



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000048/2022**

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**Held in Glasgow on 23 February 2023**

**Employment Judge McCluskey**

10 **Mrs J Rodgers**

**Claimant  
In Person**

15 **South Lanarkshire Council**

**Respondent  
Represented by:  
Mr S O'Neill -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:

1. it is just that equitable to extend time under section 123 (1) (b) of the Equality Act 2010 to consider the claimant's complaints of discrimination. The Tribunal has jurisdiction to hear her claim.
2. A case management preliminary hearing will be listed to discuss further procedure. Parties will receive a separate notice of this hearing.

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### **REASONS**

#### **Introduction**

1. The claimant's employment with the respondent commenced in 2009. Her employment terminated on 21 October 2021. Early conciliation took place from 7-9 September 2022 and the claim form was treated as presented on 9 September 2022.

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2. The claim form alleged sex discrimination and disability discrimination contrary to the provisions of the Equality Act 2010 (EqA).
3. A preliminary hearing for case management purposes took place on 14 November 2022. At that hearing the claimant clarified that she sought to bring complaints of disability discrimination only and no longer sought to bring complaints of sex discrimination. At that hearing, the complaints of disability discrimination were discussed. The claimant agreed that her complaints were summarised as follows: a. harassment by the application of the respondent's sickness absence policy in the period from 9 March to 21 October 2021; b. failure to make reasonable adjustments during her absence, in the period from 9 March to 21 October 2021, to enable her to return to work; and c. discrimination arising from disability, the unfavourable treatment relied upon being the failure to obtain an updated medical report prior to taking the decision, on 21 October 2021, to dismiss the claimant. The complaints are resisted by the respondent.
4. At the hearing on 14 November 2022, it was identified that there was an issue as to the Tribunal's jurisdiction to consider the claim on the basis that the claim was time-barred.
5. This open preliminary hearing was listed to determine whether the Tribunal has jurisdiction to consider the claim. The claimant gave evidence on her own behalf. No evidence was led by the respondent. The respondent produced a file of documents for the hearing extending to 173 pages. The claimant produced her own documents, which were three medical reports. It was established that two of those reports were already in the file of productions for the hearing produced by the respondent. The third report was added to the file and numbered page 174.

### Issues

6. The time bar issue identified at the case management hearing for determination today was: (i) Were the complaints presented within the time limit set out in section 123(1) (a) of the Equality Act 2010? (ii) If not, were the

complaints brought within such other period as the employment tribunal thinks just and equitable?

### Findings in fact

- 5 7. From the information and evidence before the Tribunal it made the following findings in fact. The Tribunal has only made findings of fact in relation to matters which are relevant to the legal issue to be decided.
8. The claimant worked for the respondent from 2009 until her dismissal on 21 October. She worked as a repairs assistant in an office-based role.
- 10 9. The claimant was diagnosed with endometrial cancer in November 2019. The cancer was discovered following a hysterectomy operation. There was a delay of several months in getting the hysterectomy operation due to administration errors in the NHS. The claimant had several months off work after the operation. She returned to work in 2020.
- 15 10. Thereafter the claimant was absent from work from 9 March 2021. Her absences were recorded as due to a shoulder injury.
- 20 11. The claimant attended an incapacity hearing with the respondent on 22 September 2021. She was accompanied by a trade union representative at that meeting. The claimant was invited to attend a further incapacity hearing on 21 October 2021. She had a cardiology appointment at the hospital that day and did not attend.
- 25 12. During the period from 9 March 2021 until her dismissal on 21 October 2021 the claimant had various health concerns as set out in her medical records including shoulder injury, hypotension and vestibular balance issues, gynaecology issues following endometrial cancer diagnosis in 2019, a suspected lump in her breast and a cardiology referral. These various health concerns were making the claimant very anxious.
13. The claimant's employment with the respondent was terminated on 21 October 2021. The advice from her trade union representative was that there was nothing wrong with the dismissal procedure followed by the respondent.

