Case No: 2302233/2020

EMPLOYMENT TRIBUNALS

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL BY CVP

BETWEEN

Ms Rowena Owen	**and**	**Network Rail Infrastructure Ltd**
Claimant		**Respondent**

Hearing date:	**27 February 2024**
Before:	**Employment Judge Martin** **Ms S Dengate**
Claimant's representative:	**Mr R Kohanzed - Counsel**
Respondent's representative:	**Ms I Ferber KC – Counsel**

RESERVED JUDGMENT ON REMITTED HEARING

The unanimous judgment of the Tribunal is that it is just and equitable to extend time for presentation of the Claimant's claim.

RESERVED REASONS

1. This hearing was listed following the remission order made by the Employment Appeal Tribunal ("EAT") of 1 August 2023. A hearing had been listed for 23 November 2023, however, this was postponed both because the Employment Judge was unwell and because direction was needed from the EAT about whether the remitted hearing should be allowed to have further witness evidence. This was raised because the Claimant provided two further witness statements from the Claimant and Mr Duarte, who was her union representative. The EAT said this was a matter for the Tribunal to determine.

2. The Respondent having examined the two witness statements did not have any objection to them being considered by the Tribunal. The Tribunal

decided that it should allow the additional witness evidence. There was no request to cross examine the witnesses and therefore their statements were taken as read.

3. Both parties provided written submissions and there was a small bundle of documents comprising 67 pages.

4. The Tribunal comprised Employment Judge Martin and Ms Dengate only. Ms Omer, who was on the original panel, was unavoidably unable to attend. The parties consented in writing to Employment Judge Martin and Ms Dengate hearing the hearing today.

5. The terms of the remission order were *"to consider afresh whether to grant a just and equitable extension of time in relation to complaints 1-25"*. The Tribunal found complaints 1 – 25 to be out of time and that it was not just and equitable to extend time.

6. The errors the EAT identified were:

35. Ground 2 raises a different challenge, being that the tribunal erred in concluding that, as a matter of law, in the absence of any evidence of the reason for the delay, it was bound to refuse to extend time. There was no dispute between Mr Holloway and Mr Kohanzad before us, that this is not the law, and neither counsel suggested to the tribunal that it was. Mr Holloway said that he regarded the point as clear law in light of the discussion in cases such as Morgan and Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23. In his written submission to the tribunal he wrote: "Although not a precursor to an extension of time, whether or not there is a good reason for a delay in bringing proceedings will be of particular relevance in determining whether to grant such an extension (as noted in Adedeji)."

36. However, there is no statement of the law to that effect in the tribunal's decision itself. Nor can we be confident that the tribunal would have regarded the point as familiar and settled law. In fact, for some years there were conflicting decisions of the EAT on the point. As recently as Concentrix CVG Intelligent Contact Limited v Obi [2022] EAT 149; [2023] ICR 1, it was contested again before the EAT, on the footing that neither <u>Morgan</u> not <u>Adedeji</u> had definitively settled the point. The EAT concluded in that case that there is no rule of law that, in the absence of any explanation in the evidence for the delay in presenting the claim, the tribunal is bound to refuse an extension (as opposed to treating this as a relevant consideration). But the decision in <u>Obi</u> was only given on 4 May 2022, in point of time after the tribunal heard submissions in the present case (and was not published until after the present tribunal gave its reserved decision).

37. The fact that the tribunal did not address this particular point of law in its decision would not by itself necessarily mean that it got it wrong. But it began [74] by saying: "The Tribunal has reluctantly concluded that the claimant has provided no evidence on which it can exercise its discretion to extend time." That reads like it was saying: "our hands are tied." At the end of that paragraph, it concluded: "Without explanation from the Claimant, it is not possible for the Tribunal to extend time." That again suggest that the tribunal wanted to convey that it would like to be able to give the claimant a remedy for the conduct that she was factually subjected to during her time at Wimbledon, most, if not all of which, it was likely, because of

its nature, to find was unlawful; but that, because of the absence of that explanation, it was legally not possible for it do so.

38. Ground 2 must therefore be upheld.

42. If extending time will in fact place a respondent at a disadvantage, it is not necessary also to show that the delay on the part of the claimant caused it. The issue here, however, was whether the respondent was in fact put at a disadvantage at all. The tribunal at [74] stated first that it accepted that the respondent chose not to call the witnesses and that was for the reasons earlier set out – plainly a refence to the letter mentioned at [3]. But it also referred further on to the inevitability that the passage of time would have affected the memories of the Wimbledon witnesses. It is not clear what it considered to be the impact of each of these things, or whether both made a contribution.

