



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000107/2023**

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**Held in Glasgow on 1 August 2023**

**Employment Judge L Wiseman**

10 **Mrs Christine Devine**

**Claimant  
In Person**

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**Scottish Fire and Rescue Service**

**Respondent  
Represented by:  
Ms L McSporrán -  
Solicitor**

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

The tribunal decided a tribunal does not have jurisdiction to determine the claim because it has been presented late and it would not be just and equitable to extend the time limit for presentation of the claim.

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### **REASONS**

1. The claimant presented a claim on the 10 March 2023 alleging she had been discriminated against because of the protected characteristic of sex. The claimant complained of indirect discrimination in terms of section 19 Equality Act in circumstances where she asserted there was a requirement to work Monday to Friday.
2. The respondent entered a response denying the claim and asserting the claim had been presented late.

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3. The hearing today was a preliminary hearing to determine whether the claim had been presented late and if so, whether it would be just and equitable to extend time all in terms of section 123 Equality Act.

4. I heard evidence from the claimant and I was referred to some productions. I,  
5 on the basis of the evidence before me, made the following material findings of fact.

### Findings of fact

5. The claimant commenced employment with the respondent in September 2007 as an Occupational Health Advisor. The claimant was promoted several  
10 times and, from February 2020 had carried out the role of Clinical Lead on a temporary basis.

6. The claimant had, since 2010, had a flexible working pattern in place whereby she worked full time hours (35 hours per week) compressed into four days (Monday to Thursday).

15 7. The claimant attended an interview in February 2021 for the permanent Clinical Lead role. The claimant was successful at interview but understood there was a requirement to work Monday to Friday. The claimant turned down the role and left the employment of the respondent in May 2022.

8. The claimant commenced alternative employment in May 2022. The claimant  
20 has a home based role. The claimant is still employed in this role.

9. The claimant noticed the Clinical Lead role being advertised in July 2022. The advert confirmed flexible working would be considered. The claimant applied for the role and attended for interview in August 2022. The claimant was not successful.

25 10. The claimant sought advice from ACAS in August 2022. The claimant understood she could make a claim to the Employment Tribunal and that there was a time limit for doing so of three months less one day. The claimant followed ACAS advice to write to the respondent first.

11. The claimant emailed the respondent on the 6 September 2022 (page 45) attaching a formal grievance entitled Indirect Sexual Discrimination (page 41) and noting she had taken advice from ACAS.
12. The claimant did not receive a response from the respondent and so sent another email on the 12 October 2022 (page 44). The email referred to commencing Employment Tribunal proceedings if necessary.
13. The respondent replied on the 25 October (page 46) confirming that notwithstanding the fact the Grievance Procedure applied to current employees, the claimant's concerns had been investigated and a response to them provided.
14. The claimant was unsure whether she had the mental strength to take things forward to a tribunal. The claimant reflected on this and duly decided to proceed. The claimant approached ACAS for early conciliation on the 17 February 2023 and presented her claim on the 10 March 2023.
15. The claimant continued to work throughout this period.

### Respondent's submissions

16. Ms McSporran referred to section 123 Equality Act and submitted the two acts complained of (February 2021 and August 2022) were significantly out of time.
17. The claimant commenced early conciliation with ACAS on the 17 February 2023. Ms McSporran referred to the case ***of Ian Pearce v Bank of America Merrill Lynch and others UKEAT/0067/19*** as authority for her submission that if the period of limitation has already expired, commencing early conciliation does not extend it.
18. The issue for the tribunal in this case was whether it would be just and equitable to extend time. The case of ***Bexley Community Centre v Robertson 2003 EWCA Civ 576*** made clear that time limits were to be exercised strictly in employment cases and there was no presumption that discretion to extend time would be exercised. A tribunal cannot hear a

complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of discretion was the exception rather than the rule.

