



## **EMPLOYMENT TRIBUNALS**

**Claimant:** Miss D. Raife

**Respondent:** The Adolescent and Children's Trust

**Heard at:** Newcastle Civil and Family Courts and Tribunal Centre by CVP

**On** 06 February 2025

**Before:** Employment Judge T.R. Smith

### **Representation**

**Claimant:** The claimant assisted by Mr. Findlay, General Secretary of NUPFC.

**Respondent:** Mr. Anderson (counsel)

## **JUDGMENT**

1. The claim unfair dismissal was not presented within the applicable time limit. It was reasonably practicable to do so. The claim of unfair dismissal is therefore dismissed.
2. The claim of direct race discrimination or in the alternative racial harassment was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claim is therefore dismissed.

## Written reasons supplied pursuant to a request dated 28 February 2025

### The issues.

1.The issues this tribunal had to consider were set out in the record of a preliminary hearing conducted by Employment Judge Sweeney on 30 August 2024

2.The issues to be determined were:-

*“To consider and determine whether the complaint of unfair dismissal was presented before the end of the period of three months beginning with the effective date of termination, or 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 a period of three months.*

*To consider and determine whether any or all of the complaints of harassment and/or direct race discrimination have been brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.”*

3.The above issues were set down to be determined on the assumption that the claimant could establish she was an employee within the meaning of section 230 (1) of the Employment Rights Act 1996 (“ERA 96”) and section 83 (2) of the Equality Act 2010 . (“EQA 10”).

4.Whilst Employment Judge Sweeney was aware of ongoing litigation on the issue of the employment status of foster carers there had been no judgement delivered in the test case of **Oni -v- London Borough of Waltham Forest**. (“Oni”).There now has. It is a first instance decision. Judgement was handed down on 02 January 2025. The tribunal in **Oni** held the claimants were not employed by the local authority pursuant to a contract.

5.The tribunal approached the hearing looking at the claimant’s claim at its highest. It assumed, for example, that the claimant would establish that MRP ( the claimant’s manager) attendance at a panel meeting on 26 April 2023, was an act of race discrimination.

### The evidence

6.The claimant relied upon the following statements

7.An undated statement of Ms Manhertz. Her statement was not relevant to the preliminary issues. She was not called to give evidence.

8.A statement of Ms Bowen dated 04 February 2025. Her statement was not relevant to the preliminary issues. She was not called to give evidence.

9.A statement of Ms Allen-Mc Farlane dated 04 February 2025. Her statement was not relevant to the preliminary issues. She was not called to give evidence.

10. A statement from the claimant of just over a page which consisting of 6 paragraphs dated 11 October 2024 . Much of the statement did not address the issues. Having regard to the fact the statement was to stand as the claimant's evidence in chief, that that she was a litigant in person ,and having regard to the overriding objective the tribunal permitted the claimant to expand upon her written evidence having regard to the fact she bore the burden of proof .The tribunal heard affirmed evidence from the claimant.

11. The tribunal also had before it a bundle of documents consisting of 31 pages. A reference to a page is a reference to a page in the bundle.

12. The tribunal was aware that the claimant suffered from difficulties with her vision. She had been provided with the bundle in large print. As it transpired the claimant was not taken to any specific document in the bundle either by Mr Findlay or Mr Anderson.

13. Whilst giving judgement the claimant interrupted the tribunal and was asked to be quiet. She then disappeared from her screen. She made no attempt to rejoin. There was no evidence of a technology failure. The claimant appeared to have voluntarily absented herself from the proceedings. Given Mr Findlay was present and taking a note the tribunal concluded the handing down of its oral judgement.

### **A note on language and phraseology**

14. Throughout this judgement the tribunal have utilised phrases that are relevant to an employment relationship such as "effective date of termination" and "remuneration". It is simply done as a shorthand way of explaining what happened. It should not be taken to be any indication of a view as to whether the claimant was or was not an employee as defined by either the ERA 96 or the EQA 10.

### **The background**

15. The claimant presented her claim form to the tribunal on 10 February 2024. The claimant is a foster carer.

16. The claimant entered into ACAS early conciliation on 08 February 2024, with a certificate issued the following day, 09 February 2024.

