**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000095/2024 & 8000096/2024 Preliminary Hearing by Cloud Video Platform at Edinburgh on 2 August 2024**

**Employment Judge: M A Macleod**

| | |
|---|---|
| **Oluwafunto Dada** | **Claimant**<br>**In Person** |
| **The Scottish Ministers** | **Respondent**<br>**Represented by**<br>**Ms C McDairmant**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The Judgment of the Employment Tribunal is that the claimant's claims are dismissed for want of jurisdiction, being time-barred, and that the claimant's application to amend her claim is also refused.**

**REASONS**

1. The claimant presented a claim to the Employment Tribunal on 1 February 2024 in which she complained that she had been discriminated against on the grounds of race by the respondent (8000095/2024), and a second claim on 2 February 2024 making a similar complaint (8000096/2024).

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. The Tribunal issued an Order combining the two claims on 2 April 2024.

4. A Preliminary Hearing was listed to take place on 2 August 2024, following the Preliminary Hearing before Employment Judge Hosie, in order to determine (1) whether or not the Tribunal has jurisdiction to hear the claimant's case on the basis that it was presented outwith the statutory deadline and (2) whether or not the claimant's application to amend her claim should be granted.

5. The Hearing was conducted by Cloud Video Platform, which presented no difficulties to the Tribunal nor to the parties. The claimant appeared on her own behalf, and the respondent was represented by Ms McDairmant, solicitor.

6. A joint bundle of productions was presented to the Tribunal by the parties and relied upon by the parties in the course of the Hearing.

7. The claimant gave evidence on her own account, and parties presented submissions at the conclusion of the Hearing.

8. Based on the evidence led and information presented, the Tribunal was able to find the following facts admitted or proved.

**Findings in Fact**

9. The claimant commenced employment with the respondent as a Fiscal Officer, working in the Crown Office, in which role she required to assist in the preparation of documents for court hearings.

10. Her employment ended on 13 October 2023 when she resigned.

11. The claimant notified ACAS of her intention to raise proceedings before the Tribunal on 22 January 2024, and received the ACAS Early Conciliation Certificate by email on 26 January 2024 (1).

12. The claim should have been presented within 3 months of the final date of the claimant's employment, at the earliest date, namely by 12 January 2024. The claimant notified ACAS after that date, on 22 January 2024, and the Early Conciliation Certificate was not issued until 26 January 2024. Accordingly, the claimant does not receive the benefit of any extension through the Early Conciliation Scheme.

13. In her claim form, the claimant identified a number of incidents upon which she sought to rely in her claim of race discrimination:

    1. In May 2023, a colleague said to her in the corridor, when she was swinging her employee card, "There you go again, swinging around the office", a comment which baffled her and which she regarded as a very racist joke. When she confronted her colleague, she found herself the subject of criticism by her manager for having triggered her colleague's PTSD, and subsequently apologised (8000095/2024);

    2. In her first week of employment, in December 2022, she was speaking to another black colleague, Malia, when a member of staff asked her twice if she was speaking her own language. When she raised this with her line manager, she was told that that colleague was "just like that". She considered this to be a very racist comment and made her feel uncomfortable (8000096/2024);

    3. In February 2022, a Procurator Fiscal Depute asked one of the claimant's colleagues if her name was a slang word. Again, she found this to be extremely odd and baffling, and it made her feel uncomfortable (8000096/2024).

14. In her evidence before this Tribunal, the claimant identified a number of other incidents:

    4. During the course of March 2023, Andrew McMann spoke to her in a rude and condescending manner about the contents of the court bag, for which she was responsible, and walked away;

5. In March 2023, Jakki Taylor, in a discussion about immigration issues, asked the claimant if she had arrived in a dinghy, to which the claimant replied that she had grown up in Aberdeen. She said that she did not take this up with anyone but was baffled by the question as she had never told anyone that she had been an immigrant or refugee, and considered that she would not have been asked such a question had she not been black;

15. The claimant submitted a grievance to her employers on 29 June 2023. She said that the grievance related to race discrimination and unfair treatment at work. Investigations were carried out by a Kirsty Hutchison in August 2023, over the course of a number of days (2, 9, 12 and 16 August). She received the outcome of her grievance on 1 February 2024, upholding some but not all of her complaints. David Casey was the grievance manager who made the decision.

