

Neutral Citation Number: [2026] EAT 41

Case No: EA-2024-000034-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 January 2026

Before:

ANDREW HOCHHAUSER KC
DEPUTY JUDGE OF THE HIGH COURT

Between:

MR D LEONARD-ELMAZ

Appellant

- and -

OCADO CENTRAL SERVICES LTD

Respondent

Mr Denys Leonard-Elmaz the Appellant appeared in Person
Ms Jude Shepherd (instructed by **Ashfords LLP**) for the **Respondent**

Hearing date: 15 January 2026

JUDGMENT

SUMMARY

practice and procedure – allegations of apparent bias disability discrimination time limits and the just and equitable extension of time

The Claimant appealed against the decision of an Employment Judge:

- (1) refusing to recuse himself on the grounds of apparent bias;
- (2) striking out the Claimant’s claim against the Respondent under s.15(1) of the Equality Act 2010 concerning the Claimant’s start date and the Respondent’s recruitment process (the “Start Date/Recruitment Claim”) on the grounds that it was presented out of time and holding that it was not just and equitable to extend time;
- (3) finding that during the relevant period, 6 April – 5 April 2022, the Claimant was not disabled under s.6 of the Equality Act 2010 because of depression;
- (4) dismissing the remaining claim of disability discrimination.

The Employment Appeal Tribunal dismissed his appeal on all grounds, on the basis that:

- (1) there was no evidential basis upon which a complaint of apparent bias could succeed;
- (2) there was no continuing act extending over a period of such that it would permit the Start Date/Recruitment Claim to have been brought in time;
- (3) in refusing to extend time on the basis that it was not just and equitable to do so, there was no error of law on the part of the ET in the legal principles it applied and the factors it took into account;
- (4) on the evidence the ET applied the correct legal test and was entitled to find that the Claimant was not disabled because his depression was not “long term”, i.e for at least 12 months;
- (5) there was no error of law in the ET’s rejection of the Claimant’s remaining disability discrimination claim.

ANDREW HOCHHAUSER KC, DEPUTY JUDGE OF THE HIGH COURT:

1. This is the final hearing of an appeal by the Claimant, Mr Leonard-Elmaz, against the judgment dated 9th October 2023 of the Employment Tribunal (the “ET”), Employment Judge (“EJ”) Tinnion, sitting at Watford. The parties are referred to herein as "the Claimant" and "the Respondent", as they were before the ET. The Claimant acted in person, as he had before the ET. The Respondent was represented by Ms Jude Shepherd of counsel, who appeared below as well. I am grateful to both of them for their submissions, and I would like particularly to thank the Claimant for the measured and helpful way in which he presented his case.

The ET Judgment

2. By an ET1 presented on 26th September 2022, the Claimant presented the following claims against the Respondent: (1) a claim of unfair dismissal; (2) a claim for disability discrimination; (3) a holiday pay claim; and (4) a wages claim. By its ET3 and Response, the Respondent denied the claims. It denied the ET had jurisdiction to consider the Claimant's claims relating to his recruitment and contended that, since he had started employment on 14th February 2022, any claims relating to the recruitment process had to be presented by 13th May 2022 to be in time. The Respondent denied the Claimant was disabled because of depression and also denied actual constructive knowledge of the same.

3. At a hearing on 27th March 2023, the ET identified the disability discrimination claim as unfavourable treatment under section 15(1) of the Equality Act 2010 (the "EqA 2010"). A list of issues was drawn up. The Respondent's solicitors subsequently provided an updated draft list of issues which clarified that the Claimant's discrimination claim related to his dismissal relied upon the disability of depression.

4. On 3rd July 2023 the tribunal listed a public preliminary hearing (the “PPH”) to consider the preliminary issues identified in the Respondent's draft list of issues; namely:

- (1) whether the Claimant's claim of unfavourable treatment relating to his recruitment should be struck out because it was not presented in time;
 - (2) whether the Claimant was disabled by reason of depression during his period of sickness absence between 6th April 2022 to the date of his dismissal.
5. At a preliminary hearing held remotely on 9th October 2023, the ET
- (1) dismissed the Claimant's oral application for the EJ to recuse himself on the ground of the appearance of bias;
 - (2) struck out the claim under section 15(1) of the EqA concerning the Claimant's start date and recruitment process as being presented out of time where it was not just and equitable to extend time;
 - (3) held that the Claimant was not disabled within the meaning of the EqA by reason of depression and dismissed the section 15(1) claim relating to his dismissal based on that alleged disability.

The Amended Grounds of Appeal

6. At a rule 3(10) hearing before HHJ Shanks on 6th November 2024, four amended grounds of appeal were permitted to go to a final hearing.