19. Ms McSporrán referred the tribunal to the cases of ***British Coal Corporation v Keeble* 1997 WL 1104672** and ***Miller and others v Ministry of Justice* 2016 WL 00890506**. The EAT in the latter case set out five principles relevant to the issue of exercising discretion. It was stated:

“(i) *the discretion to extend time is a wide one;*

(ii) *time limits are to be observed strictly in ETs;*

(iii) *if an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, “perverse”, that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took irrelevant factors, or made a decision which was not based on the evidence;*

(iv) *what factors are relevant to the exercise of discretion and how they should be balanced are for the ET. The prejudice which a respondent will suffer from facing a claim which would otherwise be timebarred is customarily relevant in such cases and*

(v) *the ET may find the checklist of factors in section 33 of the Limitation Act 1980 helpful (***British Coal Corporation v Keeble***) although this is not a requirement.*

20. Ms McSporrán submitted there had been significant delay in this case. The claimant’s explanation for the delay was not a reasonable one. The claimant had taken advice from ACAS and had, in August 2022, been aware of the possibility of making a claim to the Employment Tribunal and the time limit for doing so. The claimant had referred in her emails to the respondent of the 6 September and 12 October, to commencing tribunal proceedings. Ms McSporrán noted that if the claimant had acted at that time, or even upon receipt of the response from the respondent, the claim would have been in time.

21. Ms McSporran submitted that it would not be just and equitable to extend the time limit for presentation of the claim. There would be prejudice to the respondent in having to defend a claim which was out of time and the reason put forward by the claimant to explain the delay was not reasonable. Ms  
5 McSporran referred to the case of ***Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132*** where it was said that the potential merits of a case are not necessarily an irrelevant consideration when deciding whether it is just and equitable to extend time. If a tribunal puts this into the balance, the assessment of potential merits must be reached by  
10 reference to identifiable factors that are apparent at the preliminary hearing.
22. Ms McSporran invited the tribunal to have regard to the PCP said by the claimant to be a requirement for a Monday to Friday working pattern. However, the claimant had worked a flexible working pattern for over 10 years and accepted two other Clinical Leads worked flexibly. The advert for the post  
15 also referred to flexible working. It was submitted that the claimant would be unable to make out the PCP and group disadvantage in the circumstances.
23. The basis of the August 2022 claim was unclear beyond the complaint regarding being asked about flexible working at the interview and the timing and manner of being informed of the outcome of the interview. No PCP had  
20 been articulated and in the circumstances the claim had no reasonable prospect of success.
24. The claimant had not sought to argue there was a continuing act but if this was suggested, Ms McSporran invited the tribunal to have regard to the fact there were two discrete acts with 1.5 years between them. The claimant had  
25 also resigned in between the two acts and both acts were timebarred.
25. Ms McSporran concluded her submission by inviting the tribunal to find the claim was timebarred and that it would not be just and equitable to allow the claim to proceed.

**Claimant's submissions**

26. Ms Devine confirmed she had worked a flexible working pattern since 2011 and had worked in the role of Clinical Lead from February 2020. Ms Devine accepted the two Clinical Leads already in post worked on a flexible working pattern with one off on a Monday and one off on a Friday. Ms Devine denied the respondent had offered her flexible working in the post with the issue being that she could not have Friday off (as per her current arrangement) but could have a Tuesday, Wednesday or Thursday off.
27. Ms Devine described that she had been very demotivated and robbed of her professional confidence after February 2021. She considered her mental health was a reasonable explanation for the delay because she had had to rebuild her mental strength before starting proceedings.
28. Ms Devine acknowledged she had not had any time off in her new role, but this was because she would not be entitled to sick pay.

**Discussion and Decision**

29. I firstly had regard to the statutory provisions set out in section 123 Equality Act, which provide that proceedings (of the type brought by the claimant) may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.
30. The complaint brought by the claimant concerned two acts: the first act was said to have occurred in February 2021 and the second in August 2022. There was a lack of clarity regarding the nature of the complaint made in relation to August 2022. The claim form referred to being asked about flexible working at the interview on the 3 August 2022 and the manner of being notified of the outcome on the 12 August 2022.
31. I accepted the respondent's submission that even if the tribunal took the latest date of the 12 August 2022 as being the date for calculating the time to present a complaint, the claim was out of time. The claimant had a period of three months from 12 August 2022 in which to present a claim or contact

ACAS for early conciliation. The claimant did neither of those things. The claim was not presented until 10 March 2023, and ACAS was not contacted until 17 February 2023.

5 32. The claim was presented late and accordingly the issue for this tribunal is to decide whether it would be just and equitable to extend the time for presentation of the claim. I, in considering this issue, had regard to the case of **British Coal Corporation v Keeble** (above) to which I was referred. In that case the EAT had regard to section 33 of the Limitation Act 1980 which provides a broad discretion for the Court to extend the limitation period in certain cases. The Court is required to consider the prejudice which each party would suffer as a result of the decision to be made and should take into account the following factors:

- 15 • the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information;
- the promptness with which the claimant acted once s/he knew of the facts giving rise to the cause of action and
- 20 • the steps taken by the claimant to obtain appropriate professional advice once s/he knew of the possibility of taking action.