16. The claimant's evidence was that she was awaiting the outcome of the grievance process before presenting her claim; and also that she had been advised by her trade union representative, Steven Murray, in approximately August 2023, that she could not present a claim to the Employment Tribunal as she did not have 2 years' continuous service with the respondent. She had joined the trade union, the PCS Union, approximately one month after commencing employment with the respondent. She had raised with Mr Murray the question of bringing Tribunal proceedings, and maintained that he had discouraged her on the basis that she lacked the minimum qualifying service of 2 years.

17. The claimant did not speak to ACAS before 22 January 2024, when she notified them of her intention to raise proceedings.

18. The claimant said that she felt overwhelmed by the events which had take place at work, which caused her to feel very stressed. She consulted her GP on approximately 24 August 2023 due to feeling overwhelmed, which was causing her to pull her hair out. She was signed off work on 24 August

2023, and was absent until 3 October 2023. Her final day of employment with the respondent was 13 October 2023.

19. Her GP wrote a letter dated 24 May 2024 (246) which confirmed that she presented initially on 24 August 2023 due to stress and anxiety attributed to increasing tension in the workplace with a colleague. The claimant reported that racial jokes had been made against her in the past, and that she had raised a grievance..

20. The report went on to say that the claimant continued to struggle with stress and anxiety, and that at that date she was unable to attend a Tribunal hearing.

21. The claimant attended counselling sessions between 26 September 2023 and 11 January 2024. A letter from her counsellor, Alison Rowe, dated 17 May 2024 (245) confirmed that she had attended 6 online/video sessions, presenting with anxiety relating to her work.

22. She was not able to do much each day, though she was able to go to the gym from time to time to help take her mind off things.

23. The claimant said that she never knew that there was a time limit for presenting claims to the Employment Tribunal. She thought that a Tribunal claim was the last resort. She did not research matters because she understood that she was not able to make a claim, because of the advice which her Trade Union representative had given her.

**Submissions – Time Bar**

24. For the respondent, Ms McDairmant submitted that the claims made by the claimant are out of time, and should be dismissed for want of jurisdiction. The claimant, she said, does not set out the basis upon which the claims should be permitted to advance.

25. She set out the history of the matter, and pointed out that the claimant does not assert that there was a series of continuing acts in this case. There were unconnected events involving different people alleged to have taken place.

Even if there had been a series of continuing acts, the last such act pled took place in May 2023, and accordingly the claim was still presented well out of time.

26. Ms McDairmant noted that the claimant must persuade the Tribunal that it is just and equitable to exercise its discretion to allow the claim to proceed albeit lodged late. She referred the Tribunal to the well-known authorities on this point, and submitted that it would not be just and equitable to allow the claims to proceed. The relevant point to consider is not when the claimant received information from the subject access request she made but when she felt she was being discriminated against, starting in December 2022. The claim which is currently before the Tribunal is a direct discrimination claim, and is relatively simple to understand. She could have brought a claim within the relevant time limits.

27. In addition, the claimant had the benefit of expert advice through her membership of the PCS trade union.

28. There is no evidence, she argued, to account for the full period between the alleged acts of discrimination and the date of presentation of the claims. There is no evidence either from the GP or the counsellor which could be taken to show a link between the claimant's illness and any failure to present her claim in time.

29. Ms McDairmant argued that the claimant could have taken steps to find out the time limits applicable to a claim to the Tribunal, by searching the internet or by asking the advice of her legal colleagues within the Crown Office.

30. There is prejudice to the respondent if the claims are allowed to proceed late. The memories of those involved will inevitably fade in time.

31. She pointed out that the claimant's evidence was that her trade union representative had advised her that she could not make a claim to the Tribunal without 2 years' continuous service. Even if that were so, the remedy for such incorrect advice would lie against the trade union, not the respondent.

