**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100292/2022**

**Held by Cloud Video Platform (CVP) on Thursday 19 May 2022**

**Employment Judge Russell Bradley**

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| **Ms Janet Carroll** | **Claimant**<br>**In Person** |
| **Meallmore Limited** | **Respondent**<br>**Represented by:**<br>**Mr G Ridgeway – Employment Law Advocate** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that: -

1. The claim was not presented within the period of three months starting with the last date (6 June 2021) to which the complaint could relate;

2. The presentation of the claim on 18 January 2022 was not within such other period as was just and equitable;

3. The tribunal has no jurisdiction to determine the claims of discrimination which are therefore dismissed.

**REASONS**

**Introduction**

1. On 18 January 2022 the claimant presented an ET1. In it she makes claims of disability discrimination and for "*other payments*". Her claim was resisted. On 21 January the employment tribunal wrote to the claimant to say that the claim of disability discrimination appeared to have been presented outwith the

period within which claims/complaints of this type should normally be brought, being 3 months from the act complained of. In its Grounds of Resistance dated 18 February 2022 the respondent argued that some of the claims were potentially out of time. It argued that the tribunal did not have jurisdiction to consider them.

2. On 17 March 2022 EJ Kemp held a telephone conference preliminary hearing. He ordered the fixing of this hearing to decide the issue of whether or not the Tribunal has jurisdiction in relation to time-bar under section 123 of the Equality Act 2010.

3. At the outset I explained that I had previously, in November 2019, represented the respondent in an employment tribunal in Aberdeen. I indicated that I did not see that as a reason to recuse myself as I considered that I was able to decide the issue impartially. Both parties agreed to proceed.

4. In advance of the hearing, the respondent had prepared, lodged and copied to the claimant an indexed bundle of papers of 183 pages. Page references below are to pages within it.

5. EJ Kemp also ordered the mutual exchange of witness statements. The respondent did so. The claimant did not. In discussion with the claimant, it appeared that she was under the misapprehension that as a party she did not require to do so. It was agreed with Mr Ridgeway that I would hear the claimant's evidence in chief orally. He agreed that proceeding in this way was preferable to postponing the hearing to allow the claimant to prepare a written statement.

6. I noted that EJ Kemp recorded (paragraph 2 of his Note) that the claimant's claims are all for discrimination on grounds of disability. While the ET1 shows a claim for "*other payments*" it is not supported by any detail elsewhere in the form. EJ Kemp also recorded the claimant's confirmation that the claims were made under sections 13, 15, 19, 20 and 21, and 26, of the Equality Act 2010. The basis on which such claims are made is not at all apparent from the ET1. From a review of the tribunal file and in discussions with the parties it appears that no agenda was provided by the claimant before 17 March or since.

7. Notwithstanding an Order that witness statements should contain page references to relevant documents in the bundle, they did not. Before hearing any evidence, Mr Ridgeway provided pages numbers from the bundle which corresponded to most of the documents within the one statement (for Mary Preston) which referred to them, by Appendices.

**Issue**

8. The issue for determination as per the notice of hearing is; whether or not the Employment Tribunal has jurisdiction in relation to time-bar under section 123 of the Equality Act 2010.

**Evidence**

9. I heard evidence from the claimant. Three witnesses gave evidence for the respondent (Mary Preston, Avril McFarlane and Jennifer Young). They spoke to their witness statements.

**Findings in Fact**

10. Relevant to the issue and from the ET paperwork and the evidence (oral and documentary) I found the following facts admitted or proved.

11. The claimant is Janet Carroll.

12. The respondent is Meallmore Limited.

13. Between February 2007 and 20 June 2021, the respondent employed the claimant as staff nurse. The respondent is a care provider. The claimant's place of work was Belleaire House, Greenock. The contract ended following the claimant's resignation.

