

Neutral Citation Number: [2026] EAT 13

Case No: EA-2024-SCO-000092-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street Edinburgh EH3 7HF

Date: 15 January 2026

Before :

THE HONOURABLE LORD COLBECK

Between :

OLUWAFUNTO DADA

Appellant

- and -

THE SCOTTISH MINISTERS

Respondent

Oluwafunto Dada, the Appellant

Michael Briggs (instructed by Anderson Strathern LLP) for the Respondent

Hearing date: 18 November 2025

JUDGMENT

SUMMARY

Race discrimination; Claims presented out with 3-month period set out in Equality Act 2010, s.123(1)(a); Correct approach to be taken

In considering whether it was just and equitable to extend time in terms of s.123(1)(b) of the **Equality Act 2010**, an Employment Tribunal erred in placing reliance upon the decisions in **British Coal Corporation v Keeble** [1997] IRLR 336, **Times Newspapers Ltd v O'Regan** [1977] IRLR 101 and **Alliance & Leicester plc v Kidd** (UKEAT/0078/07/RN). The proper approach was that set out by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

The Honourable Lord Colbeck:**Introduction**

1. The appellant was employed by the Crown Office & Procurator Fiscal Service (who I refer to as “the respondent”) as a Fiscal Officer. That role required her to assist in the preparation of documents for court hearings. She commenced employment in December 2022. Her employment ended on 13 October 2023, when she resigned.
2. The appellant brought two claims for race discrimination against the respondent. Following a hearing by CVP at Edinburgh on 2 August 2024, before Employment Judge Macleod, in a judgment dated 19 September 2024 and sent to parties the following day, the employment tribunal (“ET”) dismissed the appellant’s claims for want of jurisdiction, being time barred, and refused the appellant’s application to amend.
3. The appellant appealed. Permission to appeal was granted by Judge Stout in respect of three grounds (that is Grounds 1, 3 and 4). The three grounds in respect of which permission was given can be summarised as being (1) an alleged misdirection in relation to the application of the “just and equitable” test; (3) a **Meek** ground; and (4) an alleged procedural error in relation to the order in which the ET approached its consideration of matters.

Ground 1*The appellant*

4. The appellant maintains that the ET incorrectly applied the applicable legal test for extending the three-month time limit. The just and equitable test is intended to allow flexibility based on fairness and balancing the prejudice to both parties against the reasons for the delay. That test does not explicitly require exceptional circumstances. In assessing whether it was just and equitable to extend time, the ET adopted an overly strict and segmented application of the test. While the ET acknowledged each reason individually, it ultimately dismissed each of them without holistically

evaluating whether those factors together justified the delay.

The respondent

5. Whilst the respondent accepted that the judgment contained some references to clearly inappropriate authorities, each of which arguably amounted to a misdirection, they argued that this had no material impact on the decision. The ET correctly identified that the persuasive burden was on the appellant and that she had failed to meet this. The ET found that the appellant had not discharged her evidential burden in relation to demonstrating the reason for the claim having been lodged late. The inappropriate authorities may have been of some consequence had the ET found any of the reasons advanced by the appellant proven, however it did not. Accordingly, whatever misdirection there was, it did not amount to an error of law as the appellant had been unable to establish as fact a reason for her claim having been presented out of time.

Discussion – Ground 1

6. Proceedings on complaints such as those presented by the appellant in this case may be brought before the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the ET thinks just and equitable (see **Equality Act 2010**, s.123(1)). In the present case, the complaints were not presented within the 3-month period. In such circumstances, the ET had a discretion to extend time, should it be satisfied that it was just and equitable so to do. It was for the appellant to persuade the ET that its discretion should be exercised in her favour (**Bexley Community Centre v Robertson** [2003] EWCA Civ 536 at paragraph 25).