Ground 1

7. The first ground of appeal asserts that the ET failed to consider whether the earlier claim concerning the Claimant's start date and the Respondent's recruitment process was, or arguably was, conduct extending over a period, together with the later claim, concerning the Claimant's disability of depression. This ground will only be relevant if Ground 3 succeeds and that there is a subsequent finding that the Claimant was disabled by reason of depression.

Ground 2

8. The second ground of appeal asserts that, in determining whether it was just and equitable to extend time for the claim concerning the Claimant's start date and the Respondent's recruitment process, the ET failed to consider the balance of prejudice to the parties.

Ground 3

9. The third ground of appeal asserts that, in determining whether the Claimant was disabled by reason of depression, the ET failed properly to consider whether the substantial adverse effect of the impairment was likely to last for a total period of 12 months or more. In particular, the Claimant asserts that the ET impermissibly concluded that the substantial adverse effect was not long term because it was linked to other life events, in particular gambling. The Claimant asserts that the ET failed to consider whether those life events were likely to produce a continuing or recurring substantial adverse effect. The Claimant also contends that the ET failed to consider whether the substantial adverse effect "could well" continue for 12 months rather than being more likely than not to continue for 12 months.

Ground 4

10. The fourth ground of appeal asserts that, in refusing the Claimant's application for the EJ to recuse himself on the ground of apparent bias, the ET failed to take into account the fact disclosed by the EJ during the hearing that the EJ and counsel for the Respondent had exchanged gifts with each other. Because of the interconnection between Grounds 1 and 3, I will consider these first together.

Grounds 1 and 3 – the Claimant's Submissions

11. The Claimant submits that the ET erred in law in treating the recruitment issue which took place between 18th November 2021 and 12th February 2022 and his dismissal on 4th May

2022 as unconnected events. He accepted in oral submissions that there were no complaints about his treatment during his work, but he contended that he continued to complain about the recruitment issue, maintaining that because of a delay in the start date due to a further occupational health examination which was delayed from December 2021 to early February 2022 due to Covid and the Christmas period, and which resulted in him starting on 12th February 2022 rather than 8th December 2021 as originally envisaged.

12. He relied upon the documents contained in the supplementary bundle as clearly indicating an "act extending over a period". He took me carefully through the documents in the bundle, which included some of the medical evidence that was before the ET. He also referred me to an email dated 4th May 2022, the date of his dismissal, which he sent to the Respondent in which he lodged a grievance, complaining both about the recruitment process and the dismissal. He concluded that email by saying that "You have seven days from 7th May 2022 to come to an agreement, or I will begin legal action". On this basis, the Claimant submitted that the ET erred in law in finding that the claim was time-barred.

13. Additionally, in relation to Ground 3 the Claimant submitted that the ET erred in finding that the Claimant was not disabled because his depression was not "long term". He relied upon the decision of the House of Lords in **SCA Packaging Ltd v. Boyle** [2009] UKHL 37, which held that "likely" means "could well happen", which is a lower threshold than "more likely than not". He contended that the ET erred in law in not finding that his depression was not a disability because it was linked to "life events". It ignored his medical history of ill health going back to 2018 as illustrated by documents in the supplementary bundle. In short, the ET failed to ask the correct legal question, which was "Could the adverse effect *well* occur?"

14. He referred me to paragraphs 47 and 54 of the judgment. These provided as follows:

"47. Under para 2 of Schedule 1, Part 1 to the EQA 2010, the effect of an impairment is long term if (a) it has lasted for at least 12 months; (b) is likely to last for at least 12 months; or (c) is likely to last for the rest of the life of the person affected. The term '*likely to last for at least 12 months*' means '*it could well happen*', not that it is more likely than not to happen (*SCA Packaging v. Boyle* [2009] UKHL 37 at paragraph 35)."

"54. Sixth, the Tribunal was not satisfied that the substantial adverse effect which the Claimant's depression was having on him on/after 13th April 2022 was likely to last at least 12 months. There was no medical evidence before the Tribunal to that effect, or to the effect that the effect of the Claimant's depression on his ability to carry out normal day-to-day activities was likely to be long term or likely to reoccur or keep reoccurring. Such medical evidence as there was appeared to link the claimant's depression to other life events, including in particular gambling, for which there was no associated diagnosis or prognosis."

15. He submitted that, although the EJ set out the correct test in paragraph 47, he failed to apply it properly, as seen by the words that he used in paragraph 54. He pointed to his medical records which set out his medical history since 2018 and he said that, although there was no reference to him having suffered from depression, there was sufficient material from which an inference could and should have been drawn.