14. On 6 July 2009 the parties signed an employment agreement (**pages 47 to 52**). Its clause 15 refers to the respondent's grievance procedure. **Pages 69 and 70** are the respondent's grievance policy dated March 2020. Prior to her resignation the claimant was aware of it.

15. On or about 19 November 2019 a grievance was raised by Rosemary Fyfe, then an employee of the respondent. The claimant understood that it had

been raised against her. She was and is of the view that it was "*wholly untrue*" (see the ET1 form, **page 15**). She was seriously affected by it. The cause of her mental health illness of stress, depression and anxiety (the alleged disability which forms the basis of her claim of discrimination) was Ms Fyfe's grievance. Prior to it, the claimant had no issues with her mental health.

16. On or about 23 February 2020 Ms Fyfe met with June McIntosh (an employee of the respondent). A note of the meeting was taken (**pages 102 to 112**). Ms Fyfe was accompanied at it by Jim McCourt. Mr McCourt provides advice including legal advice via an entity run by a local Greenock council.

17. Ms Fyfe subsequently left the respondent's employment. Her departure followed a period of absence. The claimant does not know when Ms Fyfe's employment ended. Her recollection was that she last worked with her before Christmas at the end of 2019.

18. The claimant was absent by reason of illness in the period January to August 2020 (Mary Preston at paragraph 8, see also **page 114**). On 17 September 2020 Ms McIntosh wrote to the claimant (**page 117**). The letter referred to "*conduct towards a fellow member of staff was deemed by this individual to have been inappropriate and a grievance was raised as a result of this by the member of staff*." The individual referred to was Ms Fyfe. The letter went on to say that the claimant's explanation was considered to be satisfactory and that no further action would be taken. The letter concluded, "*It is not normal practice to respond to an individual who has a grievance raised against them if none of the points raised in the grievance are upheld, however you have requested we do this on this occasion*." The claimant accepted that she had been told by the respondent that the grievance against her had not been upheld. She was of the opinion that she had had to fight to learn of that outcome.

19. The claimant was of the view that the way that the respondent dealt with the grievance was unprofessional. She was of the view that; the respondent did not fully understand the effect on her of the grievance and the respondent's

handling of it; and she was never really allowed a proper voice to fully deal with the issue.

20. The claimant did not raise a grievance about the way she felt she had been treated by the respondent. She did not raise a grievance under the policy because of her poor state of mental health. She believes now that at the time she was not thinking rationally.

21. On 14 October 2020 Jennifer Young started work with the respondent as an area manager.

22. On 1 December 2020 the claimant wrote to Mary Preston (**page 119**). The letter makes reference to a diagnosis of PTSD, anxiety and depression. After recounting her symptoms the claimant said, "*In all my years Nursing and giving Meallmore 14 years of nursing service I will never understand why a staff member of only a few months could destroy my life …*" This was a reference to Ms Fyfe's grievance. Her letter concluded, ""*No one at Meallmore really reached out to me to allow me to talk about the issue I found myself in or how it has impacted on my life. Therefore I am reaching out to you in the hope that this letter may help others in the future*." Ms Preston replied on or about 30 December (**page 118**). Amongst other things she asked how the claimant was feeling and coping given that she had returned to work after a period of absence.

23. The claimant spoke to Jennifer Young about the duties that she required to perform. She asked her if some of her tasks (supervision of others and the carrying out of appraisals) could be removed from her. She did so because of the way that she was feeling about work at that time. She felt less able to perform her duties because of the state of her health. On one occasion the claimant explained to Ms Young that she felt that she couldn't cope with certain aspects of her work. Ms Young said to the claimant "*but that's what's expected of you*" or words to that effect. The claimant was upset as a result. She described that comment as "*absolutely killing*" her.

24. On 8 March 2021 the claimant wrote to Gerry Hennessy the respondent's managing director (**page 123**). It appears that she enclosed a copy of her

letter to Mary Preston. She set out the impact on her of Ms Fyfe's grievance. She referred to her intention to leave her employment.

