Case: 6017336/2024

EMPLOYMENT TRIBUNALS

Claimant: Monika Dilniak

Respondent: Whitbread Group PLC

AT A PUBLIC PRELIMINARY HEARING

Heard at: **Leeds by CVP video conferencing** **On: 11th September 2025**
Before: **Employment Judge Lancaster**

Representation
Claimant: Miss M Martin, counsel
Respondent: Mr A Powis, solicitor

JUDGMENT

The claim is out of time, but may proceed under section 123 (2) (b) of the Equality Act 2010

RESERVED DECISION
WRITTEN REASONS

1. At a hearing on 17th April 2025 Employment Judge Jones identified three preliminary issues for determination:

   1.1 When did the respondent agree to any adjustments, in 2024, which would have allowed the claimant to return to work?

   1.2 Why was there a delay, after 15 March 2024, to the return of the claimant to work? Was it as the respondent contends, because the claimant had requested not to return until 26 June 2024? Or was it as the claimant contends that, save for a period of annual leave, the respondent was responsible for delays in facilitating her return?

   1.3 If the former, was the claim presented within such further period as was just and equitable in all the circumstances? If the latter the 2024 claim is in time.

2. At the start of this hearing I identified a further issue which requires to be addressed before I could, if applicable , deal with the question of extension of time limits:

2.1 What is the effect upon the limitation period of there being two ACAS early conciliation certificates?

3. The only ACAS certificate number referenced on the claim form (ET1) is R203301/24/84. That relates to a period of early conciliation between 1st July and 12th August 2024.

4. I am satisfied that that is the only reason why Judge Jones identifies this within his Case Management Order as "the relevant ACAS certificate". Miss Martin, who was present on the last occasion, has confirmed that although Judge Jones was aware of an earlier certificate and that she set out the Claimant's position that this related to a different matter, there was no detailed argument on the point, and certainly no determination made by Judge Jones.

5. The first ACAS certificate is number R174361/24/02 and relates to a period of early conciliation between 7th and 17th March 2024. In the Response (ET3) it is pleaded that this is the operative certificate for the purpose for limitation.

6. It is not contentious that there can be only one relevant certificate for the purposes of considering whether the statutory extension of time to allow for early conciliation applies: The Commissioners of HM Revenue and Customs v Serra Garau [2017] ICR 1121.

7. The requirement under section 18A (1) of the Employment Tribunals Act 1996 is that:

   "Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any mmatter,the prospective claimant must provide to ACAS prescribed information the prescribed manner about that matter."

8. "Matter" is not defined in the statute, but has been held to have a broad meaning, not to be the same as a "cause of action" or "claim" and to be capable of extend to events after the end of the conciliation period: cf Science Warehouse Ltd. V Mills [2015] 10 WLUK 251 EAT and Compass Group UK & Ireland v Morgan [2017] ICR 73 EAT .

9. Both parties rely on the Claimant's email of 15th April 2024 where she says:

   "I will of course challenge this through ACAS Early conciliation and a possible employment tribunal if necessary."

10. Miss Martin submits that in context this can only relate specifically to the argument, advanced on behalf of the Claimant by her Trade Union representative but rejected by the Respondent, that her absence from August 2023 should be treated as a medical suspension and paid accordingly. She therefore says that, assuming that this proposed approach to ACAS was the initial entering into early conciliation on 7th May 2024, it is a separate matter to the later entry into conciliation on 1st July 2024 or the claim eventually submitted on 4th November 2024.

11. I accept the Claimants evidence that she left the conduct of her complaint in the hands of her union representative, Mr Mawer at Unite. It therefore follows, however, that she does not actually know what Mr Mawer said to ACAS. It is though clear from the certificate issued on 17th May 2024, that he did properly identify that there was a

relevant matter existing between the parties whose names and addresses were notified in the prescribed manner.

12. I also accept the Claimant's evidence that Mr Mawer then told her that in his belief he needed to make a fresh application for early conciliation, which he did on 1st July 2024, on a "different ground". Once again the Claimant was content to entrust things entirely to her union representative.

13. Mr Powis submits that in reality this is the same matter, a part of the dispute between the parties as to the Claimant's alleged entitlement to compensation or payment for the period when she says she was in fact fit to work but was not permitted to return.

