EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000150/2025

Hearing held by CVP at Dundee on 15 April 2025

Employment Judge McFatridge

S Ward	**Claimant** **Represented by:** **Ms Stobart, Advocate** **Instructed by:** **Thompsons Solicitors LLP**
The Press Association Ltd	**Respondent** **Represented by:** **Mr Francis, Barrister** **Instructed by:** **Keystone Law Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the tribunal does not have jurisdiction to hear the claim as it is time barred.

REASONS

1. The claimant submitted a claim to the tribunal in which she claimed that she had been unlawfully discriminated against by the respondent in that the respondent had failed to make a reasonable adjustment. The respondent submitted a response in which they denied the claim. They

made the preliminary point that the tribunal had no jurisdiction to hear the claim as it was time barred. A preliminary hearing was fixed in order to deal with the time bar issue. Neither party sought to lead evidence at this hearing but both made legal submissions. I proceeded on the basis that the claimant's claim was as set out in their ET1. I had regard to various documents which had been submitted by the parties in a bundle prepared for the preliminary hearing. This included copies of the claimant's rotas together with a grievance letter which the claimant had submitted in September 2024, various emails between the claimant and the respondent, the grievance outcome given to the claimant by the respondent, the claimant's appeal against part of the grievance outcome and emails between the NUJ and the claimant. Neither party sought to impugn any of the documents lodged as being anything other than what they appeared to be. The emails between the NUJ and the claimant were redacted and the respondent made no issue regarding these redactions. Given that the case was determined on the basis of the pleadings I do not see the need to set out any specific matters of fact since both parties appeared to be agreed on the timeline in this case. I shall set out the parties' relevant submissions and then my decision in the matter.

Respondent's submissions

2. The respondent provided their initial skeleton argument in written format. They set out the background to the case. The claimant is a journalist who remains employed by the respondent. It was noted that the respondent accepted that the claimant was disabled by a combination of narcolepsy and cataplexy, the latter being sudden temporary muscle weakness that is closely associated with narcolepsy. They accept that they were aware of this disability from the commencement of her employment in August 2023. They noted that the claimant was making a single claim for a failure to make reasonable adjustments. The respondent accepts that they did initially impose the PCP complained of which was a requirement that the claimant work a mixture of shift patterns which frequently varied. They accepted that the reasonable adjustment contended for was a fixed shift pattern. It was common ground between the parties that this fixed shift pattern had been implemented from 28 August 2024 onwards. The

dispute between the parties was around the claimant's contention that the reasonable adjustment contended for – the fixed shift pattern ought to have been implemented by the respondent at an earlier date than it was. The respondent's position is that the claim does not succeed since although they were aware of the claimant's disability they were unaware that the PCP put the claimant at a substantial disadvantage in comparison with persons who did not have her disability.

3. The respondent noted that the ET1 in this case had been submitted on 17 January 2025. ACAS conciliation had been commenced on 30 September 2024 and the ACAS certificate issued on 11 November 2024. They noted that it was common ground between the parties that whatever date was taken as the date when time started to run it was accepted that the claimant had not lodged her claim in time. They referred to paragraph 8 of the note issued following the previous case management discussion which stated:-

> *"It is accepted that the claimant did not lodge her claim in time. Even taking the end of August (2024) as being the relevant starting point (i.e. immediately before the reasonable adjustment was made) the claim is out of time taking account of the extension allowed by virtue of the early conciliation process. The claimant's position is that it is just and equitable that the claim be accepted late."*

It was however the respondent's position that in terms of the legislation time had started to run long before 28 August 2024. They referred to section 123 of the Equality Act 2010. They referred to section 123(3) which states:-

> *"Failure to do something is to be treated as occurring when the person in question decided on it."*

The respondent noted that section 123(4) then goes on to state what assumptions the law will make in a situation where there is no specific evidence setting out when an employer has decided not to do something. Section 123(4) states:-

