents. On these occasions the judge or counsel for respondent read out the documents, which were all brief, slowly. With the exception of the case management orders, these documents are all items which originated with the claimant.

16. I had a hearing bundle of 179 pages. The claimant asked for three items to be added. These were an e-mail from Ms Slater to him dated 2nd August 2023 and another giving him the outcome on the 15th of September 2023. The claimant could not find them and Ms Slater emailed them to the tribunal clerk. The claimant also wished to rely on his occupational health report which was not available to the respondent, and emailed that to the tribunal too.

17. The claimant had been asked to set out his reasons why it was not reasonably practicable to present the claim in time and had done so in an email of the 14th June 2024, attaching 4 items of evidence. These were in the hearing bundle

and were treated as his witness statement for this hearing. The respondent's solicitor questioned him about this evidence.

### **Jurisdiction to hear claim against the second respondent**

#### **Relevant Law**

18. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

19. Section 48 of the Act provides that a worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B. Section 48(3) provides:

an employment tribunal shall not consider their complaint under this section unless it is presented a before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or, where that act or failure is part of a series or similar acts or failures, the last of them, or be within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

20. Section 48 (4A) states that time is extended for early conciliation, referring to section 207B.

21. The date of Ms Slater's last detrimental act is 25th September 2023. "Before the end of a period of three months beginning with the date of the act" means it should have been presented by 24th December 2023. However, it was not presented until 26th December 2023, when the claimant filed online.

22. The claimant approached ACAS for early conciliation on the 17th November 2023. As he said that conciliation would not be effective, so a certificate was issued the same day. As a result, time was not extended by the early conciliation process.

23. The test of what is "not reasonably practicable" is a tough one, less accommodating to claimants than the "just and equitable" test applied in cases brought under the Equality Act 2010. What is reasonably practicable is not a matter of law - "practical common sense is the keynote" - **Walls Meat Company Limited v Khan (1979) ICR 52**. The burden of showing that it was not reasonably practicable is on the claimant - **Palmer v Southend Borough Council 1984 ICR 372**. Reasonably practicable does not being reasonable, but something like 'reasonably feasible', or 'reasonable to expect that which was possible to have been done'. It means looking at what physical or mental factors prevented the claimant from bringing his claim in time. Not knowing about the time limit is not enough by itself, the ignorance must be "reasonable", meaning the tribunal must check what access the claimant had to help and advice - **Lowri-Beck Services Limited v Brophy 2019 EWCA Civ 2490**. The relevance of stress and illness is considered in **Asda Stores Limited v Kauser 8001 EAT 0165/07**. The law is extensively reviewed in **Cygnnet Behavioural Health Limited v Britton 2022 IRLR 906**.

24. As the claimant alluded to the tribunal's ability to extend time, as provided in the 2013 Rules of Procedure, I add that this power applies to time limits in those rules or set by employment judges in orders they make under those rules. The procedure rules cannot modify what was provided in the statute. This is made clear in the Employment Appeal Tribunal decision **Miad v Access Security Services UKEAT 02904/17**. That decision also deals with whether a bank holiday or weekend interrupts the three months. The dispute in that case was whether a claim form sent by post had been received over the weekend (when it would have been in time), or only when date stamped by the tribunal on the 1st working day. It was held that the relevant date is when it is actually delivered, not when employment tribunal staff read it. That practical difficulty is of course now avoided by claims being presented online. The software date stamps the claim when submitted. It does not support a contention that a time limit is interrupted by non-working days.

