



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000554/2024**

**Held in Glasgow on 3 June 2025**

**Employment Judge P O'Donnell**

**Mr A Braekkan**

**Claimant  
In Person**

**South Lanarkshire Council**

**Respondent  
Represented by:  
Mr S O'Neill -  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is:

1. The Tribunal allows the claimant's application under Rule 30 to add the allegation of direct age discrimination identified at paragraph 7a of the Note of the preliminary hearing held on 22 April 2025.
2. The Tribunal does not have jurisdiction to hear the claims of age related harassment as they were lodged out of time and the Tribunal does not consider that they were lodged within a period that it would be just and equitable to hear them.

### **REASONS**

#### **Introduction**

1. By way of an ET1 claim form presented on 25 April 2024, the claimant raised claims of constructive unfair dismissal under the Employment Rights Act 1996 (ERA), age discrimination under the Equality Act 2010 (EqA) and detriment for making protected disclosures under the 1996 Act.

2. There has been a lengthy case management process in this case in which considerable effort has been made to get the claimant to specify his case to the required degree that the respondent has fair notice of the claims they have to answer. This process culminated in a case management hearing held on  
5 22 April 2025 at which a definitive list of the claims which are to proceed to a final hearing was identified by EJ Whitcombe and appear at paragraphs 6-17 of his Note of that hearing. Some of those claims have subsequently been withdrawn by the claimant and dismissed by a Judgment dated 11 May 2025.
3. The respondent identified certain preliminary and jurisdictional issues which  
10 arose from the definite list of claims:
- a. They maintain that one of the allegations of direct age discrimination (identified at paragraph 7a of EJ Whitcombe's Note) was not pled in the ET1 and requires amendment. They object to this allegation being added by way of amendment.
  - 15 b. The allegations of age related harassment are said to be out of time. These allegations relate to comments which the claimant says were made by another employee on 5 February 2015 and 3 April 2019.
4. The present hearing was listed to determine these issues. It was also to determine an application for strike-out or deposit order but Mr O'Neil  
20 confirmed that the respondent did not insist on this in light of the claimant having withdrawn certain claims.
5. The respondent also raises the issue of time bar in respect of the other allegations of direct age discrimination and the protected disclosure detriment. In these cases, the claimant argues that there was an act  
25 continuing over a period ending with the termination of his employment. After discussion, it was agreed that this issue would be one to be determined at the final hearing where the Tribunal can hear all the evidence needed to be able to decide the issue of whether there had been any acts continuing over a period.

**Decision - amendment**

6. The Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 30.
- 5 7. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three particular factors that the Tribunal should bear in mind when exercising this discretion; the nature of the amendment; the applicability of any time limits; 10 the timing and manner of the amendment.
8. In relation to time limits, the case of *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07 confirms that this is a relevant factor in the Tribunal's discretion and can be the determining factor. However, time 15 bar does not apply, in the context of an application to amend an existing claim, to automatically bar a new cause of action in the same way as it would if the new cause of action was being presented by way of a fresh ET1.
9. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in *Selkent*, consider any other relevant factors and then 20 take all of those into account in balancing the injustice and hardship to all sides.
10. First, there is the nature of the amendment itself which is to add a new allegation of direct age discrimination. The claimant sought to argue that the relevant allegation (which relates to an alleged failure to give the claimant 25 certain type of work for a period from 22 August 2022 to 27 November 2023) was set out in the ET1 claim form but, even on the most generous reading of the form, there is nothing which sets out this allegation in any terms let alone clear and unambiguous terms.
11. At most, this is a new allegation related to an allegation that is pled in the ET1; 30 the claimant does set out an allegation that for a seven year period from the

start of his employment in 2007 he was not provided with the type of work stated in his contract. It is the claimant's position that the allegation related to 2022/2023 is a continuation of the earlier position and that the type of work given to him would depend on who is manager was at any given time.

5 12. In these circumstances, the Tribunal considers that the nature of the amendment is to introduce a new allegation of direct age discrimination relying on new facts albeit one that it is related to existing allegations.

13. Second, there is the issue of the applicability of time limits. The new allegation was first raised in a document prepared by the claimant on 26  
10 March 2025 as part of the case management process. The allegation has, therefore, been raised out of time.

14. There are, however, a number of caveats or qualifications in relation to the issue time bar that is relevant to the Tribunal's consideration.