> *"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."*

It was the respondent's primary position that this was a case which fell within section 123(4)(a). In their view whilst the claimant had not made it clear in their ET1 exactly when it was that the respondent was said to have breached their duty to make reasonable adjustments it is clear that she has sat on her claim for some time before contacting ACAS and submitting her ET1. It was noted that there were a number of points in the timeline where the tribunal could decide that time had started to run because the respondent had carried out on act inconsistent with making the reasonable adjustments contended for. They noted in paragraphs 1 and 2 of the grounds of complaint the claimant pleads that the respondent was aware of the claimant's disability at the commencement of her employment. The claimant has also stated in an email sent to the respondent, copied to her union official and others dated 28 November 2024 (page 62) that:-

> *"It is possible that the adjustments that were put in place in August 2024 may have been implemented at some earlier point (between February-August 2024).*
> *A solicitor told me that adjustments should have been made in September 2023 and that I don't have any responsibility in failing to request adjustments at the point of disclosure prior to employment."*

Alternatively, the respondent notes that in paragraphs 4-5 of the grounds of claim (page 19) that the claimant first requested the adjustment in around January or February 2024. If this is the case then assuming time did not start to run from the September just after the claimant was appointed time would start to run from February. Alternatively again, the respondent notes that in paragraph 6 of the paper apart to her ET1 the claimant suggested that she further discussed the adjustment with the respondent at a meeting on 10 July 2024 and that her request was refused at that meeting. The respondent notes that if this is the date which is

relevant as the starting point then the primary three-month time limit expired on 10 October 2024. Although the claimant did contact ACAS before that date she failed to submit her claim thereafter within the appropriate time limit. The respondent set out their position in the matter since they considered that one of the matters to be borne in mind by the tribunal in deciding whether or not to exercise its discretion to extend time was the extent of the delay. It was their view that the delay in this case was an extensive delay given that time had started to run much earlier than the date of 28 August contended for by the claimant. With regard to the reasons for the delay it was their view that entirely inadequate reasons had been given. They referred to an email lodged from Nick McGowan-Lowe a representative from the National Union of Journalists who admitted fault in relation to the late submission of the ET1. The correspondence was lodged. They noted that Mr McGowan-Lowe stated this (page 67):-

> *"I have to apologise for a significant mistake at our end. I misrecorded the date the paperwork needed to be filed, and as such it was filed after the deadline. This means that your employer could potentially ask for the claim to be struck out. This is a significant error and it should not have happened. Once we discovered it we immediately filed the paperwork."*

They noted that he then went on to say:-

> *"We had filed for early conciliation with ACAS, a step that allows for ACAS to try and negotiate a solution but were late filing the employment tribunal claim which follow that. There is no excuse for that and I apologise."*

With regard to the reason for the delay they noted that the claimant had not been called to give evidence at the preliminary hearing. The respondent was therefore not in a position to make enquiries of the claimant as to why it was that her claim had not been submitted before it was. The respondent made the point that the claimant was a sophisticated individual. She was a journalist who was well educated and adept at research. As well as being a union member she was in fact the equality and diversity representative at her workplace. She clearly had the benefit

of advice from her union and from a solicitor. The respondent referred to the case of ***Hunswick v Royal Mail Group plc*** EAT003/07. They particularly referred to paragraph 13. This stated:-

> *"There are indeed a number of decisions in this Tribunal which clearly establish that where a claimant has missed a relevant time limit as a result of relying on bad advice from a skilled adviser, including a trade union, that is a relevant factor which the Tribunal should consider in deciding whether it is just and equitable to extend time: see Hawkins v Ball [1996] IRLR 258; Chohan v Derby Law Centre [2004] IRLR 685; Baynton v South West Trains Ltd [2005] UKEAT 0848/04 …. I should say in passing that some of those cases arguably appear to go further and say that the claimant's reliance on wrong advice as to time limits should be a decisive factor; but Miss Shepherd, who appears for the Respondent, submits, in my view plainly rightly, that that is going too far. The fact that the claimant has missed the deadline as a result of bad advice is simply one factor, and whether it is decisive in his or her favour will depend on the circumstances of the case. ….*
>
> *(14) However, what Miss Shepherd submits is that the present case on its facts simply does not fall within the scope of the Hawkins v Ball line of authorities. The crucial distinguishing point is that the notional three month deadline, i.e. as extended from 10 October 2005, had already expired before any question of the Appellant being misled by the Union arose. …. The Union's mistake thus had no causative effect."*

