



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Flora Gome Djedje

**Respondent:** Community Integrated Care

**HELD AT:** London Central (via CVP)

**ON:** 9 January 2025

**BEFORE:** Employment Judge Mellor

## REPRESENTATION:

**Claimant:** Mr Aminu, solicitor.

**Respondent:** Mr Kerfoot, counsel.

# JUDGMENT

Upon hearing the parties:

- (1) The claimant's complaint of unfair dismissal and claim for 'other payments' is dismissed for want of jurisdiction having been issued out of time and it being reasonably practicable for it to have been brought in time.
- (2) The claimant's complaints of disability discrimination and race discrimination are dismissed for want of jurisdiction having been brought out of time and it not being just and equitable to extend time for presenting the claim.

# REASONS

## Introduction

1. This hearing was listed as a public preliminary hearing to determine two issues:

- a. Whether it was not reasonably practicable to present the unfair dismissal claim in time and if it was not, whether it was presented in a reasonable time thereafter.
  - b. Whether it is just and equitable to extend time to hear the discrimination claims.
2. This hearing was conducted via CVP. I had a 47-page bundle of documents prepared by the respondent, a 5-page PDF provided by the claimant together with a 2 page word document titled 'position statement'. Neither party was directed to prepare witness statements. Given the reason for the delay in presenting the claim was due to the actions of the claimant's solicitor no body suggested I hear from the claimant and the matter was dealt with by way of submissions.

### Background

3. The claimant had continuous service with the respondent from 3 April 2019 until she was dismissed with pay in lieu of notice on the 2 January 2024.
4. The claimant contacted ACAS on 23 February 2024 and the early conciliation certificate was issued on 5 April 2024. The latest date the claimant could have brought her claim was the 5 May 2024. I spent some time confirming with Mr Aminu that the last act complained of by the claimant was the dismissal on 2 January 2024. I also took both parties through section 207B Employment Rights Act 1996 (replicated at section 140B Equality Act 2010) and both representatives agreed that the date the time limit expired was 5 May 2024.
5. The claimant issued her claim on 28 October 2024, some 5+ months out of time.
6. The claimant's claims are not particularly well pleaded (a fact I find relevant and shall return to later). She brings claims for:
  - a. Unfair dismissal
  - b. Disability discrimination
  - c. Race discrimination
  - d. Other payments – arrears of pay.
7. None of those heads of claim are properly pleaded. The claimant asserts that in December 2021 she reported to her service leader that a person had failed to give medication to a service user. She learned that person was in fact her line manager. Since reporting this she says her line manager Ms Lackovicova started to raise issues about the claimant's performance and 'using intimidation, bullying and discrimination against me' none of those alleged acts are explained further, or whether that is said to be because of her race or disability. For the first time today, Mr Aminu asserted that Ms Lackovicova said to the claimant that '*she did not like her because she is black*' that was not an allegation contained within the ET1.
8. Then in 2023 the claimant had issues raised with her about her mobility.

9. The respondent says there were issues with her performance in 2023 and she was subject to performance management. Ultimately those culminated in disciplinary hearings, various extensions to the PIPs and a first written warning in 15/8/23.
10. The claimant appealed that warning, she also had a period of sickness absence because of knee pain which was caused by osteoarthritis. She was referred to OH, this was around the time she says she became a disabled person. In November 2023 she was invited to a medical capability meeting to discuss the OH advice and consider reasonable adjustments. The respondent says that her physical condition meant she was not able to carry out aspects of her role, much of which required physical activity such as pushing wheelchairs, working night shifts being engaged in outdoor activities with service users.
11. There were more meetings to discuss the claimant's role and she was offered an alternative such as changing her hours or duties to administrative but she declined. She was dismissed by reason of medical incapacity.
12. She says that she was offered an administrative position, but she declined this without them taking into consideration her particular circumstances. They dismissed her. She submitted an appeal but that was not successful, I reiterate that Mr Aminu confirmed the last date of alleged discrimination was the date of dismissal notwithstanding the appeal.
13. She has not set out what the other payments are.

**At the hearing**

14. Initially Mr Kerfoot raised two issues with documents sent by the C (a) timing (b) privilege. They cannot waive privilege on behalf of ACAS or the respondent. I allowed the documents in because firstly I was always going to need to know what the reason was for the delay so to some extent that was going to be a surprise to the respondent. Secondly, the dates of the communication with ACAS and any reference to the reason for the delay or reference to time limits was highly relevant. I asked if there would be any issue with me having seen these documents if they were redacted and was told no. I therefore treated them as such and did not consider or attach weight to the offers contained within them.
15. I had to ask Mr Aminu for further detail as to the claims given the paucity of pleading.
16. He confirmed the claimant's race is black; she did not rely on her national origin, nationality or ethnicity.
17. I asked what the disability was. Initially I was told high blood pressure and weight. When I enquired further it was her weight and her arthritis (from around summer 2023). It was clear that conduct prior to 2023 cannot be attributed to disability.