32. The claimant responded on her own behalf in relation to the time bar point. She argued that while the respondent asserted that she had every opportunity to raise a Tribunal claim, this was not the case. She said that in "civil matters", it is necessary to exhaust all the internal procedures before raising a claim. She had raised grievances to her employer as she was required to do, and so believed that she had taken every opportunity to raise this matter internally.

33. She said that it would not be appropriate to seek legal advice from criminal lawyers with whom she worked, about civil time bar issues. She did not consider the cost of a lawyer. She had sought the advice of the PCS trade union in order to obtain access to their lawyers.

34. With regard to the assertion by the respondent that she had not provided enough medical evidence to support her claim that it was due to stress and anxiety that she was unable to present the claim in time, she said that she did not believe that a GP would cover the stress and anxiety which she had been suffering while working with the respondent.

35. She said that people would be shocked to learn that the time limit for presenting claims to the Tribunal is 3 months, and that that should be taken into consideration.

36. The claimant maintained that the Tribunal has a very wide discretion, and that "I can make use of that discretion". All the events were linked by race from the start.

37. She reminded the Tribunal that the test of whether allowing the claim to proceed was just and equitable was one which related to both parties, and not just the respondent. She said that it would have been very odd for her to have brought a new claim every time a different event took place, which is why she waited until after her employment ended.

**The Relevant Law**

38. Section 123(1) of the Equality Act 2010 provides:

*"Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of –*

*(a) the period of 3 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."*

39. The case of **British Coal Corporation v Keeble [1997] IRLR 336** is authority for the proposition that the Tribunal should consider the prejudice which each party would suffer. Factors which the Tribunal require to consider are set out in that case, including the length and reason 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 had cooperated with any requests for information, the promptness with which the plaintiff had acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

40. **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA** makes clear that when an Employment Tribunal considers whether or not to exercise the "just and equitable" discretion open to it, *"…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 the discretion is the exception rather than the rule."*

41. **Times Newspapers Ltd v O'Regan 1977 IRLR 101, EAT** was a case in which the claimant knew of her rights and knew of the 3 month time limit when she was dismissed. However, a union official advised her incorrectly that the three months did not start to run while negotiations were taking place about her possible reinstatement. The EAT found that the claimant was not entitled to the benefit of the "escape clause" because the union official's fault was attributable to her and she could not claim that it had not been reasonably practicable to claim in time.

42. A similar decision was issued by the EAT in **Alliance & Leicester plc v Kidd EAT 0078/07**, in which the union official's erroneous advice that the claimant had to await the outcome of an internal appeal hearing before presenting a claim to the Tribunal was found to have been insufficient to excuse the late presentation of the claim.

43. Where a claimant relies on the advice of a trade union representative, and the claim is thereby time-barred, the claimant's remedy lies in a claim of negligence against the trade union (**Friend v Institution of Professional Managers and Specialists 1999 IRLR 173**).

**Discussion and Decision**

44. It is not disputed by the claimant that her claim was presented outwith the 3 month time limit, even if the acts complained of amounted to a series of continuing acts.

45. I should say that in this section I am dealing with the claim as it is currently pled, based on the terms of the ET1 only. The application to amend made by the claimant is a separate matter, though it is of note that the new allegations relate to incidents taking place on or around 1 March 2023.

46. It is appropriate, first, to consider the length and reason for the delay in presenting the claim.

47. The claimant commenced early conciliation through ACAS on 22 January 2024, ending on 26 January 2024.

48. Ms McDairmant submitted that any acts before 23 October 2023 are out of time.

49. The latest act complained of in the two claims forms submitted by the claimant in this case took place at some point in May 2023. As a result, if the incident took place on 31 May 2023, the latest point it might have, the claim should have been presented (or ACAS Early Conciliation commenced) by no later than 30 August 2023.

50. The delay in presenting these claims, therefore, amounts to just over 5 months, since the claims were actually presented to the Tribunal on 1 and 2 February 2024.

51. That is, in my judgment, a significant delay. It is necessary to examine the reasons proffered by the claimant for the delay.

