

Neutral Citation Number: [2026] EAT 64

Case No: EA-2024-000030-JPD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 April 2026

Before:

THE HON. LORD FAIRLEY, PRESIDENT

Between:

MISS A NDOW

Appellant

- and -

UNIVERSITY HOSPITALS BIRMINGHAM NHS FOUNDATION TRUST

Respondent

Miss A Ndow, the Appellant, in person
Mr K Zaman (instructed by Hill Dickinson LLP) for the Respondent

Hearing date: 23 April 2026

JUDGMENT

SUMMARY

Unfair dismissal; disability discrimination; time limits

The appellant was employed by the respondent as a health care assistant from 4 July 2009 to 8 June 2022. She was dismissed on 8 June 2022 following an absence management procedure in which the respondent concluded that she was not medically fit to continue in her role. The appellant appealed against her dismissal on 22 June 2022. She attended an internal appeal hearing on 18 November 2022. On 19 November 2022 she was advised that her appeal had been refused.

The appellant then presented ET1 claim forms on 10 and 12 January 2023 in which she complained of unfair dismissal (ordinary and automatic) and disability discrimination.

The claims were resisted, *inter alia* on the basis that they had each been presented out of time. Following a preliminary hearing, the Tribunal concluded that (a) the unfair dismissal complaints had been presented almost four months after the primary time limit in section 111(2) of the **Employment Rights Act, 1996** and it would have been reasonably practicable for them to have been presented within that time limit; and (b) the discrimination complaints had also been presented almost four months after the statutory time limit in section 123 of the **Equality Act, 2010**, and it would not be just and equitable to extend the time limit.

On appeal, the appellant contended that the Tribunal had erred in law (i) by failing to consider the fact that she had brought an internal appeal against her dismissal; and (ii) in failing to consider, for the purposes of the discrimination complaints, whether the dismissal of her internal appeal was itself an act of discrimination, and thus part of a course of conduct extending over a period that ended on 19 November 2022.

Held:

Neither of the issues raised in the grounds of appeal had formed any part of the appellant's case before the Employment Tribunal. The Tribunal could not be said to have erred in law by failing to consider matters that were never raised before it in evidence or the appellant's pleaded case.

The appeal was, therefore, dismissed.

THE HON. LORD FAIRLEY, PRESIDENT

Introduction and summary of procedural history

1. This is an appeal from an oral Judgment of a Tribunal at Birmingham (Employment Judge Wedderspoon, sitting alone) following a Preliminary Hearing held on 8 January 2024. Written reasons for the Judgment were requested and were sent to the parties on 8 February 2024.

Summary of key facts and issues

2. The appellant was employed by the respondent as a health care assistant from 4 July 2009 to 8 June 2022. She was dismissed on 8 June 2022 following an absence management procedure at the end of which the respondent concluded that she was not medically fit to continue in her role. The appellant appealed against her dismissal on 22 June 2022. She attended an internal appeal hearing on 18 November 2022. On 19 November 2022 she was advised that her appeal had been refused.

3. The appellant presented ET1 claim forms on 10 and 12 January 2023 in which she complained of unfair dismissal (ordinary and automatic) and disability discrimination. She presented a further claim form in December 2023, but that claim was not before Employment Judge Wedderspoon on 8 January 2024, and is not, therefore, before me in this appeal.

4. The purpose of the Preliminary Hearing on 8 January 2024 was to determine:

- (a) whether the appellant's complaints of ordinary and automatically unfair dismissal were brought outside the primary time limit in section 111(2) of the **Employment Rights Act, 1996** ("ERA");
- (b) if so, whether or not it was reasonably practicable for her to have presented those complaints within the primary time limit;
- (c) if not, whether the complaints were presented within a reasonable period after the expiry of the primary time limit;
- (d) whether the appellant's complaints of disability discrimination were brought outside the primary time limit in section 123 of the **Equality Act, 2010** ("EqA"); and
- (e) if so, whether it was just and equitable to extend that time limit.

5. At a case management hearing on 6 July 2023 before Employment Judge Childe, the appellant identified her dismissal on 8 June 2022 as the final discriminatory act upon which she relied. That was consistent with the position taken in the claim forms. Paragraph 10 of the note of the case management hearing stated:

"The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side by **20 July 2023**. If you do not, the list will be treated as final unless the Tribunal decides otherwise."