The Respondent's Submissions

16. Ms Shepherd submitted that the ET made a clear finding at paragraph 36 of the judgment that there was no continuing act and the EJ was right to do so. The recruitment process ceased on 14th February 2022 when the Claimant started the first day of his new job, as the ET correctly found at paragraph 35. The events relating to the termination of the Claimant's employment occurred in the period between 4th May 2022, the grievance hearing lodged by him against a dismissal resulting in him being offered his job back on 4th August 2022 and his resignation on 5th August 2022 the following day. There was therefore a clear period of three months in which there were no matters about which the Claimant complained of discrimination.

17. The Respondent relied upon [48] of the Court of Appeal decision in **Commissioner of Police of the Metropolis v. Hendricks** [2003] ICR 530, which stated that the burden is on the Claimant to prove that alleged incidents of discrimination are linked to one another and that

they are evidence of a continuing discriminatory state of affairs covered by the concept of a "act extending over a period".

18. Ms Shepherd submitted that the Claimant was unable to show any such links. His complaints about his recruitment and start date were said to be discrimination arising from his disability of autism. The end date for those complaints was his start date of 14th February 2022, as the EJ found at paragraph 36 of the judgment. His later complaint about his dismissal was said to be discrimination arising from his alleged disability of depression. The Claimant did not advance a case that there was a link between the two and the ET was entitled to conclude that there was no continuing act.

19. Moreover, Ms Shepherd submitted that, in relation to Ground 3, paragraph 47 of the ET judgment makes clear that the EJ applied the correct *Boyle* test. The discussion and conclusion section of the judgment in respect of depression as a disability at paragraphs 48 – 54 of the judgment plainly demonstrate that the ET did properly consider whether the substantial adverse effect of the Claimant's impairment was likely to last a period of 12 months or more.

20. Ms Shepherd submitted that on the basis of the substantial volume of medical evidence before the ET, recorded at paragraph 23 of the judgment, it was perfectly entitled to reach the conclusion that the adverse effect of the Claimant's impairment was not likely to last for a total period of 12 months or more. In particular, the Claimant accepted that: (1) there was no mention in his medical records of depression prior to December 2021; (2) there was no mention of depression or medication for depression in his medical records between December 2021 and January 2022; (3) the first mention of depression in his GP records occurred on 13th April 2022. He was subsequently prescribed anti-depressant medication, but he accepted that he only took it for one day because "it made him feel funny".

21. The ET expressly noted at paragraph 54 of the judgment that the medical evidence appeared to link the Claimant's depression to other life events, including in particular gambling, for which there was no associated diagnosis or prognosis. It therefore did consider that fact when determining the question of long-term effect. In the absence of any evidence to suggest that the Claimant's gambling was likely to produce a continuing or reoccurring substantial effect, it was entirely appropriate for the ET to conclude that it could not be satisfied that the substantial adverse effect which the Claimant's depression was having on him on or after 13th April 2022 was likely to last at least 12 months.

22. Here, the evidence showed that the Claimant had been suffering the effects of depression for only four months as at the date of the termination of his employment. The medical evidence, going back to 2011, showed that there had been no reference to or diagnosis of any depression prior to April 2022. Paragraphs 15 and 16 of the ET judgment record that the Claimant submitted a pre-job questionnaire in which he confirmed that he was not suffering and had not suffered from depression. He had also completed a new-starter questionnaire in which he answered "No" to the question "Do you have, or have you ever suffered from, a mental illness, including stress, anxiety or depression?" The medical evidence after the Claimant's resignation to 6th April 2023 showed that there was only one further period of depression between 15th December 2022 and 15th January 2023. No medication was prescribed.

23. In the absence of any evidence to suggest that it could well happen that the Claimant would continue to suffer those events for at least 12 months, the ET was correct to conclude that the Claimant was not a disabled person within the EqA by reason of depression at the material times.

Discussion and Conclusion in relation to Grounds 1 and 3

24. Having carefully considered the ET's detailed reasoning, I have reached the firm conclusion that both of these grounds should fail, principally for the reasons advanced by the Respondent. I find that the EJ applied the correct test laid down in *Boyle* when considering whether or not it could happen that the Claimant would continue to suffer the effects of depression for at least 12 months. Furthermore, based on its careful reasoning set out at paragraphs 48 – 54 of the judgment, the ET was entitled to conclude that the Claimant's depression did not constitute a disability under section 6 of the EqA during the period 6th April to 5th August 2022.