14. I unhesitatingly prefer Mr Powis's submission on this point. The correspondence on both sides which contextualises the email of 15th April 2024 refers to the identified issue of needing to look at making reasonable adjustments within the relevant timeframe as precondition of the Claimant in fact being able to return to work. That alleged failure to make reasonable adjustments is the claim that was eventually brought. Within the ET1 the claimed disadvantage to the Claimant said to arise from the alleged provision, criterion or practice includes "she suffered substantial financial loss by the Respondent's refusal to allow her to work". Even more explicitly in the Schedule of Loss she claims for loss of earnings for the whole period when she says she was fit to work with reasonable adjustments. This is the same matter as that in respect of which she first intimated tribunal proceedings on 15th April 2024, even though the possible cause of action may be differently framed.

15. It may well be an understandable misapprehension on the part of Mr Mawer, who it is said is not legally trained, to think the Claimant needed to enter a further period of early conciliation, but he was wrong. The initial certificate would also have covered subsequent events in respect of the allegedly continuing matter.

16. The first preliminary issue identified by Judge Jones is to establish when the last act occurred in an alleged course of conduct extending over a period and from which the limitation period might begin to run for the purposes of bringing a claim in time within section 123 (3) (a) of the Equality Act 2010.

17. The Respondent contends that this is 15th March 2024 (in reality this must be 18th March when the letter of that date was sent). The Claimant contends that it is 26th June 2024 when she actually returned t work (though again I think the actual date is marginally incorrect and should be 25th June 2024).

18. The claim is in respect of an alleged failure to make reasonable adjustments, alternatively a refusal to allow the Claimant to return to work. The date of the commencement of this alleged period of continuing conduct is not clear. In the ET1 it is stated that the Claimant had a doctor's note saying she was fit to work from 4th August 2023, only so long as she was not carrying suitcases. The date in the Schedule of Loss is said to be 4/3/23 (4th March 2023) but this may be a "typo" for 4/8/23. I can however see from the ET1 that there is reference to an earlier fit note expiring in March 2023, before which date Occupational Health had certainly considered that she would not under any circumstances be able to return. In an email dated 28th March 2024 the Claimant asserts that she had been available for work since 6th March 2023. In an email dated 18th December 2023 Carmel Wylie from the Respondent's HR department says that the Claimant's last fit note expired in early August 2023 but that she had not

thereafter indicated that she was fit and able to carry out her substantive role as a receptionist.

19. In any event, as was se out in Judge Jones' Case Management Summary, at least in so far as it relates to the reasonable adjustments complaint, the test for assessing when time began to run will be (in accordance with sections 123 (3) (b) and (4) f he Equality Act 2010):

"When did the respondent made a decision about the adjustments? Or, if no decision was made, when did the respondent acted inconsistently with making the decision? Or, if neither, when might the respondent reasonably have been expected to have made the adjustment?"

20. As I understand it the Claimant's case is that there was a point where she would have been fit to return to work with adjustments but that at some stage at or after the time when it would have been reasonable to make those adjustments it can be inferred that the Respondent had decided not to make those adjustments. I do not know, however, when precisely that is said to have been. A doctor's note saying she was fit to work from 4th August 2023, only so long as she was not carrying suitcases, on the face of it implies that she would - with only a relatively minor adjustment to her duties - have been able to start to return to her full-time job Iin Scarborough at that time. I doubt that will in act have been the position. It appears that both reduced hours and a transfer to York would have been required before she could actually return to work.

21. Evidentially this claim may, I think, therefore turn upon the acknowledgement from Ms Keaney (quoted in the ET1) that, at the latest, as at 16th November 2023 a transfer to York and reduced hours could by then be accommodated, but that there were concerns about identifying the extent of the other adjustments to be put in place. The case appears therefore be about an alleged unreasonable delay in implementation of that move to York and the agreement to cut her hours.

22. At a welfare meeting held on 16th February 2024, as summarised in the letter of 15th March 2024, it appears that the Claimant had by then agreed that she was now fit to carry out a substantial number of the tasks associated with the receptionist's role. I note that by this stage these are said to include "moving luggage, taking cases to and from luggage room" without the adjustment that had been proposed as at August 2023.

23. In that letter the Respondent confirmed that the Claimant may now return to work at York Northwest Premier Inn, on 16 hours /2 days per week and acknowledged too that her only other proposed adjustments of a phased return increasing from 25 per cent of hours up to the new contractual hours of 16 over no more than 4 weeks (details to be agreed) and with no daily stripping of bedrooms or regular bedroom cleaning tasks would also be accommodated.