43. Given the nature of the issues, and the passage of time, we do not think that the tribunal erred in considering the fading of memories to be at least a potential consideration. But we conclude that its reasoning on this aspect is unsatisfactory and unclear. At the very least the tribunal needed to explain more clearly whether it concluded that the fact that the delay on the part of the claimant meant that the respondent had not been able to gather evidence sooner, may also have played, or did play, a part in the respondent's decision not to call the witnesses, or some of them; or otherwise why, or how, it also took this aspect into account. For these reasons we also uphold this part of ground 3.

7. The judgment set out the following factual findings which are relevant to this remission.

"69. Throughout the matters complained of the Claimant was a member of the RMT. She sought advice from the RMT from an early stage. She then sought advice from another union. The Claimant had union representation at the grievance hearing. The Claimant did not provide any information about why she delayed bringing her claim to the Tribunal. Waiting for an internal process to complete is not sufficient. There was no evidence adduced either by oral testimony or documentary evidence that the Claimant was unwell such that she was prevented from bringing a claim or any other reason given. It is not known what steps if any the Claimant took to obtain advice other than via her union".

74. The Tribunal has reluctantly concluded that the Claimant has provided no evidence on which it can exercise its discretion to extend time. It accepts the submissions made by the Respondent that the Claimant must give some explanation. It is not sufficient for her representative to give reasons in submissions, this is not evidence. The Tribunal accepts that the Respondent chose not to call witnesses and the reasons for this are set out earlier in this judgment. However, this does not detract from the fact that the Claimant has not provided any explanation as to why she did not present her claim earlier. It is inevitable that the length of time between the allegations and the presentation of the claim will prejudice witnesses. For the Claimant, the matters were significant and memorable. For the other witnesses it is likely that the matters were not of significance given it appears that this type of behaviour had been common for some time. Without explanation from the Claimant, it is not possible for the Tribunal to extend time."

The witness evidence for this hearing

8. The Tribunal considered the witness evidence from the full merits hearing together with the additional witness statements prepared for this hearing.

The Claimant's witness statement

9. The Claimant's statement for this hearing described how she was at the relevant times. She described herself as being very unwell and being signed of long term for anxiety and depression. She described being completely overwhelmed by what had happened. Raising a grievance was a big step for her to take and she described the support she received from MR Ellix, her manager who believed what she had said and were hopeful that the grievance process would support her grievances.

10. The Claimant describes putting her faith and effort into the grievance process and that her union and management told her it was the correct course of action. In this time, she was prescribed medication and say a psychotherapist every two weeks. She describes feeling insecure in her job and the events impacted not just her but her daughter as well.

11. The Claimant describes hanging on to every communications and having to react quickly to correspondence after periods of silence. This took over her life leading her to describe herself as in survival mode.

12. She was not told about going to a tribunal by any of her three union representatives or management and was told that following the grievance process is what she needed to do. Bringing a claim did not enter her mind during the grievance process. It was only when she received the appeal outcome on 17 February 2020 that she was advised to bring a claim.

Mr Duarte's witness statement

13. Mr Duarte confirmed that he was the Claimant's union representative until he left the Respondent but that he kept in touch with the Claimant. He confirmed that he told the Claimant towards the end of the process that if she lost the appeal she should bring a claim to the Tribunal and that he told her she had three months from the appeal concluding to do so. He confirmed that this was the firs time he had discussed the possibility of bring a claim with the Claimant and as far as he was concerned no other representative had discussed the tribunal with the Claimant either.

The Claimant's submissions

14. The Claimant submitted that the Tribunal has a wide discretion about whether to extend time. It was submitted that the Claimant was very unwell and had 'tunnel vision' (Mr Kohanzed's phraseology) wanting to resolve the matter internally and this can be a good reason for not bringing a claim in time. The Tribunal was referred to an extract from Harvey *"…it is likely that any ill health or disability which is held to have caused or contributed to the reason for the claimant missing the primary time limit will be a relevant factor to weigh in the balance when considering whether to exercise the discretion to extend time. In*

Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 32 the Court of Appeal upheld an extension of time granted in a disability discrimination case where the claimant had given confused and misleading instructions to her solicitors with regard to the date when she decided not to return to work (which triggered the start date for the purpose of the DDA 1995 Sch 3 para 3) and the reason for this was her serious mental ill-health at the time."

15. The Claimant submitted that the evidence in the Claimant's witness statement about how she felt at the time, was not challenged. The Claimant was not told that she could bring a case to the Tribunal until the conclusion of the grievance process. This, it was submitted, should not go against the Claimant if her advisors were negligent. The Claimant's focus was on going through the internal grievance procedure which she considered should be sufficient to answer her grievance. The grievance process took a very long time to complete which was no fault of the Claimant.

16. It was submitted that the discrimination the Claimant endured had a profound effect on her mental health and anxiety levels which meant she was unable to focus on anything but the grievance procedure. It was submitted that using the grievance procedure was a logical and rational approach.