52. It appears to me that the claimant relies upon three different reasons to explain the delay.

53. Firstly, the claimant suggests that she was advised by her trade union representative, at some point in August 2023, that she had no right to raise Employment Tribunal proceedings on the basis that she lacked the necessary minimum two years' continuous service with the respondent. Such a requirement only applies, of course, to unfair dismissal proceedings, and not to discrimination complaints as the claimant seeks to advance here.

54. I heard no evidence from the (unnamed) trade union representative, and accordingly it is not clear what advice he or she gave to the claimant, and when. It is perfectly possible that the trade union representative did tell the claimant that she had no right to raise proceedings before the Tribunal in relation to unfair dismissal. It may be dependent on the question which the representative was asked.

55. Even if the representative gave advice to the claimant that she could not make such a claim, it only deterred her for a period of time. She did eventually overcome this obstacle and presented her claim to the Tribunal. She appears to have had the support of the trade union thereafter, but does not say that she was told again that she could not make a discrimination claim.

56. There is sufficient doubt, in my judgment, as to precisely what the claimant was advised by her trade union that it is entirely unclear that it would justify her regarding this as a reason for not raising proceedings at an earlier stage.

57. Even if she were given that advice, in any event, it is plain from the authorities that her remedy for such incorrect advice would lie against the trade union, and not against the respondent.

58. Secondly, the claimant says that she was awaiting the outcome of the grievance procedure, which did not conclude until 1 February 2024.

59. Again, the claimant's position is difficult to discern here. By that date, she had already contacted ACAS and concluded the Early Conciliation process. On that basis, she had no reason not to proceed with her Tribunal claim.

60. She did not say that she had received advice from the trade union to the effect that she had to await the outcome of the internal process before presenting her claim. She regarded it as an obvious matter, which she took from her knowledge of civil matters.

61. The claimant worked as a Fiscal Officer, and was thus engaged in the process of preparing criminal cases for trial, supporting Procurators Fiscal. It is not clear where she derived the knowledge of civil matters upon which she appears to rely; but in any event, her understanding was plainly wrong, since there is no basis for her assertion that she could proceed with the claim only when the internal process is concluded. Such an internal process does not alter the deadline for presenting a claim to the Tribunal, and there is not legal basis for her to have understood this.

62. Thirdly, the claimant relies upon her illness, of anxiety, as a reason for not having presented her claim in time. In my judgment, the evidence and information provided do not justify her contention that she was unable to present her claim at a much earlier stage. She was able to attend the gym from time to time, and while there is some support for her contention that she suffered from stress and anxiety between the end of her employment and 1 February 2024, it is insufficient to justify the lengthy delay which took place in this case. It is not at all clear that her illness was such as to prevent her from completing and submitting an ET1 form. She was not prevented by her illness from carrying out other activities, such as going to the gym, and

accordingly there is no reason to believe that she was unable to direct her attention to the Employment Tribunal claim.

63. Next, I considered the extent to which the cogency of the evidence to be led would be affected by the delay. In this case, the length of the delay is not inconsiderable, and accordingly, given that these events took place in or before May 2023, and involve specific allegations about comments said to have been made, it is likely that the cogency of the evidence, including the claimant's, is liable to adversely affected by the passage of a significant period of time.

64. Then I considered the extent to which the respondent had complied with any requests for information. In my judgment, this is not a relevant factor here. While the claimant may have sought certain information by way of a subject access request, there is nothing alleged by the claimant in her evidence or submission that the respondent obstructed her in her attempts to find out more information. In any event, the events which are the subject of her claim were all within her own knowledge, and it is difficult to see what information the respondent would have which would provide her with the basis for a claim to the Tribunal.

65. Finally, in this section, I considered the promptness with which the claimant acted once she became aware of the basis of her claim, and the steps which she took to obtain professional advice about her claim.

66. In this case, the claimant has sought to apply to amend her claim based on information she received following her subject access request. However, at this stage, I am only concerned with the terms of the ET1. In this case, it does not appear to me that the claimant has acted with promptness at all in raising the claims once she was aware of them (that is, once they had taken place within her knowledge).

67. Further, the claimant did seek advice from her trade union, though it is unclear when she did so first. It appears to have been in August 2023 that she discussed with her representative whether or not she could raise a claim.