The appellant did not write to the Tribunal at any time to challenge the accuracy of the list of issues.

The Preliminary Hearing and decision of the Tribunal

6. At the Preliminary Hearing on 8 January 2024, the Tribunal was provided with a bundle of 177 pages and a witness statement from the appellant dated 11 December 2023. The appellant also gave oral evidence. The appellant identified three reasons for her complaints being brought out of time. In summary, these were:

- (a) that when she was working for the respondent she became depressed, stressed and scared;
- (b) that when her Union refused to represent her, she lost hope; and
- (c) the pressure of her caring responsibilities for her son, who had autism. Her caring responsibilities were said to have become more onerous after her divorce.

7. The Tribunal summarised the appellant's oral evidence at ET § 14. She said that following her dismissal, she felt stressed. She referred to her son's autism and to her divorce. On 3 June 2022, her union had advised her that it was unable to represent her because she had failed to follow their advice. Following her dismissal she took no steps to research or inquire about her rights to make a claim before an Employment Tribunal (ET § 14 to 16).

8. Nothing in the appellant's witness statement or in the record of her oral evidence suggests that she placed any reliance on the existence of her internal appeal as a factor that caused her to delay from bringing a claim in the Employment Tribunal. No application has been made in this appeal under section 8.10 of the EAT Practice Direction with a view to suggesting otherwise.

9. At ET § 12, The Tribunal noted the terms of the undisputed list of issues that had been prepared by Judge Childe. In particular, it was noted that the last discriminatory act complained of was the dismissal of the appellant on 8 June 2022.

The Tribunal's reasons

10. The Tribunal concluded that the primary limitation period for presenting complaints of unfair dismissal and discriminatory dismissal ended on 7 September 2022. The appellant entered early conciliation on 29 November 2022, more than two months after the expiry of the primary limitation date. An ACAS certificate was issued on 10 January 2023, and an ET1 claim form was presented on that date. On the face of matters, therefore, the complaints of unfair dismissal and disability discrimination were each more than four months out of time.

Unfair dismissal complaints

11. Having given correct self-directions on the relevant principles of law applicable to time limits in unfair dismissal claims (ET § 20 to 24), the Tribunal concluded for reasons set out between ET § 29 and 36 that it would have been reasonably practicable for the appellant to have brought the unfair dismissal complaints in time.

12. The Tribunal noted that, in spite of her health issues, the appellant had been able to present an internal appeal on 22 June 2022 and that she was able thereafter to participate in the internal appeal hearing. She had been in receipt of support from her union until a few days

before her dismissal, and had taken no steps at all to research her rights once her union discontinued support for her. Her son's autism diagnosis was not recent.

13. In these circumstances, the Tribunal dismissed the complaints of unfair dismissal on the basis that they were brought out of time in terms of section 111(2) ERA.

Disability discrimination

14. Since the final act of alleged discrimination complained of was the dismissal on 8 June 2022, the complaints of disability discrimination were also over 4 months out of time. The Tribunal gave correct self-directions that the discretion to extend time under section 123 EqA was a broad one and that important factors were the length of and reasons for the delay, and whether the delay had prejudiced the respondent (**Adedeji v. University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23).

15. The Tribunal noted that the appellant had not put forward any cogent reason for failing to submit her complaints in time and had taken no steps to research or inquire into her rights until 19 November 2022. It took account of the fact that, if the time limit was not extended, the claimant would lose the right to pursue her discrimination complaints. Against that, it balanced the likely prejudice to the respondent in the ongoing lack of clarity about the nature of her complaints and the likely damage to the quality of the evidence as a result of delay. The Tribunal concluded that it would not be just and equitable to extend time under section 123 EqA and dismissed the discrimination complaints.

The grounds of appeal

16. The appellant's self-drafted grounds of appeal against those decisions were sifted under rule 3(7) by DHCJ Gullick KC on 13 March 2024 and were found to disclose no reasonable grounds for bringing an appeal. An email from the appellant expressing disappointment with that opinion was treated by the EAT as an application for a hearing under rule 3(10).