25. That in itself disposes of Ground 1. There is, however, also the point that the disability discrimination complaint about the recruitment and start date related to autism, whereas the latter complaint about his dismissal was said to be discrimination arising from his alleged disability of depression. The Claimant did not advance a case that there was a link between the two and, in my judgment, the ET was entitled to conclude that there was no continuing act, even had the ET found that the Claimant's depression did constitute a disability.

Ground 2 – the Claimant's Submissions

26. The Claimant submitted that, even if the claim was out of time, the ET erred in refusing to extend time. He relied upon the Court of Appeal decision in **Adedeji v. University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, where the Court of Appeal held that an employment tribunal must assess all relevant factors, including the balance of prejudice. He contended that the judgment entirely failed explicitly to weigh the massive prejudice to him i.e. losing the case entirely – against the minimal prejudice to the Respondent. Failing to conduct this exercise properly, he said, amounted to an error of law.

The Respondent's Submissions

27. At paragraph 29 of the judgment, when setting out the relevant law in relation to the discretion to extend time, the ET expressly stated "The discretion to extend time is a broad one to be exercised taking account of all relevant circumstances, in particular the length of and reason for the delay, and balancing the hardship, justice or injustice to each of the parties". It expressly referred to the *Adedeji* case in which Underhill LJ at paragraph 37 stated:

"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 particular 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'."

28. Ms Shepherd submitted that it was clear from the ET's finding in the discussion and conclusion section of the judgment on this issue, that are set out at paragraphs 39 – 45, that the ET did assess all the relevant factors in this case and, although there was no express reference to the respective prejudice to be suffered by each party, it was implicit that, as part of that exercise, the ET was weighing up the balance of prejudice to the parties and concluded that the balance weighed more heavily against the Respondent.

29. She relied upon the decision of the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v. Morgan** [2018] ICR 1194, which stated, because of the wide breadth of discretion given to tribunals to proceed in accordance with what it thinks is just and equitable, there is very limited scope to challenge the exercise of that discretion on appeal. This appeal tribunal should only disturb a tribunal's decision if it erred in principle – for example, by failing to have regard to a factor that is plainly relevant or significant or by giving significant weight to a factor that is plainly irrelevant – or if a tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable.

30. She also referred me to the EAT decision of Elizabeth Laing J (as she then was) in **Miller & Ors v. The Ministry of Justice** EAT 0003/15, where at paragraph 10(iv) she stated that what factors are relevant to the exercise of discretion and how they should be balanced are a matter for the ET. The prejudice that a respondent will suffer from facing a claim which would otherwise be time barred is customarily relevant in such cases.

Discussion and Conclusion on Ground 2

31. In my judgment, Ground 2 of the grounds of appeal fails. Applying the approach of the authorities referred to in the parties' submissions, there is no basis on which the exercise of its discretion by the ET can properly be challenged. It was fully entitled to take into account the factors that it did which are identified at paragraphs 39 – 45 of the decision. There is no error of principle that I can see. The burden of proof was on the Claimant to establish that it was just and equitable for his discrimination claim to be presented out of time, and the ET was entitled to find on the factors which they had identified that he had failed to discharge it. They conducted a relevant balancing exercise.

32. It is self-evident that, by refusing to extend time, a claimant would lose his opportunity to bring his case. I accept Ms Shepherd's submission that, although there is no express reference to the respective prejudice to be suffered by each party, it was implicit that, as part of the exercise, the ET was weighing up the balance of prejudice to the parties and concluded that the balance weighed more heavily against the Respondent.

Ground 4

33. I therefore turn to Ground 4. Ground 4 provides: "In refusing the Claimant's application for Employment Judge Tinnion to recuse himself on the ground of apparent bias, the Tribunal failed to take into account the fact, disclosed by the EJ during the hearing that the EJ and Counsel for the Respondent had exchanged gifts with each other." The essence of this ground

of appeal is not that Ms Shepherd and EJ Tinnion knew each other professionally because they both sat as fee-paid EJs in Scotland, but that they had exchanged gifts, a matter which the Claimant contended only came to light during the proceedings.

34. At paragraph 7 of HHJ Shanks' Order, sealed on 7th November 2024, he ordered as follows in relation to Ground 4:

"(1) Employment Judge Tinnion and Ms J Shepherd of counsel are to be requested to comment in writing to the EAT on the allegation made by the appellant in Ground of Appeal 4 within 28 days of such request.

(2) The appellant may respond to their written comments within 28 days of being sent copies thereof.

(3) In the event of a dispute of fact arising, the appellant should apply to the EAT for directions as to how it is dealt with at the same."

