



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4100860/2022**

**Held on 20 July 2022 by Cloud Video Platform**

**Employment Judge N M Hosie**

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**Ms S Iyyaz**

**Claimant  
Represented by  
Mr G Singh,  
Solicitor**

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**Affinity Trust**

**Respondent  
Represented by  
Ms S Fallone,  
Advocate  
Instructed by Mr  
J Davies,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claim is time-barred and it is dismissed for want of jurisdiction.

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**REASONS**

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1. The claimant brought complaints of constructive unfair dismissal and race discrimination. Her claim was denied in its entirety by the respondent; in addition, the respondent's solicitor took a time-bar point. The effective date of termination of the claimant's employment was 15 September 2021.

**E.T. Z4 (WR)**

However, her claim form was not submitted until 1 February 2022. There is a three month time limit for submitting complaints of this nature and it was accepted by the claimant that her claim had been submitted 18 days out of time.

5 **Preliminary hearing**

2. This case called before me, therefore, by way of a preliminary issue to consider the time-bar issue and to determine whether I should exercise my discretion and allow the claim to proceed, although out of time.

10 **The evidence**

3. I heard evidence from the claimant at the preliminary hearing. A joint bundle of documentary productions was also submitted ("P") This included a supplementary bundle which was submitted shortly before the hearing by the claimant's solicitor.

**The facts**

4. Having heard the claimant's evidence and considered the documentary productions, I was able to make the following findings in fact, relevant to the time-bar issue. The claimant is 57 years of age and of Pakistani ethnicity. She started her employment with the respondent around 1 November 2018 when she transferred, by reason of TUPE, from her employment with C-Change Scotland. She was employed in the role of Support Worker; her primary duties involved caring for a service user in Kincorth, Aberdeen. She has been working in the care sector for over a decade; she has an HNC in Social Sciences; and an SVQ Level 3 in Social Care.

5. The claimant resigned from her employment with the respondent with effect from 15 September 2021. On 13 December 2021, she submitted an application to ACAS to commence conciliation. The ACAS Certificate was issued on 15 December 2021. She submitted her claim form on 1 February

2022. The expiry of time limits, including the additional period added to early conciliation, ended on 14 January 2021. Accordingly, her claim was submitted late by some 18 days.

- 5 6. The claimant submitted her claim form herself, without the benefit of representation. However, she had assistance from her daughter who at one time was a law student; she obtained advice from the Citizens Advice Bureau at the end of November 2021; she was aware at that time of the three month time limit.

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7. On 8 December 2021, the claimant sent an e-mail to the respondent under the heading "Formal Grievance", in the following terms (P.40):-

*"Re issue with pay*

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*Further to the termination of my employment on 15 September 2021, at 145 Gardner Road, Kincorth as Support Worker, it was agreed that I was owed 37.5 hours, I have looked at my final pay slip and it does not seem to be on there. However, if I am wrong please alert me as to how you got to this calculation. My sick pay also seems to be wrong. If you could advise how you got this figure.*

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*Due to the numerous issues we have had such as the lack of full payment for holidays during furlough and ignored pleas for settlement and other issues relating to the treatment received by senior staff, **I am obliged to tell you that I intend to take you to an employment tribunal if this is not clarified and settled by Friday 30 December.**"* (my emphasis)

30 **Claimant's resignation**

8. The claimant resigned from her employment with the respondent by email on 18 August 2021. She was then signed off work on 23 August 2021 for two weeks due to "stress at work" (P.41). She then took her outstanding holiday entitlement until her last day of employment on 15 September 2021.

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9. The claimant was able to instruct a solicitor, Mr Singh, on 9 June 2022. On 29 June, he submitted an amended further and better particulars of the claim (P.19-24).

## **Claimant's medical condition**

### **Dental issues**

- 5 10. The claimant spoke to a letter from her dentist dated 14 July 2022 (P.92). She was diagnosed with "chronic generalised periodontitis" ("gum disease") in November 2021. Thereafter, she had two appointments with her dentist which included an appointment for a tooth extraction on 9 February 2022, shortly after that she submitted her claim form.

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### **Diabetes**

11. The claimant has had Type 1 Diabetes for around 12 years. This requires her to take insulin regularly. She also has to attend the Insulin Clinic twice a year.  
15 in the period from the termination of her employment with the respondent on 15 September 2021, until she submitted her claim form on 1 February 2022, she spoke often with her G.P. as she had high sugar levels and this was causing her stress.
- 20 12. In addition to insulin, the claimant took medication for high blood pressure and also "thyroid tablets".