15 a. The first caveat is that there is the question of whether the individual allegations of direct discrimination, taken together, form an act continuing over a period for the purposes of s123(3) EqA. As noted above, the issue time bar and continuing act are already issues to be determined at the final hearing in respect of the other allegations of direct age discrimination.

20 b. The Tribunal is not in a position, at this time, to determine whether the individual acts amount to an act continuing over a period as this requires an assessment of the evidence about each act in order to determine whether there is an ongoing and continuing state of affairs (*Hendricks v Metropolitan Police Comr* [2003] IRLR 96). The present  
25 hearing is not one at which evidence has been heard and so this is a matter which the Tribunal considers will have to be determined in due course. It is conscious of the fact that the final hearing listed for August 2025 will be considering this issue in respect of the other allegations of direct age discrimination.

- c. The second caveat or qualification is that the Tribunal does have a broad discretion to hear a claim out of time under s123(1)(b) EqA.
- d. The third caveat and qualification is that the fact that a claim lodged now would be out of time is not fatal to the application to amend.
- 5 e. The fourth and final caveat in respect of time limits is that, if the amendment is allowed, the respondent is not deprived of the opportunity to raise the time bar defence and this defence (along with the issues relating to the questions of continuing act and the Tribunal's discretion to hear any claim out of time) can be determined
- 10 subsequently (*Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634 and the more recent decision of *Douglas v North Lanarkshire Council* [2024] EAT 194).
15. In these circumstances, the fact that a claim lodged now would be out of time is not fatal to the application to amend.
- 15 16. Third, there is the factor as to the timing and manner of the application. It is true that it was, in effect, made almost a year after the ET1 was lodged and after there had already been considerable case management with the claimant being given multiple opportunities to set out his case. The claimant's explanation why he did not set out this allegation in his ET1 was that he
- 20 thought that he had set out sufficient information; the Tribunal does recognise that the claimant is a party litigant who will be unfamiliar with the legal process and not appreciate what is required in terms of pleading a case.
17. On the other hand, at the stage when the allegation was first raised, no final hearing had been listed and the respondent had been seeking clarification of
- 25 the claims being pursued.
18. Having addressed the specific factors identified in *Selkent*, the Tribunal considered whether there were any other relevant factors.
19. The Tribunal was not being asked to assess the prospects of success at this hearing and did not consider that the merits of the case was a factor which
- 30 should feature heavily in its consideration given that this was an allegation of

discrimination which could only be determined by the Tribunal once it had heard all the evidence and decided what inferences it could draw from the primary facts.

20. Turning to the balance of injustice and hardship between the parties, the  
5 Tribunal considered that there would be some injustice and hardship to the claimant in refusing the application as he would be prevented from seeking a remedy for this alleged discrimination.
21. However, this prejudice is limited as the claimant would still be able to pursue his other claims under the Equality Act as well as his claim of unfair dismissal.  
10 It is not the case that refusing the amendment would deny him any remedy at all.
22. The Tribunal does accept that the respondent would face the hardship of having to deal with an allegation (and face a liability) that they did not previously. However, the Tribunal does not consider that this is a significant  
15 hardship; the respondent has the opportunity to defend the claim and there was no suggestion that they are somehow prevented from doing so or that their ability to do so was prejudiced by the fact that the allegation was being raised late in the proceedings.
23. In these circumstances, taking account of all the matters set out above, the  
20 Tribunal considers that the balance of prejudice falls in favour of the claimant on the basis that denying him the opportunity to seek a remedy for this alleged discrimination outweighs any prejudice to the respondent in having to prepare to answer this allegation. The Tribunal, therefore, allows the application under Rule 30 to add the allegation identified at paragraph 7a of the Note of  
25 the preliminary hearing held on 22 April 2025.

*Decision – time bar*

24. The issue of time bar relates to the allegations of age related harassment which are said to have occurred 5 February 2015 and 3 April 2019.
25. The provisions relating to the time limit for bringing a claim under the Equality  
30 Act 2010 to the Employment Tribunal is set out in s123 of the 2010 Act:

- (1) *Subject to section 140B [a reference to the provision extending time for ACAS Early Conciliation] proceedings on a complaint within section 120 [the section giving the power to the Tribunal to hear claims under the Act] may not be brought after the end of—*
- 5           (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.*
- (2) *...*
- 10       (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.*
- 15       (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.*
- 20    26. It is quite clear that the claim in respect of the allegations of age related harassment were lodged out of time by a significant degree; 9 and 5 years, respectively. The claimant has not sought to argue that these allegations form an act continuing over a period, the end of which fell within the three months before the ET1 was lodged.
- 25    27. This is not a case where the provisions for extending time as part of the ACAS Early Conciliation process has any relevance given that that process was not started by the claimant until long after the primary time limit had expired in respect of the relevant allegations.