24. The date of the return to work however remained to be confirmed. It was stated that the Claimant's new manager, Sarah Keeney would contact her about her holidays accrued during her sickness absence and to agree the start date. On 19th March the Claimant queried Ms Keaney's involvement as she, mistakenly, thought that she only managed York Blossom Street and was therefore confused at to the place she would be working even though it had been clearly stated to be at the Poppleton site. She also asked for clarification that her working days would still conform to a flexible working agreement to accommodate recovery time after her weekly medical appointments. On

27th March after apologising for the delay in replying, Mark Davidson confirmed both points raised and reiterated that Ms Kearney would be in touch to address both holidays and the start date. This would now, however, have to be after 2nd April because Ms Karney was now on annual leave. On 5th April Ms Kearney did contact the Claimnt to arrange a meeting.

25. On 28th March 2024 the Claimant had requested of Mr Davidson that she be paid from 6th March 2023. On 8th April she replied to Ms Kearney stating that she was away until 15th April and referring to the email about pay. Ms Kearney referred this back- pay request again to Mr Davidson, as she did know what it referred to. Mr Davidson replied to the Claimant to 12th Aril 2024, again apologising for the delay which had been due to his being on annual leave. He referred the Claimnt to an email sent from Carmel Wylie to her union representative on 18th December 2023, rejecting the proposition that the Claimant was entitled to medical suspension pay. However, this email may well not have been received by Mr Mawer, as the email address used for him was not accurate. At this time Mr Davidson emphasised that the Claimnt should confirm her start date and working pattern with Ms Kearney" imminently" and that "we are looking forward to welcoming you back to Whitbread".

26. On 15th April 2024, that is immediately on the Claimant's notified return date from holiday, Ms Kearne chased up the request to arrange a meeting date. On 16th April 2024 the Claimant offered two dates, 29th April or 7th May and left it for Ms Kearney to decide. On 17th April Ms Kearney suggested 7th May and the Claimant immediately confirmed that "that sounds great". Internal correspondence between Ms Kearney and HR shows that the later date was chosen because it was hoped that an outstanding queries about pay and holidays would have been resolved by then. On 15th April the Claimant had, of course, threatened to go to ACAS and then if necessary to an Employment Tribunal over the pay dispute. On 26th April 2024 Mr Davidson reiterated the Respondent's position on not agreeing backpay, and once more stressed his hope that an imminent start date would be agree. Although Ms Kearney had chased up HR about the accrued holiday situation on 17th April and again on 7th May, the morning of the meeting, she had not had a definitive reply.

27. At the meeting on 7th May 2024 no actual return to work date was confirmed because the Claimant wanted cnfirmation on the holiday position first, particularly as she would have liked to use up all her accrued holiday in one go before returning and not be stopping and starting. On 28th May 2024 Mr Davidson advised the Claimant that she had accrued 64 days holiday (based of course on her full time hours at Scarborough) but that the business could not accommodate her taking all of this at one time and that the maximum permitted leave under company policy would be two weeks. Although he did say in this letter that he wished the Claimant to confirm that she could start again on Friday 7th June 2024, I accept his evidence he intended this to mean week commencing t 7th June – the Respondent' s working week runs Friday to Thursday – and not that she should actually come in on the Friday which was the day she underwent treatment. The Claimant did initially say that 7th June was inconvenient because of holiday, but I accept her evidence that she was also intending to remind the Respondent of her OH reports which recommended that her working pattern should avoid these days when she had regular medical appointments.

28. In any event, on 6th June 2024 Mr Davidson confirmed the Claimant's request to take 2 weeks paid leave before resuming work on Tuesday 25th June and to be paid in lieu for the remaining accrued holiday. Such an agreement to be paid in this way other than on

termination could not, of course, have been enforced in the Tribunal. On 15th June 2024 the Claimant therefore agreed with Ms Kearney that she would come in from 10am until 2pm on 25th June22024,and the return to work arrangement were confirmed thereafter.

29. Having regard to this chronology I conclude that the end of the period during which the Respondent may have failed in its duty to make reasonable adjustments ended, at the latest, on 18th March 2024.

30. If time begins to run at the point where a decision is made not to do something, or when an act inconsistent with doing it occurs at a time when, if it were to be done, t could reasonably have been expected it have happened, then, conversely, time then ceases to run when that decision is reversed.