The trade union did not tell the claimant about discrimination complaints or any other complaints or tell the claimant about employment tribunals. The claimant did not have any further input from the trade union.

14. The claimant was shocked when she was dismissed. From around the beginning of November 2021 she couldn't look after herself and became depressed. Her mind went back to 2019 when she had her cancer diagnosis. Her family bought her a calendar to remind her that it was 2021. When she came downstairs in the morning her family had to remind her that it was 2021 and not 2019.
15. The claimant's vestibular balance issues from before her dismissal continued. She was scared to go out of the house in case she lost her balance. In the house she could not stand to cook for herself. She could not stand in the shower to wash herself. To get across the living room she needed to hold onto furniture. She needed to have someone in the house with her to look after her. She had balance exercises to do all day every day. She was micro-managing her balance.
16. The claimant's depression and vestibular balance issues continued from November 2021. By end April 2022 there was no improvement. On 25 April 2022 she had an appointment with NHS clinical health psychology services and was referred for cognitive behaviour therapy in the ACCEPT service (Adjustment to Chronic Conditions by Engaging with Psychological Therapies). The referral identified "Particular difficulties leaving the house, and experience of panic and anxiety around falling or feeling dizzy in front of others" (page 121). Around the same time the claimant was prescribed medication for her anxiety and depression.
17. The claimant first became aware of employment tribunals in June 2022 when she visited her GP. She told her GP that she had been dismissed from the respondent and he asked her if she had contacted the employment tribunal.
18. The claimant had not heard of employment tribunals before this. She had heard about industrial tribunals whilst working for a previous employer, when

a colleague had had an accident at work. She thought industrial tribunals were only for individuals who had had an industrial accident at work.

19. At around the beginning of August 2022, the claimant had completed several cognitive behavioural therapy sessions. She had been prescribed anxiety medication which was beginning to have an effect. She was getting vestibular exposure therapy. The combination of these treatments was having an improvement on her health. This was the first time she was able to think about the employment tribunal route which her GP had told her about. She carried out research herself about bringing a claim. Her cognitive abilities due to her illness made it difficult for her to understand the process to follow or who she should contact for advice. She thought she had to obtain her medical records first. She tried contacting the Lord Provost. She did not know about contacting ACAS for early conciliation. She did not know about time limits.

20. She presented her claim to the Tribunal on 31 August 2022. It was rejected as she did not have an ACAS early conciliation certificate. She contacted ACAS and the ACAS certificate was issued on 9 September 2022. She re-submitted her claim to the Tribunal on 9 September 2022.

21. On 1 September 2022 the claimant met with Dr Elizabeth McKenzie, a clinical psychologist, on a private basis. Dr McKenzie thereafter produced a report dated 9 December 2022. Dr McKenzie assessed the claimant as suffering from severe anxiety, severe depression and PTSD (page 124). Dr McKenzie's assessment was that these health conditions were why the claimant had not appealed against her dismissal and why there was delay in submitting her complaint to the employment tribunal (page 153).

#### 25 **Observations on the evidence**

22. The Tribunal found the claimant to be a credible and mostly reliable witness. It was sometimes difficult for her to remember the precise chronology of her various ill health conditions. The medical records in the file of productions assisted with this.

