



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr D Barnett**

**v**

**The Forestry Commission**

## RECORD OF AN OPEN PRELIMINARY HEARING

**Heard at:** Watford

**On:** 19 April 2023

**Before:** Employment Judge Alliott, sitting alone.

### Appearances

**For the Claimant:** In person

**For the Respondent:** Mr S Nicholls (counsel)

## JUDGMENT

The judgement of the tribunal is that:

1. The claimant's claim of disability discrimination (failure to make reasonable adjustments) in claim number 3309822/2022 was brought in a period the Employment Tribunal considers to be just and equitable and accordingly there is jurisdiction to hear it.

## REASONS

1. Under s.123 of the Equality Act 2010 the primary limitation period is three months.
2. I have a discretion to hear out of time discrimination claims where I consider it "just and equitable" to do so – s.123(1)(b) Equality Act.
3. As per the IDS Handbook on Practice and Procedure at 5.103:

“While Employment Tribunals have a wide discretion to allow and extension of time under the “just and equitable” test in s.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that when Employment Tribunals consider exercising the discretion under what is now s.123(1)(b) Equality Act, “There is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a Tribunal cannot hear a complaint

unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.” The onus is therefore in the claimant to convince the Tribunal that it is just and equitable to extend the time limit.”

4. In addition, I have taken into account the summary of legal principles relating to new facts as recited at paragraph 5.57 drawing on the case of Cambridge and Peterborough NHS Foundation Trust v Crouchman [2009] IRCR 1306, EAT, where the following core principles to be applied to this type of case were as follows:
  - Ignorance of a fact which is “crucial” or “fundamental” to a claim will, in principle, be a circumstance rendering it impracticable for a claimant to present that claim.
  - A fact will be “crucial” or “fundamental” if it is such that, when the claimant learns of it, his or her state of mind genuinely and reasonably changes from one where he or she does not believe that he or she has grounds for the claim to one where he or she believes that the claim is “viable”.

### **The facts**

5. The disability discrimination claim was considered by Employment Judge Forde at a preliminary hearing on 6 February 2023. As a result, the list of issues in claim number 3309822/2022 was confined to an allegation arising out of an incident on 10 February 2022 when the claimant alleges he was required to attend a fact-finding investigation meeting at a location two hours travel time away from his home address and normal place of work. It is couched as a failure to make reasonable adjustments claim.
6. The three-month primary limitation period for bringing a claim arising out of an event on 10 February 202 would have expired on 9 May 2022. The claimant notified Acas on 18 May and the date of the Acas early conciliation certificate is 20 June 2022. The claimant issued his claim on 18 July 2022.
7. Obviously this is not a case where I have to consider whether there is a series of connected events or a course of continuous conduct. As such, the claimant’s claim was issued out of time. It is out of time by two months and nine days.
8. In the exercise of my discretion I have to consider a number of factors. Firstly I consider the length of the delay which, in the context of an employment tribunal, is relatively long at two months nine days.
9. I next look at the reason why the delay occurred. This is not a case where the claimant was ignorant of his right to bring a claim. The claimant has previously brought a claim for unfair dismissal in 2011 and had already presented a claim, number 3305136/2022, on 22 April 2022. Further, it is clear to me that the claimant was, in general terms, aware of the time limits for presenting a claim. He acknowledged as such although, in his two previous claims, it had not arisen because obviously enough he had issued

in time. I also find that the claimant was aware that he had to go to Acas prior to issuing a claim.

10. A factor in this case is that in claim number 3305136/2022, the first claim, the claimant pleaded the essential facts that he relies upon in support of his second claim. In paragraphs 104-108 he refers to being forced to attend the fact-finding investigation on 10 February 2022 in person, despite informing the respondent that this would not be beneficial to his disability, an assertion that there were reasonable alternative arrangements to an in-person meeting that could have been made, in particular to conduct it via Teams, and that the claimant's wife had to take a day's holiday to help him attend the meeting and he suffered a fatigue episode as a consequence.
11. I observe that the list of issues in claim number 1, 3305136/2022, has yet to be finalised. Whilst I have not heard argument on this matter, it seems to me that it would be open to the claimant to argue that in the first claim, 3305136/2022, a claim of disability discrimination is already clear on the face of the document and that he did not need to amend his claim to bring such a claim or, alternatively, that he could make an application to amend to include a disability discrimination claim on the basis that the factual basis of that claim was already set out in the body of the claim form and the exercise was merely one of relabelling. As I say, I have not heard argument on this issue so this is only a provisional view but it must be that he would stand a good chance of being granted any such amendment.
12. Be that as it may, Mr Nicholls, on behalf of the respondent, contends that given that he had pleaded the factual basis of a disability claim he could and should have brought his claim in the first proceedings which would then have been in time.
13. I have examined why the claimant did not bring a disability claim in his first proceedings.
14. The claimant told me that he only received a bundle of documents relating to the fact-finding investigation from the respondent on 18 May 2022. All but four of the witness statements showed that their interviews had been via Teams. It is clear to me and I find that the claimant reached a point on 18 May that he concluded that he had been discriminated against on the grounds of his disability. I come to that conclusion because it was on the same day that the claimant notified Acas of his claim. Thereafter, the claimant sent an email seeking clarification concerning the other four individuals and on 28 June 2022 he was informed that all the witnesses had had their interviews via Teams. The date of the Acas certificate is 20 June 2022 and in due course the claimant issued his claim within one month of that on 18 July 2022.
15. The claimant has endeavoured to characterise his disability claim as a direct disability discrimination claim reliant on comparators being all the other interviewees in the fact-finding process. In fact, I do not find that that is necessary. It seems to me that the claimant in support of a claim for failure to make reasonable adjustments can reasonably point to the fact that the

respondent was conducting interviews with other individuals via Team albeit that they were witnesses rather than the subject of the fact-finding exercise.

16. The claimant was aware in general terms of the need to bring a claim within three months of the act complained of. The claimant was also aware that he had to notify Acas before bringing a claim which is what he did the moment he became aware of the new information that caused him to conclude that he had been discriminated against on the grounds of his disability. Thereafter he issued his claim within one month of the certificate. Clearly, the claimant was wrong to assume that time was suspended and that he had a month from the end of the certificate but the workings of the early conciliation scheme are not that easy to a lay person to understand and apply.
17. Accordingly, I have taken into account the fact that the delay is to an extent understandable.
18. As far as the other factors raised in the Limitation Act, in so far as they are relevant, the delay is not so long such that it would affect the cogency of the evidence, the orderly conduct of this litigation has not been affected and I find that the respondent will not have been prejudiced as a result given the fact that the facts are raised in the first claim albeit it now appears that they will not be relevant as the first claim is solely concerned with an equal pay claim.
19. Taking into account all the circumstances of this case, in my judgment the claimant did bring the claim within a period that was just and equitable and accordingly, I find there is jurisdiction to hear it.

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Employment Judge Alliot

Date: 10 May 2023

Sent to the parties on: 14.5.2023

GDJ  
For the Tribunal Office