### **Case management preliminary hearing on 4 April 2022**

- 25 13. Employment Judge Hendry conducted a case management preliminary hearing on 4 April 2022. At that hearing he discussed "time-bar" which he referred to as "the main issue". The Note which he issued following that hearing is referred to for its terms (P.34-37). In his Note, at paragraph 8, he said this:-
- 30 "8. *The claimant explained that she didn't have any legal knowledge and did not have any legal assistance. She explained that during the time following the termination other employment, she was receiving medical treatment and*

5 was suffering from stress. She is a Type 1 Diabetic. The stress she experienced during this period affected her insulin levels. She found it difficult to concentrate. She confirmed that she had seen her G.P. during this period and discussed matters with them. I suggested to her she should speak to her G.P. and ascertain if her G.P. could give her either a copy of her medical notes covering this period and/or write confirming whether she was suffering from stress during this time, what the treatment was, and whether in their opinion it would be likely to have impacted upon her ability to concentrate. The claimant said that she felt that she was a failure and that the dismissal from employment had affected her considerably. I advised her that the Tribunal couldn't assist her in relation to these matters but she should bring them to the attention of her G.P. who might be able to arrange counselling or some other support for her."

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14. Neither the claimant's medical records, nor a report from her G.P. were included in the joint bundle. The claimant advised that around 23 June she had requested a medical report from her G.P. and that she had tried to contact him on the telephone.

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15. When asked in cross-examination why she had delayed submitting her claim form after she received the ACAS Certificate on 15 December 2021 when she was aware of the time limit she said: *'I lost my concentration; dental issues; diabetes; and my sister with cancer.'*

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### Submissions

16. The following is a basic summary of the parties' submissions.

#### Claimant's submissions

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17. The claimant's solicitor accepted that the claim form had been submitted 18 days' late. However, so far as ACAS was concerned, she had met the time limits.

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18. He referred to the claimant's "multiple medical issues" and submitted that these were a *"distraction from her submitting her claim in time"*.

19. He also referred to the report from the claimant's dentist and the "wide ranging treatment recommended".
20. He submitted that the claimant was consistent in her evidence when describing her diabetes and her concerns over her rising sugar levels and her difficulty concentrating. She had attempted to contact her G.P. for medical evidence but had been unsuccessful as her request was, "*not considered to be a medical emergency*".
21. He submitted that it was "just and equitable" in the circumstances to extend the time limit in respect of the discrimination complaint. He submitted in relation to the unfair dismissal complaint that, due to her "considerable discomfort" and her medical issues, it had not been "reasonably practicable" to submit her claim in time.

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### **Respondent's submissions**

#### **Unfair dismissal complaint**

22. So far as the unfair dismissal complaint was concerned, the respondent's Counsel submitted that the test was whether it had been "reasonably practicable" to submit her claim in time and that this was a "higher hurdle" than the "just and equitable test" for the discrimination complaint.
23. Counsel referred to Judge Hendry's detailed Note (P.34-37) and submitted that the "reasonably practicable" test was a "question of fact".
24. While the claimant had spoken about various medical conditions, Counsel submitted that her evidence was "not reliable". She was "vague" about the appointments she had at the Diabetes Clinic and with her G.P.; so far as her dental issues were concerned she first gave evidence that she had had four

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or five appointments with her dentist, but then, when questioned in more detail, she said that she had only two.

5 25. She had been able to manage her diabetes for some 12 years and there was no evidence of any extra appointments with her G.P. in the period from when her employment ended to when she submitted her claim form; and no medical records or a report from her G.P.; despite Judge Hendry's suggestion she had only made a formal request to her G.P. for a report some two weeks' previously.

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26. Counsel submitted that the claimant's evidence was neither plausible nor reliable. Her evidence about her contact with her G.P. was "not consistent".

15 27. The test is a question of fact. The claimant had failed to satisfy the "high hurdle" and establish that it had not been "reasonably practicable" to submit her unfair dismissal complaint in time.

### **Discrimination complaint**

20 28. So far as the discrimination complaint was concerned, the test is whether or not it would be "just and equitable" to extend the time limit. In this regard, Judge Hendry had referred to the "leading case" of **Robertson v. Bexley Community Centre: CA11 March 2003**(P.36).

25 29. The claimant relied on her medical conditions but, it was submitted, that her evidence was not reliable and that the documentary evidence was "woeful".

30 30. The claimant had assistance from her daughter when completing the claim form. However, her evidence in this regard was "evasive" as at first she did not want to reveal that her daughter had been a law student.

31. Further, her e-mail to the respondent on 8 December 2021 (P.40), "*indicates a level of legal knowledge*". Counsel submitted when that is considered, along with the fact that the claimant had advice from the Citizens Advice Bureau and was aware of the time limits in November 2021, that it would not be just and equitable to extend the limit

32. Finally, she submitted that "the balance of prejudice favours the respondent" and that both complaints should be dismissed on the basis that they are time-barred.

## Discussion and decision

### Unfair dismissal complaint

33. An employee who seeks compensation for unfair dismissal is bound to comply with a very strict time limit. S.111(2) of the Employment Rights Act 1996 is in the following terms:-

*"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."*

34. In respect that it was common ground in the present case that the claim form had been submitted 18 days late, the issue for me was whether or not the claimant could avail herself of the so-called "escape clause" by establishing that it was not reasonably practicable for the claim form to be presented timeously; and if so the next question for me was whether I could conclude that the claim form had been presented: "*within such further period as the Tribunal considers reasonable*".