4. It was thus the respondent's position that in this case the union's admitted failure had no causative effect. By the time they failed to properly diarise the date the damage had already been done and the case was already time barred. The tribunal was then left in the position where there was really no explanation as to why the claimant had sat on her claim and not submitted it in the time limit.

5. Finally, it was the respondent's position that the cogency of evidence in relation to the claimant's claim was likely to be affected by its late

presentation. He confirmed that the sole issue in connection with liability is whether (and when) the respondent had knowledge of the effect of the PCP on the claimant such that its failure to make reasonable adjustments was culpable. The respondent's position was that this was a fact sensitive question that would turn at least in part on exactly what the respondent knew about the claimant's condition and the effect of her shift pattern and from when. The difficulties that witnesses will now have in answering such questions were said to be obvious in circumstances where significant time had passed and where the claimant's own claim was unclear as to when the relevant breach was said to have occurred.

6. Fourthly it was the respondent's position that the claimant did not act promptly once she knew of the possibility of taking action. They referred to a letter of 9 July 2024 (page 46) where the claimant wrote to her manager stating:-

> *"I am concerned the unequal impact on my health is not recognised and don't feel late/earlies (shifts) are equal in terms of impact. In my previous role I would have involved HR in any decision making involving the Equalities Act which this situation does involve. Because of the considerations which I have outline above."*

The respondent's position was that it could be inferred that the claimant knew about the possibility of taking action long before July 2024 and indeed her grievance refers to taking union advice in December 2023. In the view of the respondent it is clear she delayed significantly before taking action.

7. Fifthly it was their position that there was no general principal that it would be just and equitable to extend time where the claimant was seeking redress through the employer's internal grievance procedure before embarking on legal proceedings. They noted that the claimant's grievance was not raised until 30 September 2024 which was long after the primary time limit had expired (if the respondent's breach is said to have occurred in January/February 2024 or earlier). There was no suggestion that the timing of the internal procedure impact on the submission of the ET1 form in January 2025. Finally, it was their position that looking at the balance

of prejudice it would not be just and equitable to extend time in circumstances where the claimant had now been given the adjustments contended for where the claimant had suffered no financial loss. On the other hand allowing the claims to proceed would cause significant prejudice to the respondent in terms of the time and cost of defending them.

Claimant's submissions

8. The claimant's representative confirmed that whilst the claimant accepted that the claim was out of time they disagreed entirely with the respondent's position as to when time started to run. It was their position that time started to run on 28 August 2024. This meant that the claim ought to have been submitted no later than 8 January 2025 and that it was therefore nine days late. The claimant's representative referred to the leading cases of ***Matuszowicz v Kingston upon Hull City Council*** [2009] IRLR 288 and ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194. She referred to paragraphs 13, 14 and 15 of the Morgan judgment. In paragraph 13 LJ Leggatt stated:-

> *"In my view, this argument is flawed because it erroneously treats a provision which is dealing only with the question of when time begins to run for the purpose of calculating the time limit for bringing proceedings as if it were determining when a breach of duty first occurs. In some provisions which specify time limits for bringing proceedings the date on which time begins to run is stated to be the date on which the cause of action accrued – indicating that this is also the earliest date on which the claimant has a right to the relief claimed. ….*
>
> *14. Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty*

began. Pursuant to section 20(3) of the Equality Act 2010 the duty to comply with the requirement relevant to this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen however that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands the primary time limit for bringing proceedings would already have expired.