17. The Claimant submitted that the Respondent would not be prejudiced. The Respondent had not called witnesses for reasons of operational convenience and safety critical reasons rather than because the witnesses were not able to recall the matters in dispute. Conversely it was submitted that the prejudice to the Claimant is immense as if time were not extended she would be deprived of any remedy for the discriminatory treatment she was subjected to. It was submitted that the Tribunal's findings speak for themselves in that it upheld many factual matters, which the Respondent concedes are likely to amount to a breach of the Equality Act 2010.

18. It was submitted that the Claimant was acting reasonably in pursuing the grievance process as she did and she was actively engaging with it. She presented her claim quickly once the process had finished and she had been advised she could bring a claim.

19. The Claimant submitted that it was not necessary to categorise the reasons give by the Claimant for the delay into good or bad reasons, it is sufficient to consider if they were reasonable.

<u>The Respondent's submissions</u>

20. The Respondent submitted that the two additional statements from the Claimant and Mr Duarte do not change any of the factual findings made by the Tribunal in particular relating to her trade union membership and representation, wanting to wait for the internal process to complete, and that she does not assert she was too unwell to have presented her claim earlier[1].

[1] See paragraph 7

21. The Respondent submits that the assertion in her new statement that dealing with the grievance was so time-consuming and emotionally draining that she "*could not and did not think past that*" does not add much. The submissions say: *"The reason put forward for this is that there were very lengthy delays during the course of the grievance and appeal where nothing happened; there was nothing to take up the Claimant's time. The Claimant cannot both rely on a complete mental incapability to act (although her evidence does not go that far); while at the same time relying on a conscious decision to pursue a grievance and an appeal: in reality, it is clear from reading the whole of her New Statement, and that of Mr Duarte, that the reason for the delay from November 2017 until March 2020 was her choice to await the outcome of the grievance process."*

22. The Respondent does not say that it chose not to call witnesses because of fading memories but does submit that the length of the delay means that it is not wrong for the Tribunal to consider that memories would have faded in relation to the events in complaints 1 – 25.

23. The Respondent suggested that it would be prejudiced by the delay in bringing proceedings as the Tribunal has not made findings of discrimination (although factual findings have been made) and that further evidence would be adduced.

24. It was submitted that there was no good reason for the delay and that there was an absence of evidence to suggest ignorance of time limits or employment rights. This is no part of the Claimant evidence, and she does not suggest she did not know of her rights. It was said that if she did not know of these rights she would have said so, and that the inference to be drawn was that she was aware of her rights.

25. It was submitted that the Claimant did not say she was so unwell it prevented her from bringing her claim in time, and that this was a background matter and not something that affected her decision.

26. In relation to prejudice, whilst the Respondent did not submit that the memories of any potential witnesses was a relevant factor give the reason why they were not called, the Respondent did submit that the Claimant's memory was affected by the delay in that she could not recall precise dates on which many events happened.

27. There was no medical evidence about why she says she was unable to bring a claim earlier, due to anxiety and depression.

28. It was submitted that there was an inconsistency of logic in the Claimant's arguments. It was not logical to say there was conscious decision to pursue the grievance and appeal and an incapability to proceed because of mental illness.

29. If there was a remedy, then it was submitted, there was prejudice due to the delays as it would be very difficult to split off matters which related to the issues in complaints 1 – 25 and the grievance process which was found not to have been discriminatory.

The Tribunal's conclusions

30. In coming to its conclusions, the Tribunal considered the following case law which was referred to in the parties submissions:

a. Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194

b. Jones v Secretary of State for Health & Social Care [2024] EAT 2

c. Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23

d. Robinson v Post Office [2000] IRLR 804

e. Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116

f. Wells Cathedral School Ltd v Souter UKEAT/0836/20

g. Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24

h. Robinson v Bowskill UKEAT/0313/12

31. The Tribunal has considered various factors in considering whether to extend time on the basis that it is just and equitable to do so. It has put aside the reasoning in the previous judgment and has looked at matters afresh. These factors include the length of the delay, the reasons for the delay, the advice given to the Claimant, the effect of the delay, the merits and importantly, the balance of prejudice to the parties. The overriding consideration was whether a fair trial was possible given the delay in presenting the claim.

32. By any standards the length of the delay is substantial. The matters to which this hearing relates, occurred between 2015 and 2017. The Claimant went on sick leave on 26 May 2017. Her claim was presented on 4 June 2020. It is therefore about three years late. This is not determinative but is a factor to be considered.

33. The Tribunal understands that the events leading to this claim were very difficult for the Claimant and she went on sick leave in May 2017 with depression and anxiety. She says that she was advised and wanted to exhaust the internal processes first. She also says that it was not until after her appeal was refused that she was told that she could bring a claim. She says she then acted quickly to instruct a solicitor.