EJ Tinnion's response

35. In a response dated 30th January 2025, the EJ stated:

"At the hearing on 9th October 2023, EJ Tinnion neither disclosed, nor stated, nor implied, that he and counsel for the Respondent at that hearing had exchanged gifts with each other. For the avoidance of doubt, EJ Tinnion has to date neither received from, nor given to, counsel for the Respondent at that hearing any gift. EJ Tinnion inferred that the claimant has either misheard or misunderstood or mis-recalled what EJ Tinnion said at that meeting."

Ms Shepherd's Response

36. Ms Shepherd has extracted a note that she took of the hearing before the EJ. It makes no reference to any exchange of gifts between her and the EJ. At paragraphs 3 and 4 of her comments she stated:

"(3) I can confirm that at no time have EJ Tinnion and I exchanged gifts of any kind. We are professional colleagues, in that we both sit as fee-paid Employment Judges in Scotland and see each other from time to time in that context, mostly at annual training events.

(4) I have checked the notes I took during the hearing. They are not verbatim, but they are a fairly comprehensive record of that which was discussed at the hearing.

There is no reference in those notes to the exchanging of gifts. I do not have a clear recollection of there being any reference by the Employment Judge to gifts in any context. It is possible that, in attempting to explain to the Claimant that our relationship was a purely professional one, the employment judge stated that we had *not* ever exchanged gifts with each other as a means to demonstrate that this was a purely professional relationship and that, in doing so, the Claimant misheard or misunderstood this explanation. But I cannot say that for certain as I do not have a clear recollection of that then occurring and I have not taken a note of any such exchange."

37. There was no response from the Claimant pursuant to paragraph (2) of HHJ Shanks' Order referred to above. He told me that he was not aware of a need to serve a statement and he was gambling heavily at the time.

The Claimant's Submissions

38. The Claimant's written submissions do not address the issue of the gifts at all, but instead focus on the fact that the professional relationship as fee-paid judges in Scotland was sufficient to create an appearance of bias, applying the test laid down by the Court of Appeal in **Jones v. DAS Legal Expenses Insurance Company Limited** [2003] EWCA Civ 1071; namely, whether the "fair minded and informed observer" would conclude that there was a real possibility of bias.

39. At paragraph 5.4 of his written submissions, the Claimant relies on procedural pressure by saying that "This impression was reinforced by the judge's conduct. Whilst insisting that he was not 'bending the Claimant's arm', the EJ repeatedly pressed the Claimant, who was not present, to make an immediate recusal without legal advice." Finally, he contended this impression was reinforced by errors of law, as set out in the earlier grounds of appeal.

40. In his oral submissions, he still asserted that mention was made at the hearing by the EJ that there had been an exchange of gifts, although he acknowledged it was very confusing; that the hearing was taking place by video; and it was difficult to follow.

The Respondent's Submissions

41. After referring to the comments from both the EJ and Ms Shepherd set out above, the Respondent submitted that the EJ therefore did not fall into error in failing to take an exchange of gifts between himself and Counsel for the Respondent into account. No such exchange had occurred, and no mention was made of such during the hearing. The EJ approached the Claimant's recusal application entirely correctly, noting the test for the appearance of bias as set out in the Court of Appeal in the *Jones v. DAS* case. The EJ did not fall into error in refusing the Claimant's application. Ms Shepherd submitted that this ground of appeal therefore had no merit and should be dismissed.

Discussion and Conclusion on Ground 4

42. The focus of this ground is whether the Claimant was informed during the hearing on the recusal application that gifts had been exchanged between EJ Tinnion and counsel for the Respondent, Ms Shepherd. In the light of the uncontradicted statements from EJ Tinnion and Ms Shepherd that (a) no gifts had ever been exchanged and (b) no mention was made of any such exchange of gifts, I have no hesitation in rejecting this ground of appeal on the basis that there has been no exchange of gifts between them; nor was there any mention made of such an exchange by either of them at the hearing.

43. It is surprising that, having made the allegation, there was no response by the Claimant as provided for in paragraph 7(4) of HHJ Shanks' Order. I do not accept the Claimant's explanation that he was unaware of the need to serve a statement, and it is significant that his skeleton argument made no reference whatsoever to the alleged exchange of gifts. The mere fact that counsel and the EJ happen to be professional colleagues as fee-paid EJs in Scotland does not begin to raise an arguable case of apparent bias in my judgment.

44. The Claimant was asked at the outset of the hearing whether he wanted to make an application which was an entirely appropriate time. I do not accept that there was any pressure placed upon him by EJ Tinnion to make the application and, since there is nothing in Grounds 1 – 3 of the grounds of appeal, there is therefore no cumulative effect.

Conclusion

45. For the above reasons, this appeal is dismissed on all four grounds. That concludes my judgment.