25. In an email on 16 March Ms Preston; referred to a conversation with the claimant on 12th; noted a review in that discussion about many of the claimant's concerns; noted the claimant's intention to reconsider her resignation; recorded her suggestion of a period of leave in April to consider what is best for her; and expressed the hope that the parties could work through things for a positive outcome (**page 129**).

26. On 6 June the claimant resigned from her employment with the respondent. On 8 June she emailed Mary Preston (**pages 131 and 132**). Her reasons for resigning were noted in it. She had separately written a letter of resignation. She put it under Ms McFarlane's office door. Ms McFarlane replied by email and "*planday*" message. Neither the letter, the email nor the message were produced. The claimant's reason for resignation from her email of 8 June is that she could no longer cope with her mental health and the pressures of working at Belleaire, and feeling destroyed and burnt out. Her email raised other issues which she felt should be looked at and addressed. They included; a lack of understanding about mental health within the respondent's company; too much negativity, with staff feeling downhearted; a lack of passion and motivation; and low morale.

27. The claimant's last working day was the 6 June (**page 130**). Her email of 8 June noted that she was on annual leave until Monday 21 June (**page 131**).

28. The (agreed) effective date of termination was 20 June 2020.

29. The claimant took until then to resign because she tried, repeatedly, to cope with her situation. She needed her job and pay from it.

30. The claimant described herself as "*hiding at home*", consulting her GP and attending the Job Centre in the period between about 20 June and about 19 September. Sometime in June or July 2020 the claimant spoke with Jim McCourt or his colleague Eddie. They discussed a possible claim of stress at work against the respondent. They also discussed a possible employment

claim. It is likely that that discussion included reference to time limits or timelines. The claimant was reminded of time lines in that discussion. At or about the same time the claimant discussed the possible claims with one or two lawyers. They were "*friends of friends*". The claimant did not formally engage them to act for her.

31. On or about 22 July the claimant requested from the respondent details of its insurers. She made this request as she advised she wished to pursue a work-related stress claim. The respondent engaged with Charles Taylor Associates who were instructed by its insurers to investigate the claim (Mary Preston at paragraphs 16 and 17).

32. On 5 November 2021 Karen Morris (a claims handler) emailed the claimant (**page 160**). In it she said; a full investigation had taken place; liability for the claim was denied; the respondent was aware during the summer of 2020 that the claimant had been suffering with mental health issues; but she was unable to evidence any negligence to support any excess work or poor management resulting in stress.

33. The claimant was unhappy that it had taken about four months to respond to her stress claim.

34. On 11 November 2021 the claimant began early conciliation with ACAS (**page 43**).

35. Between 15 and 19 November the claimant exchanged emails with Ben Squire (**pages 162 to 164**). The claimant sought a copy of the report from the investigation referred to by Ms Morris. Mr Squire declined to provide it.

36. On 17 December ACAS issued a certificate.

37. On 18 January 2022 the claimant completed an ET1 online. In it she said the following:-

    a. "*I am making a compensation claim for lost earning due to having to leave my job because of work Mental health issues, under the act of 2010 disibility equality act. descrimination I feel these issues were not*

*addressed properly I also feel that I wasn't taken sreiously enough with the anxiety distress/stress and depression I was going through and still going through*." (Box 8.1 detail on **page 14**)

b. "*Meallmore LTD was aware that I was suffering from recognised clinical mental health illness of stress depression and anxiety from early 2021 due to a greivance that was raised against me by another employee which was wholly untrue. However the way it was dealt with by Meallmore LTD was, I feel unproffessional. I was seriously affected by this but I feel that Meallmore did not fully understand the effect this had on me. I was never really allowed a proper voice to fully deal with this issue. As a Nurse I knew I had to seek help from my GP and consultations with my NHS Mental Health Teams*". (Box 8.2 on **page 15**)