15. This analysis of the mischief which section 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle to be assessed from the claimant's point of view having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. This is further supported by the decision of the Court of Appeal in Kingston upon Hull City Council v Matuszowicz [2009] ICR 1170. In that case the Court of Appeal considered the effects of the predecessor provision (which was in materially identical terms) to section 123(4) of the Equality Act 2010 in relation to a claim based on failure to make reasonable adjustments by finding alternative employment for the claimant. On the facts, the duty (and hence the failure to comply with it) was said to have arisen by at the latest August 2005 and to have continued until 1 August 2006 when the claimant's employment ended. Although the Court of Appeal did not find it necessary to reach any conclusion about the date on which time began to run Lloyd LJ (with whose judgment the other members of the court agreed) considered that the relevant date may have been 28 July 2006 observing that, at any rate during the period of April to July 2006, the employer was representing to the claimant that the question of his possible redeployment was being taken seriously (see paras 28-29). This illustrates, first of all, that the date by which the

employer might reasonably have been expected to comply with a duty to make reasonable adjustments for the purpose of the test in what is now section 123(4)(b) of the Equality Act 2010 may be different from the date when the breach or duty began. Secondly, the approach of Lloyd LJ supports the view that the date by which the employer might reasonably have been expected to comply with the duty should be determined in the light of the facts as they would reasonably have appeared to the claimant including in that case what the claimant was told by his employer."

9. It was the claimant's position that the respondent's interpretation of section 123(3) and (4) was incorrect. It was the claimant's position that time started to run on 28 August. If this were the case it was the claimant's view that the ***Hawkins v Ball*** line of authorities was extremely in point. The position in relation to a claim of discrimination was different from the situation in relation to a claim of unfair dismissal. The failure of the union should not be visited upon the claimant. She pointed out that the claimant had done absolutely nothing wrong. She had entrusted the matter to her union and been let down. Points made by the respondent about the claimant being a sophisticated individual who knew her rights were simply not relevant. She had passed the matter on to her union and the solicitors they instructed and there was no onus on her to check things herself. So far as cogency of the evidence was concerned it was clear that the respondent had carried out a grievance process and investigated the matter after the claimant submitted her grievance on 30 September. The matter would still be clear in the minds of the witnesses and there would be no difficulty with cogency of the evidence. With regard to the balance of prejudice she disagreed with the respondent's analysis. It was the claimant's position that she had been severely hurt and traumatised by what had taken place. She had suffered clear discrimination, a fact that the respondent now accepted that they ought to have made the reasonable adjustments. The claimant was looking for a declaration to that effect. If she was not allowed to proceed she would be denied justice for something which was no fault of hers.

Discussion and decision

10. Although I have not specifically set this out in my summary of each party's submissions I should record that both parties were agreed on the basic approach to the just and equitable extension the tribunal should take. The relevant cases are well known – ***Bexley Community Centre (t/a Leisure Link) v Robertson*** [2003] EWCA civ 576; ***Polystar Plastic Ltd v Liepa*** [2023] EAT 100; ***British Coal Corporation v Keeble*** [1997] IRLR 336 and ***DPP v Marshall*** [1998] IRLR 494 and ***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** UKEAT [2022] 132. The tribunal requires to adopt a multi-factorial approach similar to the approach of the civil courts in England to applications under section 33 of the Limitation Act 1980. The various headings are in no sense to be regarded as a checklist but should be a guide. These are the length of and reasons 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 parties should have co-operated would then request for information, the promptness with which the claimant acted once they knew of the possibility of taking action and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

11. In this case there was a difficulty in ascertaining the length of and reasons for the delay given that there was a stark difference between the approach of the two parties as to when time started to run. The respondent's position was that time started to run in or around January/February 2024 when the claimant first raised the matter and where the respondent carried out an inconsistent act by continuing to rota the claimant on varied shifts. The claimant's position was that time did not start to run until 28 August. I considered that before I could decide how to exercise my discretion it was essential that I make a decision as to when time started to run. It was clear that the claim was time barred in any event but there is obviously a difference between a delay of nine days and a much longer delay which is what the respondent contended for.

