



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000574/2023**

**Preliminary Hearing held by CVP (Aberdeen)**

**Employment Judge R Mackay**

**A**

**Claimant  
In Person**

**The Scottish Ministers**

**Respondent  
Represented by:  
Ms Campbell, Solicitor**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is:

1. The claims brought by the claimant as set out in Allegations 4,5,6,7 and 8 of his Further and Better Particulars were presented out of time and it is not just and equitable that the claimant should be entitled to proceed with them although late.
2. The claimant's claims brought under s15 of the Equality Act 2010 as set out in Allegations 1, 2 and 3 of his Further and Better Particulars have been presented in time and may proceed to a final hearing. The claim at Allegation 2 brought under s20 of the Equality Act may also proceed to a final hearing but under reservation of the question of time-bar until all the evidence has been heard.

## REASONS

### Background

- 5 1. The claimant raises claims of disability discrimination under of section 15 of the Equality Act 2010 (**“the Equality Act”**) and a failure to make reasonable adjustments under section 20 of the Equality Act.
2. The disability relied upon by the claimant is autism which, although he has not received a formal diagnosis, the respondent concedes for the purposes of the claim. Knowledge is conceded from January 2024 only.
- 10 3. Following an earlier case management preliminary hearing, the claimant was ordered to provide further and better particulars of his claim. He did so by means of a document dated 19 March 2024 setting out eight separate acts complained of (**“the Further & Better Particulars”**). In its response to the Further & Better Particulars, the respondent raised time bar as a jurisdictional  
15 point. This hearing was fixed to consider whether the claims had been brought in time or not, and if not, whether it was appropriate to allow the claims using the “just and equitable” extension set out in Section 123 of the Equality Act.
- 20 4. The claimant represented himself; the respondent was represented by Ms Campbell, Solicitor. Evidence was taken from the claimant by way of questioning from the Tribunal. He was thereafter cross-examined by Ms Campbell.
- 25 5. At an earlier stage of the proceedings, it was determined that the claimant’s identity should be anonymised. This Judgment has, accordingly, been issued on that basis.

### **The Further & Better Particulars**

6. The claimant set out the alleged acts of discrimination in reverse chronological order. For convenience, the acts complained of are summarised below in chronological order.

5 *Allegation 8*

7. In June 2015, the claimant did not proceed beyond the sift stage in an application he made for a promoted post. This is brought under Section 15 of the Equality Act.

*Allegation 7*

10 8. In November 2017, the respondent imposed a ban on the claimant participating in international meetings which he previously attended as part of his role. This is brought under Section 15 of the Equality Act.

*Allegation 6*

15 9. In November 2018, the claimant was subjected to disciplinary action which continued into 2019 and resulted in him being absent from work until August/November 2019. This is brought under Section 15 of the Equality Act.

*Allegation 5*

20 10. In the period from August 2019 to March 2020, there was a failure to make reasonable adjustments to the claimant's working arrangements. The failure led to a formal process which took place from 2020 to some time in 2021. This is brought under Section 20 of the Equality Act.

*Allegation 4*

25 11. The claimant was subjected to disciplinary action in April 2020. This resulted in a written warning on 17 December 2021. This is brought under Section 15 of the Equality Act.

*Allegation 3*

12. On 1 August 2023, the respondent caused distress to the claimant in sending an email which disregarded sensitive personal information relating to his disability. This is brought under Section 15 of the Equality Act.

5 *Allegation 2*

13. From 15 July 2022 to December 2023, the claimant was employed without having a recognised post and no functioning management arrangements. This is brought under Sections 15 and 20 of the Equality Act.

*Allegation 1*

10 14. In August/September 2023, and culminating on 6 September 2023, there was a refusal by the respondent to conduct a review of the treatment of the claimant (including allegations 2 to 8) from the perspective of his being autistic without the claimant lodging a formal grievance. This claim is brought under Section 15 of the Equality Act.

15 **Findings In Fact**

15. The claimant commenced ACAS Early Conciliation on 7 September 2023. The ACAS Certificate was issued on 19 October 2023 and the claim form was submitted on 13 December 2023.

20 16. The claimant was not aware of autism constituting a disability, and accordingly, amounting to a protected characteristic for the purposes of the Equality Act until November 2021.

25 17. Around that time, he had two children and a nephew diagnosed with autism and began to question whether he too had the condition. He concluded that he did and that it explained some of his behaviours including difficulties in communicating and being seen as difficult to manage. Before this time, he did not consider himself to have autism.