c. "*Due to not being able to work I am claiming financial compensation for the loss of earnings from the month of June when l was forced to give up my job due to my Mental Health until the present month. Take home monthly earnings from June 2021 until January 2022 amounts to approx £14736. Further months may be added if this runs past January 2022 I am aware that the Judge may well throw this claim out of court. However I feel I have to try. I need to be allowed my voice and my say as to how this has had a long term effect on my daily living. I have gone through a work capability assessment with Universal Credit and they have made a descision that | now have limited capability to be able to work and work related activity. Therefore they will not be asking me to prepare for work or search for work due to my Mental Health Disability. I do have various email communication letters between myself and Meallmore Ltd in relation to this ongoing matter that I can produce for evidence if required. I am unable to pay for Solicitor. Therefore l have to try and do this by myself*." (Box 9.2 on **page 16)**

d. "*I do have various email communication letters between myself and Meallmore Ltd in relation to this ongoing matter that I can produce for*

*evidence if required. I am unable to pay for Solicitor. Therefore I have to try and do this by myself*." (box 15 on **page 20**)

38. The claimant ended the contract because of the way she had been treated, that treatment was (she believed) because of her disability. She was not coping with the stresses of working at Belleaire House. She felt that she was not getting enough support to do so. A particular example of that was the comment made by Jennifer Young. She was of the view that she was treated "*less favourably*" when compared with Ms Fyfe. The claimant believed that Ms Fyfe "*got the attention*" that she herself should have received particularly where she (Ms Fyfe) was the perpetrator of lies against the claimant. The claimant believed that she was constantly harassed by Ms Fyfe and this was the basis of her claim for harassment. On her claim under section 20, the claimant believes that the respondent could have removed some of the tasks which she was undertaking. That removal would have been a reasonable adjustment.

39. The catalyst for pursuing this claim in the employment tribunal was the denial of liability by Ms McMorris.

40. In the time between June 2021 and 18 January 2022 the claimant believed that her stress claim and her claim to this tribunal are related. She continues to believe that. She does not know that there is a difference. She has no explanation as to why she did not complete her ET1 sooner than 18 January 2022. She believed that the time bar period ran from the date of presenting he ET1 form and not from when she left her employment.

41. The claimant is now trying to move forward. She wanted to be heard about her situation. She was motivated to make a claim as she hated the thought of someone else having to go through the issues which she had endured.

**Comment on the evidence**

42. On some particular issues the claimant's evidence was vague. That is not at all a criticism of her given the passage of time, the number of people she had dealt with, and her mental health. She was not clear on when Ms Fyfe left the

respondent's employment albeit that was not a significant fact. But she was quite vague as to the timing of discussions with Mr McCourt (or his colleague) and the "*lawyer friends*". There was no evidence about how many discussions she had with them. Her evidence was not particularly consistent about the advice she had been given about time limits. Nor was it consistent or clear as to why it was not until 11 November that she started early conciliation. In cross examination she said that she could not explain it. In another passage of evidence her reasoning for doing so was that her claim to the respondent's insurers was rejected. Notwithstanding the inconsistency, I was able to make the finding noted at paragraph 39.

43. While not ultimately critical to the issue for me to decide, Ms McFarlane's evidence about the absence from the bundle of the claimant's letter of resignation and her reply was somewhat unsatisfactory. EJ Kemp had ordered an exchange of documents by 14 April. It was clear that Ms McFarlane knew about that order. But she could not explain why this material had not been included in the bundle for this hearing.