23. The respondent challenged the claimant's credibility in relation to knowledge of employment tribunals. The respondent submitted that it was not credible that the first time the claimant knew of employment tribunals was when her GP told her about them in June 2022.
- 5 24. The Tribunal accepted the evidence of the claimant that she had previously heard of industrial tribunals but understood that these were only for industrial injury claims. The Tribunal accepted the evidence of the claimant that she had not heard about employment tribunals as a forum for making complaints about workplace matters until sometime in June 2022 when she spoke to her  
10 GP.
25. The Tribunal considered that the claimant was candid in acknowledging that she had heard of industrial tribunals and thought their purpose was only to deal with industrial injuries. On that basis, and on balance the Tribunal accepted that the claimant had not heard about employment tribunals and their purpose until discussion with her GP.  
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26. The respondent challenged the credibility of the report prepared by Dr McKenzie upon which the claimant had relied. The respondent said that as the report was produced on a "no win no fee basis", there was a risk that Dr McKenzie was biased. Therefore, the report could not be relied upon.
- 20 27. The Tribunal did not accept that this was the case. The report sets out Dr McKenzie's professional qualifications as a chartered health psychologist. The report acknowledges her professional responsibilities to the court. The Tribunal was satisfied that the assessment provided by Dr McKenzie that the claimant was suffering from severe anxiety, severe depression and PTSD was  
25 given in good faith by her. The Tribunal was also satisfied that Dr McKenzie's assessment that these health conditions were why the claimant had not appealed against her dismissal and why there was delay in presenting a claim to the employment tribunal, was also given in good faith.
28. The Tribunal was therefore satisfied that it could consider the pages of Dr  
30 McKenzie's report, to which it was directed in the hearing, in reaching a determination on the issue of time bar.

**Relevant law**

29. Section 123(1) of the Equality Act 2010 (EqA) states that complaints may not be brought after the end of: (a) the period of 3 months starting with the date of the act to which the complaint relates; or (b) such other period as the Tribunal thinks just and equitable.
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30. 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**).
31. 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.
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- 20 32. 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 Employment 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.
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33. 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
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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”*.

34. The respondent also invited the Tribunal to consider **MTN-1 Limited v O’Daly [2022] EAT 130** and **Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132**.

## 10 Submissions

### *Claimant’s submissions*

35. The claimant gave a very brief submission. She said she had been too ill to bring her claim any earlier. She said that the respondent had been in breach of the EqA 2010 in the way that it had treated her.

### 15 *Respondent’s submissions*

The Tribunal has summarised the respondent’s submissions as follows:

36. Mr O’Neill referred to the relevant statutory provisions. He said that ACAS should have been contacted in the period between 21 October 2021 and 20 January 2022 but were not.

- 20 37. Mr O’Neill said, in relation to delay, that from the date of dismissal to presentation of the claim was nearly 11 months. There was no issue of discrimination raised by her trade union representative at the capability hearing. She did not exercise her right of appeal following her dismissal. It is not credible that the first the claimant knew of employment tribunals was when  
25 her GP told her about them. She knew to seek representation from a trade union prior to her dismissal. She is an intelligent woman. It is disingenuous to say that she did not know about employment tribunals and, by extension, the time limits.



38. Even if she did not know about employment tribunals before speaking to her GP, it then took her over two months to present her claim.

39. Mr O'Neill said that it cannot be argued to be a mental health issue which prevents the claimant from presenting a claim prior to the conversation with the GP. This is because she relies on ignorance of employment tribunals and the law prior to that date. After speaking to her GP, it would have been reasonable for her to take expert, skilled advice promptly thereafter to ascertain next steps. She did not do so. Her claim was first presented on 31 August 2022, over two months later. Following an initial rejection, it was treated as presented on 9 September 2022.

40. Mr O'Neill submitted that in relation to the effect on evidence, it is almost 16 months since her dismissal. It will be several further months before any final hearing. That will affect the memories of both parties.

41. Mr O'Neill submitted that the delay in presenting her claim will prejudice the respondent as it has come out of the blue. The documentation regarding her absence from 9 March 2021 until her dismissal on 21 October 2021 is available but memories of witnesses will have faded.

42. Mr O'Neil submitted that in relation to the strength of her case, she was dismissed following absence for shoulder pain. She was given an all clear for her cancer in December 2019. At the time of her dismissal, she was not considered to have a disability. The respondent disputes that she was disabled at the time of her dismissal and, if she was, they did not know about it. Issues of disability were not something asserted by her or her trade union when she was dismissed. Additionally, each of her disability discrimination complaints are weak and unlikely to succeed.