### **Factual Findings**

25. The claimant sought legal advice after his suspension in April 2023, as can be seen by a long letter written to the first respondent by his solicitor Jennifer al-Jabani on 12th May 2023. The claimant did not name her as his representative on the 1st claim form, but he did name her on the second claim form. His evidence today was that at the time of filling it in in December 2023 he was not sure if she would be representing him or not. He did not elaborate. He volunteered to send the e-mail chains with her to the tribunal but it was suggested to him by the tribunal that these documents were privileged and if he disclosed some he could be required to disclose all of them, which he might not wish to do.
26. Whatever his difficulties with accessing documents today, it is clear from his written communications with the and with the tribunal that he is literate and articulate. He volunteered that he is a graduate of Goldsmiths College and studying for a social science degree.
27. He said he had applied for both early conciliation certificates online, and that he had presented his employment tribunal claims on ET1 online.
28. The claimant of course has difficulty with digestion following pancreatic surgery but he did not suggest that these difficulties are responsible for the delay in presenting his claim. Instead he relies on stress, depression and an alcohol problem. He says he was also affected at the time by his application for the right to buy his flat being turned down.
29. There is a letter from a mental health counselling provider, Natsiyat, dated 13th of June 2024. This states that the claimant had started therapy in August 2023 which was coming to an end 13th June 2024. Today the claimant said that his attendance at therapy services had not been concluded but he gave no other detail. The letter does not otherwise comment on how he was able to function during therapy. It will have started while he was still suspended and continued through the dismissal. There is a letter dated 8 February 2024 from Emma Mcfeely, alcohol team leader at Change Grow Live, a recovery treatment provider in the London Borough of Camden. She states that the claimant

initiated treatment with them 27th November 2023 for support around his alcohol use. He had attended a medical review with the clinical team, 1 :1 key worker sessions, and was currently engaging in a foundations of change group programme twice a week for 1 1/2 hours until the 16th of February, and then would move to a foundations of growth programme once a week for 1 1/2 hours until 18th of March 2024. The claimant confirmed he had attended group sessions but disputed that there had been any 1:1 session. There was otherwise no comment on his functioning or level of alcohol consumption, but drinking must have been a problem for him to have started treatment in November, and may of course have been a problem before then.

30. The claimant described being stressed by being suspended, and then was dismissed and became depressed. He referred to an occupational health report, which is dated 9th June 2023. The report says he was unable to attend meetings (the disciplinary and grievance process) because of poor concentration.
31. He also referred the tribunal to his GP letter of the 5th of June 2024. Doctor Scott says that she has been looking after the claimant for several years for a number of medical issues, including pancreatic surgery for a neuroendocrine tumour, and musculo-skeletal problems. Further medical issues in this list, occupying about a line of the page, have been redacted. There is no reference to mental health. She records that he is seen about once a month, had made good progress in recent months but needed further support and monitoring. This may be a reference to mental health. Physical difficulties meant that she supported his request to have hearings on separate days because of challenges focusing for long periods and his unique nutritional requirements.
32. The claimant was also under review at the maxillofacial clinic in this period. In May 2023 he had attended Accident and Emergency at the Royal Free Hospital following an assault. He was discharged, then followed up at another hospital. The records from the autumn of 2023 so that he had begun to suffer increasing pain (23rd October 2023). He was reassured that although there was a hairline fracture still, it was not something he should worry about, and not something which would get worse. He was prescribed Diclofenac for the pain.
33. Summarising the picture from this evidence, and in particular the claimant's ability to function in the three months from the 25th September 2023 until 26th December 2023, he had some impaired function from depression, he was engaging in problem drinking, and he was troubled by the hairline fracture from the assault.
34. A letter from Camden Council about the right to buy shows that is not quite right that he was depressed by a refusal of his application. The letter is dated 5th January 2024, which is after he had presented his claim. It said the offer made on 19th May 2023 was being withdrawn because he had not responded within 16 weeks. Although the claimant did not say so, I could speculate that he did not reply to the council because he had lost his job and did not know if he had the income to pay a mortgage. I do so because in other correspondence he represented that he was turned down for the right to buy because he no longer had a job.

35. The claimant was asked why he was able to put in a claim on 26th December, but not two days earlier. He replied that 26th of December is a public holiday. It is not easy to see the relevance, as the last day was 24th December, not a public holiday. The claimant suggests that being a public holiday means it should not be counted in his three months.
36. He then said that over the preceding two weeks he had been preoccupied with preparing for the Christmas holiday, although in the event he was not able to participate because he spent Christmas day and Boxing day preparing his claim.