17. In her claim form the claimant said that she was advised on 26 April 2023 that she was removed from the respondents foster panel. The claim form also contained extremely vague allegations against MRP where she said MRP had been "*horrible*" to her and "*racial*" towards her.

18. The respondent presented its response form on 11 March 2024.

19. As part of its response, the respondent asserted that the claimant, as a foster carer, was neither an employee as defined by the ERA 96, or as set out in the extended definition of employee in the EQA 10.

20. A private preliminary hearing was convened on 03 July 2024 before Employment Judge Jeram to clarify the issues.

21. The claimant clarified she was pursuing complaints of direct race discrimination and/or harassment .

22. The claimant told Employment Judge Jeram that she complained of the way she was treated in the period from February 2023 until April 2023.

23. The case was relisted for a further private preliminary hearing on 30 August 2024 before Employment Judge Sweeney (“The Sweeney hearing”)

24. At that hearing the claimant claimed that MRP persuaded the respondent panel to deregister her on 26 April 2023. At its most favourable, therefore the last allegation of racial harassment or discrimination occurred on 26 April 2023.

25. It was clarified that the decision taken by the respondent to deregister the claimant was on 26 April 2023. A subsequent decision taken in September 2023 was not a decision of the respondent but a decision of the IRM. The IRM was an independent body which looked at any deregistration decision afresh. There was no claim against the IRM. The claimant contended at the Sweeney hearing that “termination” was 25 September 2023.

26. Thus the conclusion of the two preliminary hearings was that the “effective date of termination” was either 26 April 2023 or 25 September 2023 with the last possible act of any form of discrimination was 26 April 2023.

### **The facts**

27. The claimant believed she was subjected to race discrimination from February 2023 . She knew from that date that something was wrong in her mind.

28. On 26 April 2023 the foster children were taken out of the claimant’s care. She thought that was unjust.

29. At this point she had knowledge of all the facts she needed. She believed she been subject to race discrimination and she believed the deregistration was wrong.

30. Despite the above concerns the claimant took no immediate steps either by use of the Internet or by consulting external parties as to what avenues of redress were available to her. Whilst it is true she had spoken to the fostering network , that started prior to April and whilst the claimant said in evidence that she received some advice about the way she was discriminated against she did not explain when or why she then she delayed submitting her claim form.

31. The claimant contended that part of the reason for the delay in submitting a claim to the employment tribunal was that she was unaware of their existence until February 2024. The tribunal did not find that evidence credible. Employment tribunals have been in existence for over 50 years and cases are regularly mentioned both on television and in the printed media.

32. In March 2023 the claimant’s mother was diagnosed with a terminal illness and she sadly died on 17 July 2023. The tribunal does not minimise the distress that would have caused the claimant. Despite that she was able to leave the house and liaise with third parties and write correspondence. There was no cogent evidence of

any physical or mental impediment that would have been such that she was incapable of completing a tribunal claim form.

33. The claimant was also awaiting an operation for difficulties with her eyesight. However that had not prevented the claimant, certainly from April 2023 from writing and understanding correspondence received from the respondent. The claimant accepted that prior to 10 February 2024 she could have completed a tribunal claim form despite her visual impairment.

34. In about October 2023 the claimant joined the NUPFC, what the tribunal understood to be a trade union for foster carers. The NUPFC were well aware of tribunals given that they were supporting the claimants in **Oni**. They were equally aware of the status argument deployed against foster carers as that was the very nub of **Oni**.

35. There was no suggestion from the claimant that the NUPFC were in any way negligent towards the claimant. The claimant said she sent papers to the union about her deregistration but was extremely vague as to what she did or didn't say to her union or ask for.

36. The claimant said she only became aware that she could bring an employment tribunal claim when she logged in to the live broadcast of the case of **Oni** on 08 February 2024. She asserted she heard the judge say that foster carers could go to tribunal. The tribunal considered that evidence to lack credibility. The judgement in **Oni** was reserved and only sent to the parties on 21 January 2025. The tribunal considered in such circumstances Employment Judge Crosfill was most unlikely to have said the words attributed to him by the claimant.