68. I would observe that under cross-examination it was put to the claimant that she should have sought the advice of her colleagues in the Crown Officer or Procurator Fiscal's Office as to time limits. In my view, there is no basis for suggesting that the claimant was somehow at fault for not asking her colleagues for such advice: Procurators Fiscal are rightly regarded as expert in the area of criminal law, but just as an employment lawyer would be hesitant to give advice as to the time limits applicable in the criminal courts, it would appear to me entirely reasonable that a Fiscal would not be forthcoming with advice about the time limits applicable to the Employment Tribunal. Furthermore, these were her colleagues, and the claimant might well be reluctant to share details of her potential claim against the organisation, and indeed involving some of them, with those colleagues.

69. However, it is plain that the claimant did not clearly seek advice on time limits from her trade union representative, and did not carry out any simple searches on the internet which might have generated information and basic advice about this matter for her. The claimant is clearly an intelligent and articulate person and there was no good reason put forward by her for not having carried out any research into these matters herself.

70. I must also consider the question of prejudice as it is balanced between the parties in this case.

71. Clearly, if the claimant were not to be allowed to proceed with her claims, that would cause her prejudice; on the other hand, if the claim were to be allowed to proceed, the respondent would be prejudiced in that they would require to defend, at some expense and inconvenience, a series of claims which relate to matters which took place some time ago, and from December 2022. It appears to me that the balance of prejudice, judged according to the factors determined above, falls heavier on the respondent in the event that the claims proceed rather than upon the claimant if they do not.

72. It is my conclusion, therefore, that in all of the circumstances of this case, it is not just and equitable to allow the claimant's claim to proceed, having

been presented significantly after the statutory deadline in this case. The Tribunal must abide by the terms of section 123(1) of the 2010 Act, in which it is said that a complaint may not be brought unless within three months of the act complained of, or such further time as the Tribunal considers just and equitable (taken very short in summary). The strict time limit contained therein may only be lifted if, in what **Robertson** suggests will be exceptional circumstances, the claimant demonstrates that the discretion open to the Tribunal should be exercised. For the reasons set out above, it is my judgment that it would not be just and equitable to allow this claim to proceed, and accordingly it is dismissed for want of jurisdiction.

73. This Hearing was listed in order to deal with a second issue, that is, whether or not the claimant's application to amend her claim should be granted. I deal with this relatively briefly.

74. On one view, the dismissal of the original claim simply renders the application for amendment redundant, in that if the unamended claim is dismissed, there is nothing to amend.

75. However, it is appropriate, in my judgment, to consider the arguments made by the parties in relation to the application to amend.

76. The claimant's application to amend her claim is derived from the terms of her agenda document, sent to the Tribunal in advance of a case management Preliminary Hearing on 18 April 2024 (68). Essentially, the claimant seeks to include a claim of harassment relating to an alleged incident which took place on 1 March 2023.

77. It is a new claim, in that no previous complaint of harassment was made by the claimant on the grounds of race. Not only does it amount to the attempted introduction of a new head of claim, it is also an attempt to introduce new facts not previously pled by the claimant.

78. The nature of the amendment is, therefore, significant and new.

79. The applicability of time limits is of importance. The amendment was presented in the agenda, on 18 April 2024, more than a year after the

alleged event. There is no clear reason given for why the claim was not included within the original claim. It is also important to note that I have already decided that the complaints made by the claimant in the original ET1 were time-barred, and that it would not be just and equitable to allow them to proceed.

80. Finally, the timing and manner of the application must be considered. As has been identified above, the application was made in an agenda rather than explicitly by application, more than a year after the events referred to therein.

81. In my judgment, it would not be in the interests of justice to grant the claimant's application to amend her claim to introduce a new claim of harassment under section 26, and accordingly, that application is refused.

82. The Judgment of the Employment Tribunal is therefore that the claimant's claims are dismissed for want of jurisdiction; and that the application to amend is refused.

**Employment Judge: M A Macleod**
**Date of Judgment: 19 September 2024**

Date sent to parties **20 September 2024**

I confirm that this is my Judgment in the case of Dada v The Scottish Ministers and that I have signed the Judgment by electronic means.