### **Discussion and Conclusion**

37. There is no doubt that the claimant was in a distressed state following suspension, and extending after his dismissal. The nature of mental distress is not made clear by the documents, but he was having regular counselling and he was engaged in an alcohol recovery programme. He experienced pain from the fracture which was treated with painkillers.
38. He was however able, during this time, while receiving therapy and while stressed, to go to ACAS twice for early conciliation, and to complete and present not one but two claim forms. The second claim form was only two days late and it is not explained how he was too unwell to make it not reasonably practicable to present it by the 24th December, but recovered sufficiently to be able to present it by the 26th December.
39. As for awareness of the time limits, it is clear he had had access to legal advice at an earlier stage if not more recently, and he was able to navigate these processes with regard to his first claim. If he genuinely believed that his time did not run out until 26th December 2023, that belief was not reasonable. Whatever he had heard from the solicitor about this there is a great deal of online advice on the ACAS website and the employment tribunals website and the presidential guidance through Gov.uk.
40. I conclude that the claimant has not shown that it was not reasonably practicable to present the claim before the end of the three months from 25th September 2023. The tribunal does not have jurisdiction to hear his claim against the second respondent. Whether the tribunal has jurisdiction to hear claims against the first respondent is for the full tribunal to decide. It may be a relevant difference that he had already brought proceedings against the first respondent.

### **Case Management: Should the two claims be heard together?**

41. The claimant argues that hearing the two cases together will significantly increase the complexity and the length of the hearing. He is firmly opposed to this. More than once today when being questioned about his ability to present a claim in the autumn of 2023 he would not look at the earlier ACAS certificate or the earlier claim form, on the basis that this hearing was not engaged with that claim.

42. The respondent argues that there is significant overlap of the relevant evidence. The complaints about the grievance process begin (as the claimant's documents show) on 2nd August 2023, so the complaint is not limited to dates following his dismissal. Further, in my experience, much of the evidence in claims about grievance handling is contained in the documents, and by some additional evidence from the investigator on why decisions were or were not made. I anticipate that additional evidence on the grievance procedure is unlikely to occupy the tribunal more than one day and probably much less than that.
43. Because of the overlap in time and subject matter, it would be undesirable to have a separate panel making decisions in each claim. If they are to be heard separately it would be better that the same panel hear them. If it is a three person panel, that raises significant practical difficulties in reassembling to hear the second claim. The resulting delay can last months.
44. As the extra time required to hear the second claim at the same time as the first claim is small, I do not see how it impacts significantly on the claimant's difficulties. There are already restrictions on hearing time imposed by his need to eat. I can see that the GP suggested having hearings on alternate days, but she does not explain how the nutrition limitation, or musculoskeletal difficulty, require that, and the rest of the letter suggests that she is discussing conditions which have been redacted from the letter. Adjustments to the length of the hearing is a matter which could be considered further by a judge if there were clearer medical evidence as to how the claimant's medical conditions impact on his ability to participate in a hearing. It would be helpful if any further medical evidence could consider when and so how long a break might be required during a hearing day, and why a break of an entire day might be necessary, which would cut hearings to three days a week rather than five. If the claimant is also restricted to participating for only half of each day (as he protested today), this will be a very prolonged and expensive final hearing.
45. I understand that the parties have not considered with the judge whether the final hearing should be online or in person. I reassured the claimant that an online hearing is held in public as much as a hearing in the building (there was a public observer today).
46. In view of the claimant's technical difficulties accessing documents I have asked the respondent's solicitor to send him a hard copy hearing bundle and hard copies of the witness statements for use in the final hearing, whether it is held remotely or at Victory House.
47. As a matter of case management, I order that the two claims are heard together at the final hearing in October by the same panel. This is a decision which better accords with the overriding objective to deal with cases justly having particular regard to avoiding delay and saving expense. As stated, adjustments can be made to the hearing process to accommodate the claimant, but it would be helpful if the tribunal were provided with more detailed evidence of how the various medical conditions affect his ability to participate in a hearing.



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Employment Judge Goodman

Date 12 July 2024

JUDGMENT SENT TO THE PARTIES ON

18 July 2024

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FOR THE TRIBUNAL OFFICE

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