18. Prior to contacting ACAS, the claimant did not seek legal advice. He has received some support from an autism charity since May 2022. It was they who advised him of the need to contact ACAS before making a claim to the Employment Tribunal.
- 5 19. On two occasions the claimant obtained advice from a trade union representative. First, between March 2017 and June 2019, and secondly, in September 2021. On the latter occasion, he informed the trade union representative that he was autistic.
- 10 20. The claimant had no desire to go to an Employment Tribunal until the events (set out in Allegation 1) of August/September 2023. Before that, it had not occurred to him that he would wish to bring a claim. As noted, for much of the period in question, he was unaware of his autism and the possibility of a complaint under the Equality Act in any event.
- 15 21. The claimant has submitted a number of data subject access requests to the respondent. There is no suggestion that the respondent has failed to comply with those.
22. A number of those involved in the subject matter of the allegations from the respondent's side have left the respondent's employment, many having done so several years ago.

20 **Relevant Law**

23. Section 123(1) of the Equality Act provides that a complaint of discrimination must be presented to the Employment Tribunal within three months of the date of the act to which the complaint relates. Section 123(3) provides that acts occurring more than three months before the claim is brought may still  
25 form the basis of the claim if they are part of "conduct extended over a period" and the claim is brought within three months of the end of that period.
24. Time runs from the date of the alleged discriminatory act not the date on which the claimant has knowledge of the act, or knowledge of the facts that

might prove it was discriminatory (**Mensah v Royal College of Midwives**, UK EAT/124/94).

25. In considering whether there has been conduct extended over a period, the Court of Appeal has held that the question is whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably (**Hendrix v Metropolitan Police Commissioner** [2002] EWCA Civ1686).
26. The Employment Tribunal has the power to decide whether acts should be grouped into a continuing act or whether they are unconnected (**Lyfar v Brighton & Sussex University Hospital's Trust** [2006] EWCA Civ 1548).
27. Where claim arises out of an omission, the employer's failure to do something is to be treated as occurring when the employer decided not to do it (**Section 123(3)(b) of the Equality Act**).
28. In a claim for a failure to make reasonable adjustments, the time period runs at the end of the period in which the employer might reasonably have been expected to comply with the duty (**Matuszowicz v Kingston-upon-Hull City Council** [2009] IRLR 288). This should be assessed from the claimant's perspective (**Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640).
29. An Employment Tribunal can extend the time for bringing a discrimination claim by such period as it thinks just and equitable (**Section 123(1)(b) of the Equality Act**).
30. The exercise of the discretion should be the exception, not the rule (**Bexley Community Centre v Robertson** [2003] EWCA Civ 576), and it is for the claimant to show that the extension is just and equitable (**Polystar Plastic Ltd v Liepa** [2023] EAT 100).
31. Whilst there is no rigid checklist, the EAT (**British Coal Corporation v Keeble** [1997] IRLR 336) held that relevant factors would include:

- the length and reason for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- 5       • the extent to which a party sued has co-operated with any request for information;
- the promptness with which the claimant acted once they knew of the possibility of taking action;
- the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

## 10       **Submissions**

32.     Both parties made submissions which the Tribunal considered in reaching its decision. The primary focus of the claimant's case was that the complaints were part of a continuing act and thus in time, having regard to the date of the most recent alleged acts. For the respondent, Ms Campbell accepted
- 15       that the complaints set out in Allegations 1 and 3 were in time. So far as the remainder were concerned, she invited the Tribunal to find that there were out of time, not part of a continuing act, and that it was not just and equitable to allow an extension of time.

## **Decision**

- 20     33.     On the basis of the claimant having commenced early conciliation on 7 September 2023, subject to there being a continuing act, or a just and equitable extension, any claims occurring prior to 8 June 2023 are out of time.
34.     The respondent's solicitor conceded that the acts set out in Allegations 1 and 3 are in time. That is correct as the relevant acts are said to have taken place
- 25       on 6 September 2023 and 1 August 2023, respectively. Those two claims under s15 of the Equality Act may, accordingly, proceed to a final hearing.

35. Allegation 2 is said to relate to the period from July 2022 to December 2023. If that allegation is as the claimant contends, part of a continuing act, it is in time. The respondent's position was that the act in question took place in July 2022 and did not amount to a continuing course of conduct.