25 33. I also had regard to the case of **Southwark London Borough Council v Afolabi 20023 ICR 800** where the Court of Appeal confirmed that while the above checklist provided useful guidance for tribunals, it need not be slavishly adhered to.

34. I noted the discretion of tribunals when considering the issue of just and equitable is very wide although time limits are to be observed strictly.

35. I next turned to consider the length of and reasons for the delay. I noted the claimant took no action (in terms of seeking advice or making a claim) after

the events of February 2021. There is a period of just over two years between those events and the claim being presented. I further noted there is a period of some 7 months between the events of August 2022 and the claim being presented. The claimant did not clarify whether she argued there was a continuing course of conduct, but given the latest date (12 August 2022) is the most favourable to the claimant, the tribunal proceeded on that basis.

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36. The claimant had a period of three months (from 12 August 2022) in which to make her claim or make contact with ACAS regarding early conciliation. The claimant did not contact ACAS regarding early conciliation until 17 February 2023. This was outwith the time limit.

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37. The claimant, when asked about the reasons for the delay, explained she had sought advice from ACAS in August 2022. The claimant understood she could bring a claim in the Employment Tribunal if there was “no joy” from early conciliation. The claimant also understood there was a period of “3 months and 1 day” in which to make a claim, although it was explained this timeframe could be extended.

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38. The claimant followed ACAS advice to write to the respondent. She did this on the 6 September by sending a formal grievance. The respondent had no obligation to investigate the grievance, but they decided to do so. The respondent sent a reply to the claimant on the 25 October, following their investigation.

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39. I concluded from these undisputed facts that as at the 25 October the claimant was aware she could make a claim to the Employment Tribunal; she was aware of the time limit for doing so and she was aware her grievance had been investigated by the respondent and she had received their response. The claimant had also, in her email of the 12 October, stated that upon receipt of a response from the respondent she would “*then commence my Employment Tribunal proceedings with ACAS if necessary*”.

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40. I next considered the reasons why the claimant did not act at that stage. The claimant explained she was not sure she had the mental strength to take things forward. She reflected on this over Christmas and New Year and

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5 decided she would proceed. I acknowledged it can be difficult pursuing a claim however I balanced against that the fact there was no evidence to suggest the claimant had visited her GP during this time and she had not required to take any time off work. The claimant referred very generally to her “mental health” but there was no evidence to explain why she could not have acted sooner than she did in circumstances where she knew of the time limits for presenting her claim. I concluded the claimant failed to act promptly after receiving advice from ACAS in August regarding time limits.

10 41. I acknowledged the claimant would suffer prejudice if I decide not to exercise discretion to allow the claim to proceed.

42. I also acknowledged the respondent would suffer prejudice if I decide to allow the claim to proceed because they would have to defend a claim which was made late.

15 43. I, having had regard to the above factors, decided it would not be just and equitable to allow the claim to proceed. I reached that conclusion primarily because the claimant was in a position (having received advice from ACAS) to act and present her claim in time. The claimant did not act promptly and I did not consider the claimant’s explanation justified the delay in circumstances where there was no medical evidence to suggest the claimant was not fit to proceed, and in circumstances where the claimant was sufficiently fit to continue working throughout this period.

20 44. I did not, in reaching my decision, take into account the merits of the case brought by the claimant. I did however consider there was merit in the submission made by the respondent regarding the likelihood of the claimant being unable to show there was a provision, criterion or practice (PCP) as described. I say this because the claimant worked flexibly, and although the permanent Clinical Lead position required to be covered on a Monday to Friday basis, the two existing Clinical Leads worked flexibly with one off on a Monday and one off on a Friday. I considered that against that background the claimant was likely to be unable to establish the PCP upon which her case was predicated.

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45. I decided a tribunal does not have jurisdiction to hear the claimant's claim because it has been presented late and it would not be just and equitable to extend time. This means the claimant's claim cannot proceed.

5 **Employment Judge: L Wiseman**  
**Date of Judgment: 07 August 2023**  
**Entered in register: 08 August 2023**  
**and copied to parties**

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