EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000543/2025

Held in Aberdeen by Cloud Video Platform (CVP) on 10 July 2025

Employment Judge J McCluskey

Mr R P Gill	**Claimant** **In Person**
Group Employment Services Limited	**Respondent** **Represented by:** **Mr R Lyons - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. The complaint of indirect religion or belief discrimination about an allegation said to have occurred on or around 6 May 2024 was not presented within the applicable time limit but it is just and equitable to extend the time limit. This complaint will therefore proceed.

2. The application to strike out the complaint of direct religion or belief discrimination about non-payment of bonus said to have occurred on or around 10 December 2024 is refused.

3. The application for a deposit order as a condition of continuing to advance the complaint of direct religion or belief discrimination about non-payment of bonus said to have occurred on or around 10 December 2024 is refused.

REASONS

Introduction

1. There was a case management preliminary hearing on 1 May 2025. At that hearing the case was listed for a public preliminary hearing on 10 July 2025 to determine time bar in relation to the complaint of indirect religion or belief discrimination said by the claimant to have occurred on 6 June 2024 - this

was the date noted by EJ Hosie in the note of the case management hearing and sent to parties on 7 May 2025

2. At the same hearing on 1 May 2025, the respondent submitted that the second complaint made by the claimant, of direct religion or belief discrimination, about not receiving a bonus on 10 December 2024 should be struck out as having no reasonable prospect of success or alternatively the claimant should be ordered to pay a deposit as a condition of continuing with this complaint. EJ Hosie directed that these applications should also be determined at the hearing on 10 July 2025.

3. These are the only two complaints made by the respondent in his claim form.

4. The respondent prepared a file of productions extending to 106 pages. The claimant confirmed that he had a copy of the file and he accessed the file during the hearing.

5. At the hearing today the claimant gave evidence on his own behalf about the time bar matter. He was asked questions in cross examination by Mr Lyons. Thereafter, parties made short oral submissions. Mr Lyons referred to written submissions which he had sent to the Tribunal and to the claimant yesterday, which he relied upon. The claimant confirmed he had received these and the Tribunal also has a copy. Mr Lyons gave his submissions first followed by the claimant.

6. I advised that I was reserving my judgment in relation to time bar and would write to parties with my judgment and reasons.

7. After a break the Tribunal considered the respondent's application for strike out of the second complaint, failing which a deposit order. No evidence was heard from parties about the prospect of this complaint succeeding. Both parties made short oral submissions. Mr Lyons referred to written submissions which he had sent to the Tribunal and to the claimant yesterday, which he relied upon. The claimant confirmed he had received these, and the Tribunal also has a copy. Again, Mr Lyons gave his submissions first followed by the claimant. Again, I advised parties I was reserving my judgment and would write to parties with my judgment and reasons.

Findings in fact – time bar

8. The Tribunal made the following findings in fact, necessary to determine the issue of time bar.

9. The claimant is employed by the respondent in a security role. His employment started around April 2023 and is continuing. His place of work is at BP premises in Peterhead.

10. The claimant submitted a written complaint to the respondent on 10 December 2024. In that grievance he alleged that there had been a conversation between the claimant and his manager Mark Murphie by phone earlier that year during which Mr Murphie told the claimant that he would not be allowed to wear a turban on-site. the claimant wrote "Since that conversation, I have noticed a distinct change in my treatment....I have been denied opportunities and bonuses that my colleagues received". The claimant referred to not receiving a bonus on 10 December 2024.

11. The respondent held a grievance meeting with the claimant on 16 December 2024. The claimant told the respondent he thought the phone call with Mr Murphie was on 28 July 2024, but he was not certain.

12. On 17 December 2024 the respondent wrote to the claimant. His grievance was not upheld.

13. On 23 December 2024 at a grievance appeal meeting, the claimant told the respondent that the date he had given of the phone call with Mr Murphie on 28 July 2024, was not correct. The claimant said the correct date was 5 June 2024. The claimant's grievance appeal was not upheld.

14. The claimant participated in ACAS Early Conciliation between 17 January 2025 and 24 February 2025. He presented his claim to the Tribunal on 28 February 2025.