7. The Employment Judge’s analysis of what he described as the relevant law began, correctly, with s.123(1) of the **Equality Act 2010**, however, he then went on to refer to **British Coal Corporation v Keeble** [1997] IRLR 336. As the respondent submits, for a number of years following **Keeble**, the approach taken to considering the operation of the just and equitable test was to apply a “checklist” formula, largely drawn from section 33 of the **Limitation Act 1980**. It is conceded that there were frequent cautions from appellate courts to avoid a “slavish adherence” to this list. I return

to this issue below at paragraphs 15 and 16.

8. The Employment Judge's reference to **Bexley Community Centre** is not problematic, however, the same cannot be said for the references to the authorities cited at paragraphs 41 – 42 of his judgment, as highlighted by Judge Stout when granting permission. The effect of the authority cited at paragraph 43 falls to be considered separately from those cited at paragraphs 41 and 42.

9. The Employment Judge first referred to the decision of the EAT in **Times Newspapers Ltd v O'Regan** [1977] IRLR 101. Mrs O'Regan was dismissed on 12 June 1975. Her union began negotiations with the employers in order to secure her reinstatement and later, when this proved unsuccessful, to secure for her a favourable reference. Mrs O'Regan had discussed the question of an application to an Industrial Tribunal with a union official, but she had the impression that the 3-month time limit ran from the time the union negotiations were exhausted. When the negotiations broke down in October 1975, Mrs O'Regan filed an unfair dismissal claim. An Industrial Tribunal found that whilst the application was made outside the time limit, it had not been reasonably practicable for Mrs O'Regan to bring her claim in time on grounds that her belief that the time period ran from the end of negotiations "was not an unreasonable one".

10. The employer appealed to the EAT which held that The Industrial Tribunal had erred in law in finding that it was not reasonably practicable for the Mrs O'Regan to make her complaint of unfair dismissal within the requisite 3-month time period on grounds of her belief that the 3-month time period ran from the end of negotiations between her union and the employer.

11. In the context of the present appeal, the decision in **Times Newspapers Ltd** is of no assistance. As can be seen from the foregoing paragraphs, the test which applied in that case was one of reasonable practicability. The Employment Judge's reference to **Times Newspapers Ltd** gives rise to the significant concern that he misdirected himself by considering the wrong test for extending time (albeit he does make reference to the correct test earlier and later in his judgment).

12. The same concern arises in respect of the Employment Judge's reliance on **Alliance & Leicester plc v Kidd** (UKEAT/0078/07/RN). Again, a claim was presented out of time and the ET,

having found there to be no personal fault on the part of the claimant for the lateness of the submission of the claim, allowed it to proceed out with the 3-month time limit. The applicable statutory provision in **Alliance & Leicester plc** was section 111(2)(b) of the **Employment Rights Act 1996**, in terms of which claims could be considered within such further period as the ET considered reasonable in a case where it is satisfied that it was not *reasonably practicable* (my emphasis) for the claim to be presented before the end of the 3-month period within which it required to be presented. The Employment Judge's reference to **Alliance & Leicester plc** gives rise to a similar concern to that referred to in the preceding paragraph.

13. The final case alluded to by Judge Stout in the granting of permission to appeal was **Friend v Institution of Professional Managers and Specialists** 1999 IRLR 173. The Employment Judge did so (at paragraph 43 of his judgment) in support of the proposition that where a claimant relies on the advice of a trade union representative, and the claim is thereby time-barred, the claimant's remedy lies in a claim of negligence against the trade union.

14. For present purposes, I need say little more about the decision in **Friend**, save that there was no question of the tribunal proceedings in that case being presented out with a time limit. Accordingly, the difficulty I have identified in relation to the Employment Judge's apparent reliance on the decisions in **Times Newspapers Ltd.** and **Alliance & Leicester plc** does not arise in relation to the decision in **Friend**. The Employment Judge did have to consider an issue of advice said to have been given by the claimant's trade union but was not persuaded by the evidence he heard in that regard (see paragraph 56 of his judgment).

15. I return then to the apparent reliance of the Employment Judge to the decision in **Keeble**. The respondent properly referred this tribunal to the decision on the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 paragraph 37. I need no more in relation to that, save to repeat and emphasise what the Court said was the best approach.