28. The question is solely whether the Tribunal exercises its discretion to hear the claims out of time.
29. The Tribunal does have a broad discretion to hear a claim out of time under s123(1)(b) of the 2010 Act. In *British Coal Corp v Keeble* [1997] IRLR 336,  
5 it was confirmed that this involved a consideration of the prejudice each side would suffer taking account of all the relevant circumstances of the case.
30. *Keeble* also suggested that the factors set out below are ones which the Tribunal should take into account in exercising its discretion. However, in subsequent decisions it was made clear that the Tribunal has been given a  
10 very wide discretion under the 2010 Act and it should not treat these factors as a “checklist” (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5) but, rather, take into account all relevant factors with no one factor being determinative.
31. The length and reason for any delay as well as the question of any prejudice  
15 to the respondent arising from the delay have been said to always be relevant factor (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050) although requires to bear in mind that no one factor is determinative.
32. The factors which may be relevant to the exercise of the Tribunal’s discretion  
20 are:
- a. the length of and reasons for the delay;
  - b. the extent to which the cogency of the evidence is likely to be affected by the delay;
  - c. the extent to which the party sued had co-operated with any requests  
25 for information;
  - d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
  - e. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.



33. Other factors which may be relevant to the exercise of the discretion are:

a. the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);

5 b. the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; and

c. the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim.

10 34. The burden of proof in the exercise of the discretion lies on the Claimant and past cases have made it clear that it should be the exception and not the rule, with no expectation that the Tribunal would automatically extend time (*Robertson v Bexley Community Centre* [2003] IRLR 434). This does not, however, mean that exceptional circumstances are required for the Tribunal  
15 to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (*Pathan v South London Islamic Centre* UKEAT/0312/13).

35. The claimant's explanation why he did not lodge the harassment claims at an earlier date was that he faced a number of issues during his employment and  
20 he just wanted to get on with the job. He explained that he had raised complaints with the respondent about these issues but he chose not to take a claim to the Tribunal over something that he described as "relatively minor".

36. It was, therefore, the claimant's choice not to bring the harassment claim at an earlier date rather than some form of impediment to doing so (such as a  
25 lack of knowledge about his rights or that he was not aware of the facts giving rise to the claims). The claimant is entitled to make such a choice but there are consequences to doing so, one of which is that any claim would be out of time with the very real prospect that it cannot proceed.

37. The Tribunal does not consider that the claimant's explanation for why he  
30 delayed in making his claim is one which weighs in favour of allowing the claim

to proceed out of time. He has certainly not acted promptly in taking this claim forward.

5 38. There is the obvious prejudice to the claimant that he cannot seek a remedy for this alleged harassment but he has to bear the responsibility for that prejudice given that he chose not to pursue this claim at an earlier date. Further, as noted above in relation to the issue of amendment, the claimant is not being denied the opportunity to seek a remedy as a whole. He has a number of claims proceeding to a final hearing and the harassment claim is what he described as a “relatively minor” part of the overall claim.

10 39. The Tribunal considers that it is axiomatic that the significant passage of time will impact on the recollection of witnesses and the quality of the evidence. Although the alleged harasser is still employed by the respondent and can be called to give evidence, the Tribunal considers that it is not just about the ability of the respondent to call a witness to give evidence but the quality of  
15 the evidence which any witness can give. Asking a witness to recall a single comment from what will be 10 years ago or even 6 years ago when the case proceeds to a final hearing is difficult.

40. Taking all these matters into account, the Tribunal finds that it would not be just and equitable for the claim of age related harassment to be heard out of  
20 time. In particular, the Tribunal considers that, given the very long delay in bringing this claim, the balance of prejudice falls in favour of the respondent. The Tribunal, therefore, finds that it does not jurisdiction to hear the age related harassment claims.

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**Date sent to parties : 09 June 2025**