15. The claimant believed at the time of the phone call that what Mr Murphie had said to him was wrong and was discriminatory because of his Sikh religion or belief. But he feared being sacked and so decided to do nothing about it. He has a partner and a family to support. When he didn't receive his bonus on 10 December 2024, he decided that he had to complain about both matters.

16. The claimant contacted ACAS for advice shortly after 10 December 2024. He did not seek any advice about bringing a claim in the Tribunal before then. He had decided to do nothing as he feared being sacked.

17. In the period between the phone call with Mr Murphie and presenting his claim in the Tribunal there were no issues with the claimant's health.

Observations on the evidence

18. At the hearing today, the claimant said he may have been mistaken as to the date previously given on which the phone call with Mr Murphie took place. The claimant checked his mobile phone during the hearing today and said he now believed the date of the call with Mr Murphie was 6 May 2024 but he could not be sure.

19. The 6 May 2024 date is noted here as a record of the date provided by the claimant today.

Relevant law – time bar

20. Section 123(1) Equality Act 2010 (EqA) says *"Subject to sections 140A and 140B proceedings on a complaint within section 120 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".*

21. The burden of proof is on the claimant to establish that it is just and equitable to extend time (**Robertson v Bexley Community Centre [2003] IRLR 434 CA**).

22. In **British Coal Corporation v Keeble IRLR 336** the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act 1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised, such as (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 cooperated (d) the promptness with which the claimant acted once they 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 they knew of the possibility of taking action.

23. In **London Borough of Southwark v Afolabi [2003] IRLR 220** the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. The Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** confirmed this, stating that it was plain from the language used in s123 EqA (*"such other period as the Employment Tribunal thinks just and equitable*") that Parliament chose to give Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

24. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, the Court of Appeal approved the approach set out in **Afolabi** and **Morgan** and, at paragraph 37. Underhill LJ confirmed that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the case 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".*

Discussion/decision – time bar

25. The date of the alleged discriminatory phone call with Mr Murphie is not clear. The claimant said today that he thought the call was on 6 May 2024. This is earlier than the previous dates given of June 2024 and July 2024. For the purposes of assessing the question of time bar I have used the date given by the claimant today of 6 May 2024.

26. The ordinary limitation period for the claimant to bring a discrimination complaint to the Tribunal ended on 5 August 2024. The complaint was presented to the Tribunal on 28 February 2025. The complaint is 207 days late.

27. The claimant's evidence today, which I accepted, was that he believed at the time of the phone call that what Mr Murphie had said to him was wrong and was discriminatory because of his Sikh religion or belief. But he feared being sacked and so decided to do nothing about it. He has a partner and a family to support. But when he didn't receive his bonus on 10 December 2024, he decided that he had to complain about both matters. He then raised a grievance, appealed against the outcome of that grievance and presented his claim to the Tribunal. There was no dispute that the second complaint about not receiving his bonus is in time.

28. The claimant's evidence today was that he had contacted ACAS for advice shortly after 10 December 2024, but he had not sought any advice about bringing a claim in the Tribunal before then for the reason already given, that he feared being sacked. The claimant's evidence today was also that there were no issues with his health in the period between the phone call and presenting his claim in the Tribunal.

29. In considering whether to exercise its discretion to extend time, the Tribunal had regard to the prejudice which each party would suffer as a result of the decision to extend time, and had regard to the relevant circumstances, in particular the length of the delay and the reason for it, the extent to which the cogency of the evidence is likely to be affected by the delay, the promptness by which the claimant acted once he knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action (**Keeble**).

30. The length of the delay is 207 days. The reason given, which I accepted, was that the claimant decided not to seek advice about the call which he believed to be discriminatory or to make a complaint at the time was because he feared losing his job. Once there was a subsequent act, which he also believed was

discriminatory on the grounds of his religion or belief, he acted by raising a grievance and then presenting a claim in the Tribunal. He has a partner and family to support and did not want to lose his job.

31. The Tribunal considered the extent to which the cogency of the evidence was likely to be affected because of the delay. It is clear that the claimant is not certain of the day on which the phone call took place. That said, the respondent denies the content of the call in any event. The length of the delay is not significant, and parties have already addressed their mind to the question in the claimant's grievance raised in December 2024. the Tribunal is not persuaded that the cogency of the evidence is likely to be significantly affected by the delay.