18. Mr Aminu said the dismissal was the last act, but I made several attempts to understand if there were earlier acts and whether the dismissal was only disability or race or both. He said that there were earlier acts including the comment 'I don't like you because you are black' and that from 2021 the claimant was subject to racist conduct. The ET1 refers to 'disciplinarys' but there were meetings throughout 2023 and it is entirely clear which of those she complains of or if it was all of them. For the purposes of limitation however, I have already set out the relevant dates for the purposes of the issues before me today.
19. It was confirmed by Mr Aminu that the dismissal was said to be both an act of race and/or disability discrimination (which sections of the act those were said to be was never clarified in particular with the disability even though I asked whether it was sections 13, 20/21 or 15).

**Presentation of the claim.**

20. The claim was not presented in time; the below is a summary of the exchange between Mr Aminu and ACAS:
- a. Email on 11/4/24 to claimant's solicitor from ACAS reminding them the EC Certificate was issued on 5/4/24, but that conciliation was still available and *"the respondents rep has asked what the claimant seeks to settle at this stage"*.
  - b. On 3/5/24 they wrote in response to ACAS's email, apologising for the delay and seeking £15,000 to settle.
  - c. On 29/9/24 4.5 months later they chased that offer by email. In that they wrote *"we acknowledge that the certificate you issued on 5/4/24 but since you indicated that conciliation will continue our client instructs us to employ conciliation for a while before submitting any claim to the employment tribunal"*.
  - d. On 30/9/24 ACAS replied to confirm it had not received a response to the offer. It also reminded the claimant's solicitors that conciliation ended on 5/4/24 with the certificate. The author also referred to the covering email sent with EC Certificates which states *"Make sure you submit your claim on time. You have at least one month from the date you receive this certificate...if you are concerned you might be out of time, make your claim as soon as possible"*.
  - e. Another month passed before issuing the claim on 28/10/24.
21. Claimant first instructed her solicitor in January 2024. Mr Aminu was the solicitor on record for EC process. He confirmed today he is a solicitor on the roll, and he has some experience of employment tribunal claims (although not his principal area of practice).
22. Mr Aminu says it was not reasonably practicable to present the claim in time because it was stated that conciliation was still available, the respondent had contacted ACAS and they wanted to settle the claim, because they asked that question the claimant expected the respondent would accept or reject that. Mr Aminu said that he was aware of the 3-month time limit, but he thought that when ACAS wrote that there was ongoing conciliation. It was a misunderstanding by her solicitor, and he accepted that today.

23. I referred Mr Aminu to **Deadman v British Building and Engineering Appliances Ltd 1974 ICR53 CA** (Deadman) and **Wall's Meat Co Ltd v Khan 1979 ICR 52 CA** and **Governing Body of Sheredes School v Davies EAT 0196/16**. I invited submissions on whether there was anything about the circumstances that I needed to consider.
24. Mr Aminu repeated that it was not reasonably practicable because "we believed it would be better for us to settle it, we believed it would be better for everyone, and we were waiting for a response".
25. I asked about the 1 month between the letter of 30/9/24 and issuing the claim. Mr Aminu said they issued it straight away after receiving the email from ACAS, but that is not right. He confirmed he had instructions in order to conciliate and that there was a draft ET1 ready to go before the EC Certificate was issued.
26. In respect of the 3/5/24 to 27/9/24 a 4-month gap Mr Aminu told me that: *"between then we were waiting for the respondent to get back to us, we called over the phone and they said that they were waiting. We then realised that nothing was going on that is when we decided to file the claim. We didn't issue against that silence as we wanted to see more evidence of her medical condition, I was waiting for those documents, that is why there was delay. I was waiting for medical report."*

#### **Discussion and Conclusion on the Unfair Dismissal Claim (and other payments).**

27. There is no definition of reasonably practicable, but I have reminded myself of the essential points made by Underhill LJ in **Lowri Beck Services Ltd v Brophy 2019 EWCA Civ 2490 CA**. I have given it a liberal interpretation. The reason for the delay in this case was the skilled adviser's mistake. Mr Aminu was aware of the limitation in the tribunal and was aware he had a certificate. I do not find his misunderstanding about the conciliation to be reasonable given the information ACAS sends with the certificate and the content of the emails which included the warning about time limits.
28. It is not reasonable for any claimant to delay issuing a claim because they are awaiting a response to settlement proposals. It is up to a claimant to pursue their claim, and even if a respondent was deliberately stonewalling them that is not a barrier to issuing; it does not make it unfeasible or, to the point, reasonably impracticable to issue.
29. It clearly was reasonably practicable to issue on time because they already had a draft ready to go and the claimant's solicitor was engaging with ACAS. I have been given no other reason why there was any barrier, impediment, difficulty or it was not reasonably practicable other than the solicitors mistake about conciliation. In accordance with Deadman, on the information I have been given, the claimant is affixed with that mistake. The tribunal has no jurisdiction to hear this claim and so it is dismissed.