31. The reversal of any decision not to make reasonable adjustments which ought still to have been made was when the contrary decision was clearly taken in the letter of 15th March 2024. Also from that point at every stage, as recorded in the correspondence, the Respondent was then acting entirely consistently with that decision to process the return to work as soon as reasonably practicable. And, indeed, the Claimant responded positively throughout referring to “good news” and “fantastic news”

32. In answer to the second question posed by Judge Jones, I am satisfied that the reason for the delay between 18th March and 25th June 204 was due to the sorting out of the incidental logistical arrangements. The delay was not because of a further lack of commitment or failure to agree to the making of the necessary adjustments. Nor was it, as pleaded in the section 15 claim , because of a continuing “subsequent recovery from a flare-up in her multiple sclerosis”: the Claimant, as she acknowledged, had in fact by this time recovered sufficiently to return substantially to her duties Obviously some matters in respect of holiday entitlement might have been resolved more quickly if information had been processed earlier, but I do not find the overall length of the delay to have been unreasonable on the part f the Respondent. That is particularly having regard to the other commitments and work responsibilities of both Mr Davidson and Ms Kearney. It is not realistic to suggest that a more junior manager might have handled the Claimant’s return in all the circumstances. This was not a matter without complexities. Also the delay was to a large extent contributed to by the Claimant’s own personal circumstances and her, admittedly understandable, desire to resolve the collateral issues before returning.

33. Applying my findings at paragraphs 2 to 15 above, time therefore expired on 17th June 2024.The 10 days potentially added by reason of the stop-the -clock provisions under the first ACAS early conciliation certificate from 7th to 17th March would not extend time further. The claim issued on 4th November 2024 is accordingly some 4 ½ months out of time.

34. The only remaining issue is therefore whether or not I should extend time under section 123 (2) (b) of the Equality Act 2010. I have a wide discretion as established on the authorities: particularly I note Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 and Miller and ors v Ministry of Justice and ors EAT 0003.15 and Jones v Secretary of Sttae for Health and Social Care 2024 EAT 2

35. I have already referred to the Claimant’s reliance on the advice of her trade union representative. I am also prepared to infer that her solicitors were unaware of the

earlier ACAS certificate and thought that with time beginning to run on the eventual return to work date (25th June 2024) and with an ACAS certificate for six weeks from 1st July to 12th August the claim would be in time. As has been demonstrated by the fact that the issue has given rise to substantive argument in this hearing the matter is not glaringly obvious. I would, however, criticise the solicitors for not having at least adverted to the possibility that time had in fact begun to run from 18th March 2024. I note that the pleading jumps from the citing of the 15th March letter at paragraph 19 to the assertion in paragraph 20 that the Claimant eventually returned to work on 26th June 2024 with no analysis of the reasons for this delay, nor any attempt to formulate events within this discrete period as giving rise to a discrimination claim. The claim would still have been late even had they acted more promptly in the light of this possibility but not by so long I do not know when they were in fact instructed but I think t can be assumed it was after 17th June. This does not, therefore, appear to be a case where the solicitors have simply missed a deadline and might be liable in negligence. On any view, however, it is not in any way the personal responsibility of the Claimant that the claim was late.

36. The delay is not insignificant given the short time limits in the tribunal, but it is not inordinately long. That is particularly so when it is borne in mind, in context, that the Claimant had been off work since December 2021, not actually signed of sick after August 2023 and that it had in the event taken some three months to facilitate her return even when adjustments had finally been agreed. This was a longstanding issue, that had already taken a significant time to resolve.

37. Apart from the obvious prejudice of being denied the opportunity to defeat the claim by raising the out-of-time defence there would be no forensic disadvantage to the Respondent in having to defend it on the merits. The evidence will still be available to them.

38. The Claimant has received the benefit of payment for a substantial amount of accrued holiday in lieu. Although, had she returned to work earlier on reduced hours that would necessarily have been on a lower salary, she had been without any income since August 2023, when (according to the ET1) statutory sick pay ran out. I am satisfied, having seen and heard he give evidence, that the Claimant is entirely genuine in having expressed her desire to return to work if at all possible. She is the exception to what is unfortunately the general rule in the experience of this Tribunal that someone who has been off work for such a substantial period is, in fact, unlikely ever to return.

39. I therefore conclude that the balance of prejudice lies in favour of allowing the claim to proceed. She is somebody who is coping with a significant disability, as a result of which she has limited earning capacity. She has an arguable case that she has lost income as a result of a delay in implementing reasonable adjustments. She should not be deprived of any potential remedy where the Respondent is nonetheless perfectly able to defend that claim on its facts.

EMPLOYMENT JUDGE LANCASTER

DATE 19th September 2025

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/