5 36. It is clear that the claim is that the claimant was left without a recognised post for an extended period. His position is that he was kept under review during that period with a view to identifying a permanent position for him. That state of affairs (leaving aside the merits) clearly amounts to an ongoing situation or a continuing state of affairs in which the claimant alleges that he was treated  
10 unfavourably. It has not been presented as a one-off act which thereafter had continuing consequences. For those reasons, the Tribunal was satisfied that this allegation amounts to a continuing act and is, accordingly, brought in time for the purposes of s15 of the Equality Act.

15 37. To the extent that the claimant also brings this claim as a failure to make a reasonable adjustment, the position is different. The alleged failure for the purpose of s20 of the Equality Act is an alleged omission (i.e. to place the claimant into a substantive post). Having regard to the authorities (**Matuszowicz** and **Abertawe** referred to above) there is an argument that the time limit should begin at an earlier stage (that is to say when the  
20 employer might reasonably have been expected to comply with the duty). On the basis that this Employment Tribunal heard limited evidence (and none from the respondent) about the alleged adjustments in question, and nothing about any positive decision-making by the respondent, it was considered appropriate that the claim for reasonable adjustments be permitted to  
25 proceed under reservation of the right of the respondent to argue at the final hearing, that this aspect of the claim has been brought out of time. There is no significant prejudice to the respondent given that the same subject matter will require to be considered under Section 15 of the Equality Act.

30 38. So far as the remaining five complaints are concerned, looking at them as individual acts, they have been brought out of time (and in respect of some



of them, very substantially out of time). The Tribunal first of all, therefore, considered whether they should be treated as part of a continuing course of conduct.

5 39. From the claimant's perspective, he saw the acts as being continuing to the extent that they all, as he saw it, flowed from his medical condition. That is not, in the view of the Tribunal, sufficient. Each of the allegations is quite distinct and each stands alone. There is no continuing state of affairs connecting the allegations. This point is reinforced by the quite distinct nature of the different allegations and the often substantial periods of time between them. Allegation 8 relates to 2015, Allegation 7 relates to 2017, Allegation 6 relates to 2018, Allegation 5 relates to 2019 to 2020 and Allegation 4 relates to dates in 2020. There is then a further substantial gap between those and the three which have been accepted.

15 40. For those reasons the Tribunal concluded that there was no conduct extending over a period so as to bring Allegations 4 to 8 in time. It went on to consider whether it would nonetheless be just and equitable to allow Allegations 4 to 8 (or any of them) to be allowed late. Having considered the legal principles referred to above, it concluded that it would not be just and equitable to do so.

20 41. It had regard to the fact that the claims are very substantially out of time. It accepted the submissions of the respondent's solicitor that the cogency of the evidence is likely to be affected (not least given the fact that many of the witnesses are no longer employed by the respondent).

25 42. It is clear that during the course of his employment, the claimant has received information by way of data subject access requests and there is no suggestion that the respondent has failed to co-operate in that.

43. Considering the claimant's reasons for not proceeding earlier, the overriding theme emerging from the claimant's evidence was that he did not wish to raise a complaint earlier. It was only as a consequence of the circumstances

giving rise to Allegation 1, that he decided to do so. It had regard to the fact that he was until 2021, unaware of his own diagnosis and the potential for raising a claim under the Equality Act. Even taking those points at their highest, however, no reason was given for the delay in raising a complaint for approximately two years thereafter. Although he took advice from trade union representatives, he made no effort to obtain legal advice once knowing of the possibility of taking action. Having regard to his own evidence about his lack of desire to raise proceedings until 2023 in any event, however, it is unclear that had he done so, it would have made any difference.

44. Considering the relative prejudice to both parties, there is clear prejudice to the respondent in allowing substantially late claims in circumstances where witnesses are no longer readily available, and in circumstances where the claimant himself did not consider himself to be disabled for the majority of the relevant period. On the other hand, the claimant still has three valid claims to pursue which may, if successful, provide him with a remedy. Considering all of these factors in the round, the Tribunal decided that it was not just and equitable to allow Allegations 4 to 8 to proceed.

45. The case will now be listed for a case management hearing to determine further procedure in the case and to fix a final hearing.

**Employment Judge: R Mackay**  
**Date of Judgment: 15 January 2025**  
**Date Sent to Parties: 15 January 2025**