12. The starting point has to be section 123 itself. In sub-paragraph 1 it states that proceedings on a complaint may not be brought after the end of (a) the period of three months starting on the date of the act to which the complaint relates or (b) such other period as the employment tribunal

thinks just and equitable. The important point in time the tribunal is looking at is the date of the act to which the complaint relates.

13. Where the act to which the complaint relates is an overt time limited act such as demotion or other less favourable treatment, there is little difficulty in deciding the date of the act to which the complaint relates. Matters are more complex however in two situations. One of these is where the act continues over a period and the other is where the act is not an overt act but is an omission or failure to do something. Section 123(3)(a) deals with the first of these situations where it provides that conduct extending over a period is to be treated as done at the end of that period. In my view it would have been open to Parliament to simply leave matters at that in which case it is highly likely that over time the courts would have decided that a failure to make reasonable adjustments was a continuous act so long as the failure continued. Parliament did not however leave matters at that and enacted 123(3)(b) which states that *"failure to do something is to be treated as occurring when the person in question decided on it."* It is therefore clear to me that Parliament did not intend that a failure to make reasonable adjustments was to be regarded as a continuing act where time does not start to run until the end of the period. I am reinforced in this belief by the case of ***Matuszowicz***. The employment tribunal in that case fell precisely into that error when they found that the alleged failure to make reasonable adjustments was a continuing act extending over a period of time up to August 2006 when a TUPE transfer had occurred. In the ***Matuszowicz*** case that decision was overturned by the EAT who found that a failure to make reasonable adjustments was an act which fell fairly within the terms of section 123(3). The EAT therefore overturned the decision of the employment tribunal and decided that the claim of a failure to make reasonable adjustments was out of time. When the case went to the Court of Appeal the Court of Appeal did not restore the employment tribunal's ruling. The Court of Appeal confirmed that section 123(3)(b) was applicable and that a failure to make reasonable adjustments was a failure to do something and that it should be treated as occurring when the person in question decided upon it. In that case however the Court of Appeal looked at the matter differently from the EAT. They noted that where something is an omission it may and often is, impossible to determine

when an organisation has decided not to do something. They then looked at section 123(4). Section 123(4) states what happens when there is no evidence as to when the person in question decided not to do something. It states:-

> *"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."*

14. In the ***Matuszowicz*** case there was no inconsistent act. The adjustment intended for was to transfer the claimant to suitable alternative work. This was a failure which had continued up until the date the claimant was TUPE'd out of their employment. They had not found him other work but equally they had not done anything inconsistent with finding him other work. The ***Matuszowicz*** case was therefore a case which required to be decided on section 123(4)(b). In the ***Matuszowicz*** case the Court of Appeal said that there was often a distinction to be drawn between a situation where an actual decision was made not to do something -the employer may simply not do it either through lack of diligence or competence or any reason other than conscious refusal. The ***Morgan*** case dealt with a similar situation and a similar analysis.

15. The argument which is being refuted at the beginning of section 13 of Morgan was an argument made by the respondent that effectively the claimant could not have their cake and eat it. They could not on the one hand say that the duty to make reasonable adjustments had arisen some time in the past and that the respondent was in breach of it but at the same time say that for the purposes of limitation of actions time did not start to run until afterwards. I entirely agree with the court that there is a distinction between the time when an obligation to make reasonable adjustments comes into existence and when time starts to run because the employer has failed to comply with that duty. However once the duty has been breached time does start to run and the breach cannot be treated as a continuing act.