32. It cannot be said that the claimant acted promptly either in taking professional advice or in presenting a claim once he knew of the facts giving rise to the cause of action. This was explained by the claimant as due to a fear of losing his job. He took such action promptly once what he believed was another discriminatory act had occurred in not receiving his bonus.

33. The Tribunal considered the respondent's submission that the complaint of indirect religion or belief discrimination about the phone call is weak and likely to fail. The respondent referred to the case of **Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132** and submitted that it was not wrong to consider and assess the merits of the proposed complaint in the matrix of determining the time point. He went on to cite what the respondent says are the weaknesses of this complaint suggesting nuances in the comments made by the claimant in the grievance investigation and what Mr Murtrie was likely to have intended in making the comment about wearing a turban, whilst also submitting that the comment was not made.

34. The Tribunal concluded that it had not heard anything today which points to a particular conclusion of weakness on the prospective merits of the indirect discrimination complaint. The Tribunal was unable to make an assessment on merits of this complaint by reference to what it had heard today, particularly given that the claim is one of discrimination, the Tribunal does not have all the evidence before it and is not conducting a final hearing.

35. The Tribunal then considered the prejudice which each party would suffer depending on the decision reached. If the complaint does not proceed the claimant will suffer considerable prejudice in that he would be precluded from pursuing one of his two complaints. The prejudice which the respondent would suffer if time were extended is that it will have to deal with a complaint which has been lodged out with the statutory time limits. However, it remains open to the respondent to defend the complaint.

36. Taking all of the relevant factors into account and considering those factors alongside the prejudice which each party would suffer depending on the decision reached, the Tribunal was satisfied that it was just and equitable to extend the time limit under section 123(1)(b) EqA and that the Tribunal has jurisdiction to hear the complaint.

Relevant law – strike out and deposit order

37. In **Xie v E'Quipe Japan Limited [2024] EAT 176**, HHJ Taylor summarised some of the core components of the previous case law guidance in **Anyanwu v South Bank Student Union [2001] ICR 391, Mechkarov v Citibank NA [2016] ICR and Cox v Adecco Group UK & Ireland and others [2021] ICR 1307**. He referred to rule 37 of the Employment Tribunal Rules 2013 which provided a discretion to strike out a claim if it has no reasonable prospect of success. That provision is now found in rule 38(1)(a) of the Employment Tribunal Procedure Rules 2024. The other core components to which he referred are:

    a. Strike out is a draconian step to be taken only in clearcut cases.

    b. There is a public interest in discrimination cases being heard on the merits.

    c. Care should be taken when an application for strike out is made against a litigant in person.

    d. That said, there is not an absolute prohibition on strike out in discrimination cases, particularly if the claim is contrary to undisputed documentary evidence.

    e. Where there is a core of disputed fact strike out is generally inappropriate.

    f. When assessing strike out the case of the party against whom the application is made should generally be taken at its highest.

38. A core of disputed fact can include the reason why a person took a decision: **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 [2007] ICR 1126** and **Zeb v Xerox (UK) Ltd UKEAT/0091/15/DM** at paragraph 20. That is why strike out is generally inappropriate in a case that turns on the mental processes of an alleged discriminator and/or a person who took a decision, such as a decision to dismiss (**Xie v E'Quipe Japan Limited [2024] EAT 176**).

39. Taking a case at its highest generally requires an assumption that the claimant will establish the facts from which it is contended that discrimination

should be inferred: (**Romanowska v Aspirations Care Ltd UKEAT/0015/14/SM; Mechkarov;** and **Xie**).

40. When deciding whether to make a deposit order, a broad assessment of the merits is all that is required; it is not necessary for the judge to engage in detailed analysis. Tribunals should be wary of making an assessment of the strength of a party's case from a review of the documentary evidence where key facts are in dispute, especially in discrimination cases (**Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) 2019 ICR 687, EAT**).

41. In **Sharma v New College Nottingham EAT 0287/11** the EAT held that an employment tribunal had erred in concluding that the claimant's race discrimination claims had little reasonable prospect of success. This conclusion had been reached solely on the basis that the contemporaneous documentation was inconsistent with the claimant's account. However, there were underlying factual disputes. The claimant was asserting that, behind the documentation, there was behaviour towards him that constituted acts which, in the absence of an acceptable explanation, the tribunal could conclude were on the grounds of his protected characteristic.