34. The Tribunal has used its lived and industrial experience to consider the Claimant's state of health and how this may have impacted her decision to concentrate on the grievance process. She says she did not even think about going to a tribunal at that time. The Tribunal accepts what she says about how the events leading to this claim affected her.

35. The Respondent says that she was able to engage with the grievance process and therefore could have engaged in the tribunal process earlier. The Tribunal does not agree, especially given the advice that she had been given. The Tribunal accepts her evidence that she was not able to focus on anything else other than the grievance. The Respondent's argument

that there long periods of time where nothing happened in that process, and that therefore she had nothing to occupy herself such as would have prevented her form bring a claim is rejected on the basis that the Tribunal accepts that the Claimant, as she says, was focussed on the grievance and completing that internal process. Whilst there may have been times that there was no active involvement in the process, this does not mean that the Claimant's mind was not fully occupied in the process. She was waiting for the *"next step in the process, the next meeting or next correspondence I could not think past that*".

36. The Claimant was represented by her union, the RMT from an early stage however, on her evidence which was not challenged, the union advice was not to go to Tribunal before the grievance was exhausted. This was clearly wrong. Mr Duarte says that he thought the time limit would run from the conclusion of the process. The Tribunal finds that the Claimant took this in good faith and followed the union advice. Given this advice the Tribunal finds that it was reasonable for her to continue with the grievance process. She was clearly engaged in the process the delays as set out in the chronology fall squarely at the door of the Respondent. For example, in January 2018 she attended a grievance meeting, and it was not until 19 June 2018 that she had an outcome meeting. The grievance outcome was not provided in writing until 3 December 2018. The Claimant appealed on 18 February 2019 and the appeal outcome was not given until 10 February 2020. The Tribunal accepts that this length of time would have put additional pressures on the Claimant and exacerbated how she felt.

37. The Claimant, in her additional witness statement says that she was too ill to concentrate on anything more than the grievance. This is covered to some degree in her original witness statement as set out in her submissions. She says she was on medication and received counselling. There is no medical evidence before the Tribunal which describes how she was at that time the only information is her evidence and evidence that she was on long term sick leave from May 2017. The Respondent points to this and says that the Claimant's ill health was a background to her decision to continue with the grievance process first. The Tribunal accepts that it was inevitable that she would be anxious about matters. It has no reason to disbelieve the Clamant when she says she was unwell. Whilst the Respondent says that there was no medical evidence to support this, she was not directly challenged on it. The Tribunal has both lived and industrial experience of mental health issues and can see how the Claimant would be impacted not only by what happened but also by the significant delays in completing the grievance process.

38. As the Tribunal noted in its judgment it is inevitable that a delay of around three years would impact the Respondent witnesses ability to recollect events with clarity. The Tribunal is aware of the reasons why the Respondent chose not to call witnesses in relation to complaints 1 – 25, and that these reasons were not to do with difficulties in remembering events, but for operational reasons. It follows therefore, that even had the Claimant presented her claim within the time limit, or at least earlier than she did, that

the same operational reasons would have existed, and the Respondent would not have called any witnesses in relation to these events. This was not disputed by the Respondent.

39. The Respondent did submit that there would be prejudice as further evidence was needed to be given for liability and that the remedy would be difficult to assess given that the remedy was only for complaints 1 – 25 and not for the grievance process. It was submitted it would be difficult to disentangle these two things. The Tribunal does not agree. First, there will be no additional evidence on liability. The findings of fact are set out in the judgment. Second, even if the remedy is complicated, the Tribunal is used to dealing with such matters and there is contemporaneous documentation available for example her grievance which shows how she was feeling.

40. Given the extent of the delay in presenting the claim, there is inevitably prejudice to each side. However, given the Respondent's stance in deciding not to call witnesses for operational reasons, the Tribunal finds that the prejudice of not extending time would fall heavily on the Claimant.

41. The prejudice to the Claimant is obvious. If time were not extended she would not receive a remedy. The Tribunal has made clear findings of fact. Considering this again, the Tribunal is of the view that whilst the length of the delay is substantial, it did not have much of a prejudicial effect on the Respondent. Balancing it up, the Tribunal finds the balance of prejudice is in favour of the Claimant.

42. Turning to the merits of the claim, this is not a preliminary hearing it was a final hearing at which the Respondent was given the opportunity to present evidence. The Tribunal has made its factual findings on the evidence before it.

43. Not one factor is determinative. The Tribunal considers that all factors are relevant and they all played a part in it's decision that it is just and equitable to extend time for presentation of the claim. The Tribunal will now list a one-day hearing to complete the liability stage. The parties will be notified in due course of the date.

Employment Judge Martin

Date: 28 February 2024

JUDGMENT SENT TO THE PARTIES ON
28th February 2024

FOR EMPLOYMENT TRIBUNALS