43. Mr O'Neill referred to three cases. He submitted that mental health can be a ground for extending time on a just and equitable basis. In **MTN-1 Limited v O'Daly [2022] EAT 130** the delay was due to the claimant's ADHD and time was extended. In **Abertawe Bro Morgannwg University Local Health Board v Morgan, CA [2018] EWCA Civ 640** the claimant suffered from a depressive illness. The Court of Appeal said that the Tribunal does not need

to be satisfied as to the reason for the delay. But the claimant's delay here is not one day but over 7 months. The reason for delay is not knowing about tribunals and then a further delay of over two months.

44. In **Kumari v Greater Manchester Mental Health NHS Foundation Trust**  
5 **[2022] EAT 132**, the EAT said the Tribunal has a wide discretion based on identifiable factors including the strength of the claim. In this case the claimant's complaints are all weak and likely to fail, even if the claimant is disabled.

### Discussion and decision

- 10 45. Section 123 EqA provides: (1) 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.
- 15 46. Section 140B EqA deals with the extension of time limits to facilitate conciliation before the institution of proceedings and provides that the power conferred on the tribunal to extend the time limit on the grounds of justice and equity is exercisable in relation to that time limit as extended by section 140B.
- 20 47. The subject of the complaints are: a. harassment by the application of the respondent's sickness absence policy in the period from 9 March to 21 October 2021; b. failure to make reasonable adjustments during her absence, in the period from 9 March to 21 October 2021, to enable her to return to work; and c. discrimination arising from disability, the unfavourable treatment relied upon being the failure to obtain an updated medical report prior to taking the  
25 decision, on 21 October 2021, to dismiss the claimant.
48. The last date from which time would run is 21 October 2021, based on the claimant's allegations of a course of continuing conduct in relation to her complaints. The period of three months from that date is 20 January 2022. For any extension of time under section 140B EqA, ACAS would need to have  
30 been contacted during that period. The claimant did not do so. The last date

for presenting a claim, based on the date of 21 October 2021 is therefore 20 January 2022. The claim was not presented on or prior to that date. The complaints were not presented within the time limit set out in section 123(1)(a) of the Equality Act 2010.

5 *Just and equitable extension*

49. The Tribunal must then determine whether the complaints were brought within such other period as the Tribunal thinks just and equitable (section 123(1)(b) EqA. The complaints were brought on 9 September 2022, over 7 months after expiry of the relevant time limit. The claimant attributes the delay in presenting her claim to two factors as follows: (i) her medical conditions which she stated made her too ill to be able to present a claim any sooner; (ii) her lack of knowledge about the ability to bring employment tribunal proceedings, prior to a conversation with her GP in June 2022.

50. 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 she knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.

*Length of delay and reasons for it*

51. The claimant alleges a course of conduct during which alleged discriminatory acts took place in the period 9 March 2021 – 21 October 2021. On the basis that time runs from 21 October 2021, the claim should have been lodged by 20 January 2022. The delay in this case is not inconsiderable.

52. The Tribunal accepted that the claimant had been suffering from a complex set of medical conditions during the period of her absence and at the point of her dismissal on 21 October 2021. These medical conditions are supported

by her medical records. The Tribunal accepted that these medical conditions were making the claimant very anxious.

53. The Tribunal also accepted the evidence of the claimant that from November 2021, shortly after her dismissal, her medical conditions became compounded by depression. The combination of her deteriorating mental health and her vestibular balance issues resulted in the claimant not being able to leave the house and being able to do very little for herself. She required the support of family members for day to day living.
54. The claimant's evidence was that her mental ill health and vestibular balance issues did not improve until around the beginning of August 2022. The Tribunal accepted this evidence. It is borne out in the medical notes which indicate an NHS referral towards the end of April 2022 for eight sessions of cognitive behaviour therapy. Around this time the claimant was also prescribed medication to help her anxiety and depression.
55. The claimant's evidence, which the Tribunal accepted, was that only once she had completed some of these sessions and when the medication for her anxiety and depression began to work, did she have any cognitive ability to consider bringing employment tribunal proceedings.
56. The claimant became aware of employment tribunals as route to bring complaints about workplace matters sometime in June 2022 when she told her GP of her dismissal. The claimant's evidence, which was accepted by the Tribunal was that she had not heard of employment tribunals before then. In any event, however the Tribunal also accepted the claimant's evidence that she remained too unwell to consider bringing employment tribunal proceedings until the beginning of August 2022.
57. The Tribunal then considered what steps the claimant had taken from around the beginning of August 2022 when her health was beginning to improve. The claimant's evidence, which the Tribunal accepted, was that although her health had improved, her cognitive abilities due to her illness made it difficult for her to understand the process to follow to present her claim or who she should contact for advice. The Tribunal was satisfied that this was borne out