37. There is one further fact that should be mentioned. Before the tribunal the claimant contended that her claim was in time because she was in correspondence with the respondents in January 2024 and was regarded as an employee. The tribunal has little hesitation in rejecting that contention. The document the claimant relied upon was an email dated 21 January 2024 (28). On any reasonable construction that was an email responding to a SAR application by the claimant under the Data Protection Act 1998. It in no sense established any form of ongoing employment relationship between the claimant and the respondent.

38. The alleged harasser MRP handed in her notice in April 2023. She is no longer employed by the respondent.

### **The law tribunal applied**

#### **Unfair dismissal**

39. Section 111 (2) ERA 96 provides:-

*“(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*

*(a) before the end of the period of three months beginning with the effective date of termination, or*

*(b) 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.”*

40. Pausing at this juncture the burden of proof is upon the claimant and there are two separate and distinct elements to the hurdle she must surmount. If a claim is out of time the claimant must establish it was not reasonably practicable to present her claim in time. If she does that, then she must demonstrate, and this is the second element of the hurdle, that her claim was then presented within such further time as the tribunal considered reasonable.

41. The time period set out in section 111(2) is subject to adjustment under section 207B ERA 96. The adjustment however only applies if the ACAS certificate is obtained in the primary time limit. Given the tribunal have found there was no ongoing relationship and at its highest the relationship between the claimant and respondent ended on 25 September 2023 then it is not engaged.

42. The time period as formulated under section 111 (2) is strict.

43. The strictness of the test was emphasised by Judge LJ in **London Underground Ltd v Noel [1999] IRLR 621** when he said :

*“By section 111(2)(b) this period may be extended when the tribunal is satisfied ‘that it was not reasonably practicable for the complaint to be presented before the end of that period. The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, ‘in all the circumstances’, nor when it is ‘just and reasonable’, nor even where the tribunal, ‘considers that there is good reason’ for doing so.”*

44. Browne-Wilkinson J ( as he then was) observed in **Bodha (Wishnudut) v. Hampshire AHA [1982] ICR 200 at 204:-**

*“The statutory test remains one of practicability ... The statutory test is not satisfied just because it was reasonable not to do what could be done’-*

45. There is a considerable volume of case law on reasonable practicability. The tribunal considered the recent authority of the EAT in **Signet Behavioural Health Ltd**

**-v- Britton [2022]EAT 108 (case EA-2020-000972-OO) at paragraph 19** contained useful guidance.

46. The EAT suggested the following questions were addressed by the tribunal: –

- *Identify the substantial cause of the claimant's failure to comply with the statutory time limit;*
- *Determine whether and if so the claimant knew of his or her rights;*
- *Determine whether the claimant had been advised by anyone;*
- *Determine the nature of any advice given and whether there was any substantial fault on the part of the claimant which led to the failure to present a claim in time.*

## **Discrimination**

47. Section 123 EQA 10 states: –

*“...Proceedings on a complaint ... may not be brought after the end of –*

- (a) the period of three months starting with the date of the act to which the complaint relates, or*
  - (b) such other period as the Employment Tribunal thinks just and equitable....*
- (3) For the purposes of this section –*
- (a) conduct extending over a period is to be treated as done at the end of the period;*
  - (b) failure to do something is to be treated as occurring when the person in question decided on it*
- (4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-*
- (a) when P does an act inconsistent with doing it, or*
  - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*

48. In calculating time section 140B of the EQA 10, effectively extends time whilst the parties are engaged in early conciliation in a similar manner to section 207B ERA 96. For the same reasons already mentioned the extension of time provisions are not applicable in this case.

49. A tribunal has a wide discretion in determining whether or not it is just and equitable to extend time. That said, the power of the tribunal is a discretion and the burden is on the claimant to convince the tribunal that it is just and equitable to

extend time. The discretion is the exception rather than the rule, **Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.**

50. Whilst the tribunal in exercising its discretion is not required to adopt the checklist set out in section 33 of the Limitation Act 1980 it may help illuminate the task of a tribunal, see **Adedji -v- University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23** at para 37

51. Factors set out in section 33 include: –

1. The length and reason for the delay.
2. The extent the cogency of the evidence may be affected
3. The extent, if at all of the failure of the employer to cooperate
4. What action the claimant took when the claimant became aware of a potential claim and in particular how promptly they acted
5. Action taken by the claimant to obtain professional advice when aware of the claim.