35. In ***Palmer & Saunders v. Southend-On-Sea Borough Council*** [1984] IRLR 119, the Court of Appeal suggested that the best approach is to read “practicable” as “feasible” and to ask: “was *it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?*”

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36. The claimant maintained that due to her medical conditions it had not been “reasonably practicable” for her to present her claim form in time. She said this in the further and better particulars of her claim which were submitted by her solicitor (P.20):-

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*“7. The claimant cites health problems which resulted in her claim being submitted late. The claimant has had various dental appointments in which she has had to have teeth removed. Further work to remove the claimant’s teeth is scheduled later this year. A letter has been obtained from the claimant’s dentist and a copy is provided. The claimant is also a diabetic and managing her sugar levels can affect her levels of concentration. A G.P. report has been requested and will be provided as soon as it is available. The claimant believes that her health problems led to her submitting the claim late.”*

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37. As the respondent’s Counsel submitted, the claimant’s evidence about her “health problems” was inconsistent and not reliable. In any event, in my view, on the evidence, her health conditions were not an impediment to her submitting her claim form in time.

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38. She had only consulted her dentist on two occasions in the relevant period from the termination of her employment on 15 September 2021 until she submitted her claim form on 1 February 2022; she had been in contact with her G.P. about her diabetes but there was no evidence of extra appointments or additional medication. Nor was there any report from her G.P. notwithstanding Judge Hendry’s clear suggestion at the case management preliminary hearing on 4 April 2022 (P36-37).

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39. Further, by late November 2022, at the latest, the claimant was aware that she could bring an Employment Tribunal claim and that there was a three

month time limit. She also had the assistance of her daughter, a former law student, and on 8 December 2021 she had written to the respondent to advise, amongst other things, that she intended to “take you to an *Employment Tribunal*”.

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40. In all these circumstances I was not persuaded that it had not been “reasonably practicable” to bring her unfair dismissal complaint in time. In my view, it was “feasible” to do so.
- io 41. Accordingly, the Tribunal does not have jurisdiction to consider this complaint and it is dismissed.

#### **Discrimination complaint**

- 15 42. The general rule is that claims of work-related discrimination under the Equality Act 2010 (“the 2010 Act”) must be presented to the Employment Tribunal within the period of three months starting with the date of the act complained of (s.123(1)(a)).
- 20 43. As I recorded above, it was accepted by the claimant’s solicitor that the discrimination complaint was late by some 18 days. The issue for me, therefore, was whether, in all the circumstances, I should exercise my discretion and extend the time limit on the basis that it was “just and equitable” to do so (s.123(1)(b)).
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44. In determining whether I should exercise my discretion and allow the late submission of the claim, I found the guidance in ***British Coal Corporation v. Keeble & Others*** [1997] IRLR 336 to be helpful. I also found the guidance of the Court of Appeal in the recent case, ***Adedeji v. University Hospital Birmingham NHS Foundation Trust*** [2021] EWCA Civ23, to be of assistance. In that case, the Court reviewed a number of recent cases involving the list of Limitation Act factors cited in ***British Coal***, quoting:
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5            *"The best approach for a Tribunal in considering the exercise of the discretion under s.123(1)(b) is to assess all the factors in the particular which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."*

io            45.    The claim form was submitted some 18 days out of time. However, the claimant was aware of the time limit some months before, in late November 2021.

              46.    Nor, as I recorded above, was I persuaded that the claimant's "health problems" were the reason for her submitting the claim late.

15    **Prejudice**

              47.    Were I not to exercise my discretion to extend the time limit then the claimant will be prejudiced as her claim will be dismissed. On the other hand, were I to allow the claim to proceed then the respondent will be prejudiced in having to defend the proceedings and considerable expense will be incurred not only in conducting the Employment Tribunal proceedings, but also in investigating a number of allegations set out in the further and better particulars (P19-24).

25            48.    I was also mindful, as I recorded above, that although the claimant did not have the benefit of professional advice at the relevant time, she did have assistance from her daughter and, as the respondent's Counsel submitted, her e-mail of 8 December to the respondent (P.40), *"demonstrated a certain level of knowledge."*

30            49.    While I was mindful that the just and equitable "escape clause" is much wider than that relating to unfair dismissal claims which require a claimant who has submitted a claim form out of time to show that it was not "reasonably practicable" to comply with the normal time limit, I was also mindful of such cases as **Robertson** (referred to by Judge Hendry in his Note (P.36)). In that case, the Court of Appeal stated that when Employment Tribunals consider

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exercising the discretion under s.123(1)(b) of the 2010 Act: *-‘There is no presumption that they should do so unless they can justify a 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.**’* (my emphasis)

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50. In all the circumstances of the case, and having regard, in particular, to the claimant’s state of knowledge of Tribunal procedures and time limits, assistance from her daughter, the lack of medical evidence to explain the reason for the delay, not to mention the need for finality in litigation and potential prejudice to the respondent, I had little difficulty, on the evidence, in arriving at the view that it would not be just and equitable to exercise my discretion and extend the time limit.

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51. Accordingly, the Tribunal does not have jurisdiction to hear the discrimination complaint and it is also dismissed.

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**Employment Judge: N M Hosie  
Date of Judgment: 28 July 2022  
Entered in register: 28 July 2022  
and copied to parties**

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