by her evidence that during August 2022 she thought she needed to get her medical records first and so had not presented her claim. She had also been unsure who to contact about employment tribunal proceedings and advice and had tried contacting the Lord Provost.

5 58. The claimant had the benefit of trade union representation at the time of her dismissal. The trade union did not identify any complaints or advise about employment tribunals. The claimant did not have contact with the trade union after her dismissal. The Tribunal did not consider that the claimant could be criticised for not contacting the trade union again in August 2022 when her health was beginning to improve. She had already been advised by the trade union in October 2021 that the respondent had done nothing wrong.

10 59. When the claimant presented her claim on 31 August 2022, she did not have an ACAS early conciliation certificate. The Tribunal accepted her evidence that her cognitive abilities due to her illness made it difficult for her to understand the process to follow. Her claim was rejected by the Tribunal. Thereafter she obtained an ACAS early conciliation certificate on 9 September 2022 and re-submitted her claim form on the same day.

15 60. The claimant's evidence about her medical conditions and the impact on her ability to bring employment tribunal proceedings was supported by the report from Dr McKenzie, the clinical psychologist. The Tribunal accepted the relevant parts of the report about the impact of the claimant's conditions on her ability to appeal against her dismissal and to bring employment tribunal proceedings any sooner than she had done.

20 61. The Tribunal accordingly accepted that the claimant's medical conditions meant she was unable to present her claim successfully until 9 September 2022 or to take advice or instruct a third party (such as a trade union or solicitor) to do so on her behalf

#### *Cogency of evidence*

25 62. The Tribunal considered the extent to which the cogency of the evidence was likely to be affected because of the delay. The delay here is not

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inconsiderable. However, the facts upon which the complaints rest have been the subject of the respondent's incapacity procedure, with which the respondent has engaged throughout the period of the complaints. In the circumstances the Tribunal was not persuaded that the cogency of the evidence was likely to be significantly affected by the delay.

*Merits of claim*

63. The Tribunal considered the submission of Mr O'Neill that the claimant's complaints are all weak and likely to fail. He directed the Tribunal to **Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132** and submitted that the Tribunal has a wide discretion based on identifiable factors including the strength of the claim.

64. The question of whether the claimant is disabled within the meaning of section 6 EqA is not an issue to be determined today. The respondent asserts that the claimant was absent prior to dismissal with a shoulder injury and was dismissed for absence due to this injury. The respondent asserts that the claimant was dismissed following the respondent's incapacity procedure. The claimant asserts that she had several complex medical conditions during her absence, in addition to her shoulder injury. She asserts that the respondent was aware of at least some of these prior to her dismissal.

65. The Tribunal concluded that it had not heard evidence today which points strongly to a particular conclusion of weakness on the prospective merits of any of the disability discrimination complaints made. The Tribunal did not have evidence to satisfy itself that the complaints were weak and likely to fail.

*Prejudice*

66. The Tribunal then considered the prejudice which each party would suffer depending on the decision reached. If the claim does not proceed the claimant will suffer considerable prejudice in that she would be precluded from pursuing her remaining complaints. The prejudice which the respondent would suffer if time were extended is that it will have to deal with the claim

which has been lodged out with the statutory time limits. However, it remains open to the respondent to defend the complaints.

*Conclusion*

5 67. 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 claim.

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**Employment Judge: J McCluskey**  
**Date of Judgment: 11 April 2023**  
**Entered in register: 14 April 2023**  
**and copied to parties**

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