Discussion /decision - strike out and deposit order

42. Firstly the Tribunal considered the application to strike out the complaint of direct religion or belief discrimination about the claimant not receiving a bonus in around December 2024. It was common ground that the claimant had received a bonus at around the same time in 2023.

43. The respondent's application relies upon rule 38(1)(a) Employment Tribunal Procedure Rules 2024 which says that the Tribunal may strike out all or part of a claim on the grounds that it "has no reasonable prospect of success".

44. I reminded myself of the guidance from previous case law set out in previous paragraphs of this judgment.

45. This is a discrimination complaint and the strike out application is being made by a litigant in person. There is a public interest in discrimination cases being heard on the merits. Strike out is a draconian step to be taken only in clearcut cases.

46. When assessing strike out the case of the party against whom the application is made should generally be taken at its highest. At its highest the claimant asserts that he had completed the required training and was fulfilling his professional responsibilities for the award of a bonus. The claimant asserts that he was the only one in his team of six people working at the same location as the claimant who did not receive a bonus. The claimant said today that there had been problems with IT log in for online training, but all training had

been completed by him. He asserted that others in his team had also experienced problems with IT log in and completing training, and they had been awarded the bonus.

47. The respondent submitted that there is no an absolute prohibition on strike out in discrimination cases, particularly if the complaint is contrary to undisputed documentary evidence. The respondent referred to a bonus matrix in the bundle of productions which showed training knowledge and lateness as criteria for the award of bonus. It also referred to an email sent to another employee telling him he had not received a bonus due to issues with training knowledge. The Tribunal decided that this documentation was insufficient to conclude that the complaint was contrary to undisputed documentary evidence. Plainly there was a core of disputed fact about the application of the award of bonus, particularly to others who, the claimant said, had also experienced IT problems in completing online training but had received the bonus. The claimant also asserted that the lateness, which the respondent says it took into account, was after the time when bonus was assessed.

48. Taking all of the relevant factors into account, the Tribunal was satisfied that it could not be said that the complaint has no reasonable prospects of success. Accordingly, the application to strike out the complaint about the claimant not receiving bonus is refused.

49. Next the Tribunal considered the alternative application for a deposit order as a condition of continuing to advance the complaint of direct religion or belief discrimination about the claimant not receiving a bonus in around December 2024.

50. When deciding whether to make a deposit order, a broad assessment of the merits is required; it is not necessary for the judge to engage in detailed analysis. Tribunals should be wary of assessing the strength of a party's case from a review of the documentary evidence where key facts are in dispute, especially in discrimination cases (**Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) 2019 ICR 687, EAT**).

51. As already stated, the Tribunal is satisfied that there are key facts in dispute in relation to this discrimination complaint. Whilst the respondent asserts that the contemporaneous documentation is inconsistent with the claimant's account, there remain underlying factual disputes. Additionally, the allegation about Mr Murphie telling the claimant he could not wear a turban on-site is a disputed fact. The claimant appears to seek to make a link between the alleged comment and non-payment of bonus in his claim form when he says "Since that conversation, I have noticed a distinct change in my treatment".

52. Whilst the burden of proof starts with the claimant, once there are facts from which a tribunal could decide that an unlawful act of discrimination has taken

place, the burden of proof shifts to the respondent to prove a non-discriminatory explanation. The Tribunal makes no comment about how and if the burden of proof may shift in relation to the bonus complaint once evidence is led. The disputed comment made by Mr Murphie, if it is found to have been made, may or may not have a bearing on the determination of the second complaint about the claimant not receiving his bonus. It is another disputed fact. The Tribunal reminded itself again that it should be wary of assessing the strength of a party's case from a review of the documentary evidence where key facts are in dispute, especially in discrimination cases (**Spaceman**).

53. Taking all of the relevant factors into account, the Tribunal was satisfied that it could not be said that the complaint has little reasonable prospects of success. Accordingly, the application for a deposit order as a condition of continuing to advance the complaint of direct religion or belief discrimination about an allegation said to have occurred on or around 10 December 2024 is refused.

Date sent to parties **14 July 2025**