16. The argument made by the respondent in Morgan is not an argument that was made by the respondent in this case. The position is that a duty to make reasonable adjustments arose probably fairly early on in the claimant's employment but that time does not start to run until a later date which is either the date when the respondent made a conscious decision not to make the adjustment or are deemed to have made such a decision by applying the rule set out in the act. The start date for time running requires to be calculated bearing in mind what the ***Morgan*** case has said which is that we look at it from the claimant's view as to when it became clear or should have become clear to the claimant that the respondent was not complying with its duty to make reasonable adjustments.

17. What I take from the authorities is that

(1) A failure to make reasonable adjustments is not to be regarded as a continuous act for the purpose of section 123(3)(a).

(2) Where there is evidence of a date on which the respondent has decided not to provide an adjustment and that evidence is acceptable, evidence of the date the decision was made then time starts to run from that date.

(3) Where there is no such evidence time starts to run from the date the respondent does an act inconsistent with providing the reasonable adjustments. (123(4)(a))

(4) Where there is no such inconsistent act, time starts to run from the date when looking at it from the claimant's point of view it becomes clear to the claimant that the respondent is not going to comply with their duty to make a reasonable adjustment.

18. Applying that to the facts of this case I find that the respondent carried out an act inconsistent with complying with their duty to make reasonable adjustments when they continued to rota the claimant on varied shifts after the claimant first requested the adjustment in or around January or February 2024. This date is based on the date given by the claimant in paragraphs 4 and 5 of the paper apart to her ET1. It is not possible to be more precise. In my view however what that does mean is that the

claimant ought to have lodged her claim or at least commenced early conciliation with a view to lodging her claim no later than April/May 2024. Assuming the end of May 2024 (which is generous to the claimant) this means that the claim was submitted some seven months late and not the nine days contended for by the claimant. In addition to that, it puts the situation in this case on all fours with the situation in the case of ***Hunswick v Royal Mail Group plc***. The union's mistake in failing to diarise the case properly in January 2024 had no causative effect. It cannot therefore be relied upon as a reason for the delay and ***Hawkins v Ball*** line of authorities are not appropriate. I also agree with the respondent that the claimant has not provided any other reason for the delay.

19. With regard to the cogency of the evidence I consider that the respondent's position is likely to be correct. Although I take on board the claimant's comments about the grievance, the decisions being impugned are decisions which were taken over a year ago. With regard to the balance of prejudice I do not seek to downplay the claimant's upset at having in her view been discriminated against but I do note that she has now obtained the adjustment contended for and remains in employment. I consider the respondent would suffer prejudice in having to defend the claim and go over a matter which they no doubt considered they had dealt with when they gave the claimant the adjustment she wanted in August last year. On the general point as to whether the claimant acted promptly once she knew of the possibility of taking action I would agree with the respondent. The claimant was clearly aware of her rights. She made a specific request in February 2024 and it would have been crystal clear to her that this was refused. It would have been clear to her that the respondent had decided not to grant her request. There is nothing before me to say why she did not raise proceedings or at least start early conciliation at that point. She had the benefit of being a union member and indeed held a position in the union.

20. Taking all of these matters into account, I acknowledged that the discretion I have is a wide one.

21. The claimant's representative made the point that the merits of any case can be helpful pointers. If it is clear that the claimant has been

discriminated against this will obviously weigh in the balance as to whether she should be permitted to advance her claim or not. She made the point that the respondent has effectively accepted large parts of the claim. They accept that the duty arose however there is a dispute as to when it arose. This is based on their contention that they were unaware of the effect of the PCP on the claimant given her disability. Although the respondent has accepted certain things I note that the claim is still very much disputed by them and the matter of when they became aware of the effect of the PCP on the claimant due to her disability is something which can only be determined after hearing evidence.

22. My discretion in the matter is wide. There is no presumption either yes or no that I can fall back on. Looking at matters in the round I do consider that this is not a case where I should exercise my discretion to extend time. In my view justice and equity favours leaving the time limit in place. The tribunal therefore does not have jurisdiction to hear the claim and the claim is dismissed.

Date sent to parties **30 April 2025**