52. The above is not a comprehensive checklist and other relevant matters that may be considered including the length of the extension sought. A likely highly significant factor is whether the delay would affect the conduct of a fair trial:- **DPP -V- Marshall 1998 ICR 518.**

## **Conclusion**

53. Assuming the claimant was an employee what was the effective date of termination?

54. The tribunal found it was 26 April 2023 when the claimant had the children in her care taken over and ceased to receive any form of remuneration for their care.

55. Mr Anderson's submission that in effect the IRM on 25 September 2023 was akin to an appeal in a normal employment relationship had merit. The appeal itself did not extend the relationship. In fact the respondent's position was stronger here as the "appeal" was to separate and independent body.

56. Thus the primary finding of the tribunal was that the engagement ended on 26 April and thus the unfair dismissal claim was out of time. If it was wrong on that point and time ran from the 25 September 2023 the claim would still be out of time.

57. For the reasons already given there was no ongoing quasi employment relationship after 25 September even though the claimant was writing to the respondent.

58. It is common ground that the last act alleged act of race discrimination occurred on 26 April 2023.

59. Having established where time ran from the claimant then sought to apply the facts it had found.

60. The tribunal has carefully reminded itself that there are two separate and distinct tests it must apply with the higher bar was set for unfair dismissal.



61. There are however a number of conclusions which are relevant to the application of both tests.

62. On the claimant's own case she believed she been treated badly at the latest by 26 April 2023 but then did nothing.

63. The tribunal simply did not accept the claimant's evidence that she did not know of the existence of employment tribunals.

64. The claimant contended she was ignorant of her rights which is a different argument to the lack of knowledge in respect of the existence of employment tribunals. The difficulty with that submission was she had the opportunity to make enquiries to discover her rights and until she approached her union in October 2023 she had completely closed her mind that opportunity.

65. Even from October 2023 she did not lead any cogent evidence as to why there was then a delay until 10 February 2024.

66. This was not a case where the claimant was deceived or misled by the respondent.

67. At the very latest the claimant ought to have known of her rights when she first spoke to her union. She had all the information she needed. Her union were well aware of the **Oni** employment tribunal litigation. There was nothing in the evidence to suggest that she asked for a referral to the legal department for assessment. Her principal focus appeared to be obtaining information via the SAR procedure from the respondent. She did not require that information or indeed any further information to submit a tribunal claim.

68. The claimant's case was never that she thought she could not bring a claim due to status but even if that was the case it would not have assisted her, see for example **Spence -v- Somerset County Council 1996 ICR 364**.

69. Whilst the tribunal have noted the claimant's health and the impact of her mother's death neither had any significant impact on the claimant's ability to contact third parties for advice and to complete documentation. There was no medical evidence before the tribunal to suggest that during any of the period from April 2023 until the claimant presented her claim form that she was in any way incapacitated to such an extent that either wholly or partly during that period she could not present a claim form.

70. On the basis that time ran from 26 April 2023 the unfair dismissal claim was presented approximately 10 months late and was well out of time.

71. The claimant has not discharged the burden of proof by demonstrating it was not reasonably practicable to present her claim in time.

72. Turning to the discrimination claim, were the lower hurdle of "just and equitable" applied to an out of time claim the tribunal found time ran from the last alleged discriminatory act namely 26 April. Again the claim was approximately 10 months out of time.

73.The involvement of IRM was irrelevant. It was not akin to some form of grievance process which may be a relevant factor in considering whether to extend time. It solely related to the claimant's engagement with the respondent and not allegations of discrimination.

74.The prejudice to the claimant of not extending time is considerable in that she will be deprived of a claim. The prejudice to the respondent is equally considerable. It will be asked to look at events that are now almost 2 years old and for which oral testimony will be crucial. Trial is unlikely to take place for at least another 9 months. The respondent would face the prejudice of an out of time claim it would need to defend and would be hampered because its principal witness has left the respondents employment (although of course she may be traceable and her attendance may be compatible by means of a witness order). The respondent would face further prejudice as it appears that in respect of the discrimination complaint much will turn upon oral evidence. The passage of time is likely to significantly impact upon the cogency and credibility of such evidence.

75.Balancing the issues of prejudice the tribunal came to the conclusion that it should not exercise its discretion in favour of claim.

Employment Judge T.R.Smith

Date 07 March 2025

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