30. I do not have to consider whether it was presented within a reasonable time frame thereafter given I have found it was reasonably practicable to present it in time. However, if it had been necessary to make a finding, I would have reached the conclusion that the claim was not presented within a reasonable time frame. There are two further periods of delay (a) May to September and (b) 30/9/24 to 28/10/24. Given I was told there was a draft prepared before 5/4/24 these delays are not reasonable.

**Discrimination – just and equitable extension.**

31. I have a much broader discretion to allow late discrimination claims to proceed within a period I consider to be just and equitable. Mr Kerfoot referred me to **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA** *“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”*. I have had in mind the comments made in various appellate authorities about the ‘exception rather than the rule’ comment and have not treated that as a rule or gloss.
32. I have further considered **Miller and Ors v Ministry of Justice and ors and another case EAT 0003/15** and the summary of principles of Laing J (as she then was).
33. Mr Kerfoot also referred me to **British Coal Corporation v Keeble & Ors 1997 IRLR 336** which addresses the applicability or assistance of section 33 Limitation Act 1980. Again, I refer myself back to **Miller** and the points observed in that case. I must decide what factors are relevant and how they should be balanced.

**Relevant factors**

34. I have considered the following:
35. The reasons for the delay are the same as I have already explained. That is the skilled advisor’s mistake. Unlike in unfair dismissal claims the claimant is not affixed with this mistake. It is however relevant that she was relying on him when considering the balance of prejudice overall.
36. The length of the delay: It is a 5-month delay which is significant. That might not be so detrimental if the claim was only dealing with the decision to dismiss. However, the claimant also seeks to argue (albeit this would require further and better particulars) that she was subject to discrimination from December 2021. So that 5 months is likely to have an impact on the ability to recall those events.
37. Prejudice to the claimant: she would be deprived of her opportunity to bring a claim in the tribunal. It is an important claim for her, but this is a company of some 6000 employees and so if they have discriminated against an employee, it is of broader significance. Against that are also the importance of time limits and observing that legislation.

38. The claimant is not left without a remedy, as Mr Kerfoot submitted. Her solicitor has accepted he misunderstood, that was his mistake, and he apologised for it. Therefore, she has a potential remedy against him. Whilst bearing in mind the differences between the tribunal and county court (including costs and the fact that she would have to establish likelihood of success in this claim) I do consider it relevant that she is not left without any remedy particularly in a case where, to his credit, Mr Aminu has accepted his mistake at this hearing.
39. I invited submissions on the balance of prejudice Mr Aminu says that the claimant being affixed with his mistake does not apply to discrimination claims and fairness and justice says that she should be able to bring her claim; she has not brought any complaints before and had not been discriminated against her before. She believed that the line manager discriminated against her because she is black.
40. He said *"I Apologise for the misunderstanding between us and ACAS, the best intention of justice and means that she should be able to bring her claim as to whether there has been discrimination. For her to have that opportunity."*
41. Prejudice to the respondent. Mr Kerfoot relied on the customarily claimed prejudice which is the respondent will suffer facing a claim which would otherwise be time barred. Given the passage of time, it was reasonable for the respondent to have expected the claim was abandoned when nothing was issued before 5/5/24.
42. He reminded me the respondent is a charity reliant on public funding and that money would have to be spent defending a claim that is otherwise time barred so there is a public policy point.
43. He also relied on the forensic prejudice point. Although he did not assert there was any specific difficulty with witnesses and accepted there was a thoroughly pleaded ground of resistance, he also submitted the respondent was unaware that the claims included allegations that dated back to 2021. That is more likely to be subject to forensic prejudice than the later allegations.
44. The currently pleaded claim. Into the balance I find it is relevant that, even 5 months after the expiration of limitation, the claim has been insufficiently pleaded particularly on the discrimination claims. The claimant has not set out heads of claim (is it section 13 or section 15 for example). Nor has she set out clear facts such as what was said, by whom and when. It was clear from my enquiry that the discrimination claims would have required significantly better particularisation. The respondent does not yet know what claim it has to defend. That builds in more prejudice because they have not been able to investigate at an early stage, and there may well be amendments to the already late claim.

### **Conclusion on the discrimination claim**

45. When I balance all of the factors, I consider relevant, it is my conclusion that the prejudice to the respondent would be greater. I accept the claimant will suffer prejudice by not being able to pursue her claim in the tribunal, and I accept that she attempted to do so by instructing a solicitor.

46. However, 5 months is a significant delay particularly when taking into account that it is almost twice as long as primary limitation. That delay is compounded by the poorly pleaded case and the inevitable impact that has on the progression of these proceedings. In circumstances where the claimant is not left entirely without a remedy, I have reached the conclusion the balance of prejudice tips in favour of the respondent.

47. It is not therefore just and equitable to extend time in the discrimination claims and those too are dismissed.

**Dismissal of all claims**

48. All of the claimant's claims have been presented out of time. It was reasonably practicable to bring the Employment Rights Act 1996 claims in time (unfair dismissal and other payments). It is not just and equitable to extend time in the discrimination claims (disability and race).

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Employment Judge Mellor

Date 9 January 2025

JUDGMENT SENT TO THE PARTIES ON

14 January 2025

FOR THE TRIBUNAL OFFICE