16. The best approach for a tribunal in considering the exercise of the discretion under section

123(1)(b) is to assess all the factors which it considers relevant to the question of whether it is just and equitable to extend time, including, in particular, the length of, and the reasons for, the delay in presenting the claim.

Conclusion – Ground 1

17. In relation to the first ground of appeal, it is conceded by the respondent that the judgment contains references to what they describe as “clearly inappropriate authorities”. That concession is properly made. The references to Keeble; Times Newspapers Ltd and Alliance & Leicester plc were all inappropriate. It is conceded that each of these arguably amount to a misdirection. Despite Mr Briggs’ valiant efforts to persuade me that these had no material impact on the final decision, I disagree. I am not satisfied that such a conclusion is open to me in the face of the concessions that were properly made. The reliance upon Times Newspapers Ltd and Alliance & Leicester plc strongly suggests that the Employment Judge at least had regard to the wrong test when applying the law to the facts he found. The first ground of appeal succeeds.

Ground 3

18. The appellant argued that the ET had failed to give reasons that enabled her to understand why her case was dismissed. Standing the conclusion I have reached in respect of the first ground of appeal, it is unnecessary to consider this ground.

Ground 4

19. Having concluded (at paragraph 72 of his judgment) that it was not just and equitable to allow the appellant’s claim to proceed, the Employment Judge went on to consider the appellant’s application to amend, that by adding an allegation of harassment relating to an alleged incident on 1 March 2023. The application to amend, which was refused, is considered at paragraphs 73 – 81 of the ET’s judgment.

20. In allowing this ground to proceed to a full hearing, the sifting judge observed that it was arguable that the ET should have taken into account the appellant's proposed amendment to the claim when deciding whether the claim as a whole was in time, that under reference to **Sakyi-Opare v The Albert Kennedy Trust** (UKEAT/0086/20/AT).

The appellant

21. The appellant argued that the ET had erred in the order in which it considered the issues of what she describes as "limitation and amendment". She argued that it was incumbent on the ET to adopt a sequence that allowed it to understand the shape of the claim before determining whether time should be extended. There is not a rigid rule that amendment must be addressed first, before limitation. Tribunals must, however, adopt a logical order that reflects the interaction between the issues.

22. Here, the ET treated the amendment as an entirely separate application, refusing it after it had already stripped itself of jurisdiction in respect of the original claims. That meant it denied itself the opportunity to consider whether the new allegation illuminated the nature, seriousness or pattern of the treatment, or whether it bore on the "continuing act" analysis.

The respondent

23. The tribunal has, in its absolute discretion, the power to manage proceedings in a matter in which it considers fair. It did so in the present case, which can be distinguished from **Sakyi-Opare** on the basis that the ET did consider the appellant's application to amend. The error in **Sakyi-Opare** does not exist in the present case.

Discussion & Conclusion – Ground 4

24. Whilst the present case can be readily distinguished from **Sakyi-Opare**, the ET's judgment on the application to extend time appears to have had no regard, whatsoever, to the terms of the proposed amendment, an amendment which, on the face of its judgment, the ET only turned its mind

to after it had refused to extend time. The ET's judgment does not identify whether or not any aspect of the application to amend was relevant to question of whether it was just and equitable to extend time. It should have. The fourth ground of appeal succeeds.

Disposal and Further Procedure

25. In terms of disposal, the appeal succeeds. I will set aside the order of the ET of 19 September 2024. The question then arises as to what should happen next.

26. The appellant sought a remit of the matter to a differently constituted ET to reconsider matters. The respondent argued that the matter should be remitted to the same ET to consider matters afresh.

27. In the present case, it is appropriate to remit the case back to the original ET. It had the benefit of hearing the evidence and assessing witnesses. Having due regard for the overriding objective, there is no requirement for the case to be re-heard. It will be remitted back to the original ET to consider matters of new in light of the decision of this tribunal.