17. The rule 3(10) hearing took place on 29 January 2025. By that stage the appellant had assistance from ELAAS. Counsel who appeared at the rule 3(10) hearing on her behalf was granted permission to amend the proposed grounds of appeal by substituting two substitute grounds for those previously advanced. The amended grounds were then allowed to proceed to this full hearing of the appeal.

18. In summary, the first of the two amended grounds suggests that the Tribunal erred by failing to consider the relevance to time limits of the fact that the appellant had brought an internal appeal against her dismissal. The second amended ground is that the Tribunal erred in failing to consider, for the purposes of the section 123 EqA time limit, whether the dismissal of the appellant's internal appeal was itself an act of discrimination and thus part of a course of conduct extending over a period that ended on 19 November 2022.

The appeal hearing

19. Although the appellant had been offered representation through ELAAS for this appeal hearing, she elected to represent herself. She did not lodge a skeleton argument. She lodged a sheaf of documents all of which were to do with the merits of her claims rather than the narrower issue of time bar with which this appeal is concerned.

20. The appellant was given permission to participate remotely in the hearing. She did so using a mobile phone. Whilst electronic copies of the documents for the hearing had been provided to her, she did not have these (or paper versions of them) in front of her during the hearing and had difficulty in accessing electronic copies whilst she was using her phone to participate in the hearing.

21. The appellant nevertheless made oral submissions. Many of the points raised by her were not part of the grounds of appeal for which permission had been given. For the most part, her submissions concerned the underlying merits of her unfair dismissal and discrimination complaints.

22. In these circumstances, I took great care to take the appellant through the points made in the two grounds of appeal, the relevant sections of the Judge's reasons, and any relevant documents, including the terms of the appellant's written witness statement that was before Judge Wedderspoon on 8 January 2024.

23. Counsel for the respondent made brief submissions and adopted his skeleton argument. In summary, he submitted that there was no evidential basis on which the Tribunal could have concluded that the internal appeal was a cause of delay in bringing the claims, as that was never the claimant's position in evidence below (ground 1). Counsel also submitted that it had never been any part of the claimant's case that refusal of her internal appeal was a discriminatory act. He drew my attention, in particular, to the case management note of Employment Judge Childe (ground 2).

24. In the absence of a skeleton argument from the appellant, I took particular care to ask her for her responses to the points made against her grounds of appeal in the respondent's written skeleton argument and submissions. Ultimately, I understood the appellant to accept that she did not mention the internal appeal to Judge Wedderspoon as a cause of any delay in bringing her claims. She appeared also to accept that the final act of alleged discrimination of which she had complained was her dismissal on 8 June 2022.

Analysis and decision

Ground 1

25. The fundamental difficulty with the first ground of appeal is that, in her evidence at the preliminary hearing, the appellant did not rely to any extent upon the fact that she had brought an internal appeal as a factor that had caused her to delay bringing a claim to the Employment Tribunal.

26. The Tribunal could only make its decision on the basis of the evidence before it. The burden of establishing the reason for the delay rested on the appellant. She had every opportunity to give evidence on that issue, and did so. It would have been entirely wrong for the Tribunal to have speculated by placing any weight upon a factor for which there was no evidence of causal effect upon the appellant's delay in bringing the complaints. Correctly, the Tribunal determined the issues before it at the preliminary hearing on the basis of the evidence that was presented to it. No error of law is apparent in its approach.

Ground 2

27. In ground 2, the appellant submits that the Tribunal erred in not taking account of the possibility that the refusal of her internal appeal on 19 November 2022 was a discriminatory act. Had it done so, it may have concluded that the refusal of the appeal was the last act in a course of conduct extending over a period for the purposes of section 123 EqA with the effect that all of her discrimination complaints would have been brought in time.

28. Whilst that is a position that could, perhaps, have been advanced in the pleaded case, during case management, in evidence or in submissions before the Employment Tribunal, it was not the basis on which the appellant presented her case below. As the Tribunal noted at ET § 12, the final allegedly discriminatory act upon which the appellant relied was her dismissal on 8 June 2022. As in ground 1, the Tribunal cannot properly be criticised for having erred in law in relation to a matter that was never raised before it at any time. The role of this Tribunal is to examine the decision taken on the case that was actually presented below, rather than on the case that might have been presented. On the case that was presented to the Employment Tribunal, there is no basis on which it can be said to have erred in law.

Disposal

29. For these reasons, the appeal is dismissed.