**Submissions**

44. Mr Ridgeway made an oral submission. I do not repeat it all. He referred to section 123 of the Equality Act 2010. He referred to the decision of the Court of Appeal in the case of ***Robertson v Bexley Community Centre (t/a Leisure Link)*** [2003] I.R.L.R. 434. He noted that there were several delays in the circumstances here. He reminded that (as per EJ Kemp's comments which I note below) early conciliation did not "*stop the clock*" on the period in which a claim could be presented. He reminded of the claimant's evidence of advice she had been given by both Mr McCourt (or his colleague) and from lawyer friends. In his submission it was clear from her evidence that she had awaited the response on her stress claim after which (when it was rejected) she pursued this claim. In his submission she could have pursued both at the same time, and on her own evidence there was no valid reason for the critical period of delay which he said was between 20 June and 11 November. She was able to complete the ET1 form when she did, and there was no evidence of any impediment to her doing so before January 2022. There was, in his

submission, no "*continuing act*". He argued that a relevant factor was the prospects of success of the claim. On that point (and while accepting that success is rare) he argued that the claim is liable to an argument of "*no case to answer*". I noted that two issues in the respondent's agenda (conflated by me into one) were "*Should any complaints be struck out or subject to a deposit order on the basis that they have no reasonable prospects of success?*" He emphasised that on the claimant's case it appeared that her allegations of discrimination pre-date her resignation by some considerable margin and therefore those allegations are even further out of time. On the question of prejudice, he argued that if the case were to proceed it would require witnesses to recall and give evidence about events as long ago as November 2019. The prejudice to the respondent would be that the passage of time from then until any final hearing could be the ability of any witnesses to recall events with sufficient accuracy as to do them justice.

45. The claimant made a very short oral submission. She reminded me of the time between her first contacting the respondent's insurers and them advising of the outcome of their investigations. She said that they had not kept in touch with her, while she had to "chase" them by email.

**The Law**

46. Section 123(1) of the Equality Act 2010 provides, "*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 3 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*." Section 123(3) of the Act provides, *"(3) For the purposes of this section—(a) conduct extending over a period is to be treated as done at the end of the period;(b) failure to do something is to be treated as occurring when the person in question decided on it*." Sections 140A and 140B are not relevant here.

47. From the case of ***Robertson v Bexley Community Centre (t/a Leisure Link)*** I take the following basic principles:-

a. If the claim is out of time, there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine;

b. When considering the exercise of its discretion, has a wide ambit within which to reach a decision;

c. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time;

d. The exercise of discretion is the exception rather than the rule.

48. Some of the frequently relevant factors are set out in the well-known case of ***British Coal Corporation v Keeble*** [1997] IRLR 336, EAT, though they are neither a checklist nor a substitute for the statutory wording. They are nevertheless helpful in many cases. The Tribunal must have regard to all the circumstances of the case including 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 has cooperated with any request for information, the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action. A tribunal does not need to consider all of those factors in each and every case and in some cases certain factors may have no relevance at all.

49. Two factors which are almost always relevant the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (***Southwark London Borough Council v Afolabi 2003*** ICR 800).

50. When exercising its discretion, a tribunal is entitled to take into account the merits of the case. But it is against the rules of natural justice to do so if it has not been raised or argued (***Lupetti v Wrens Old House Ltd*** [1984] I.C.R. 348).

**Discussion and decision**

51. At paragraph 5 of his Note EJ Kemp said (**page 38**), "*The claims all arise in the period up to the effective date of termination on 20 June 2021. That then required early conciliation to have been commenced by 19 September 2021 as a first step to making a claim. In fact early conciliation was, it appears from the certificate, commenced on 11 November 2021. The certificate itself was issued on 17 December 2021. As early conciliation was not commenced timeously the period of conciliation does not extend for timebar purposes."* Neither party disagreed with the accuracy of this short but important time line.

52. There seems to me to be little doubt that the claimant complains about "*conduct extending over a period*". It is possible that the period began in November 2019 and continued until her resignation, on 6 June, her last working day. But it did not extend beyond 6 June. There are no allegations of discrimination about what took place between 6 and 20 June. The claimant then required to commence early conciliation by 5 September. By 22 July she had begun the process of making a stress at work claim. By the end of July she had had advice from various sources about that claim, about an employment claim, and about the time limits to do with the latter.

53. On the claimant's evidence and in her short submission, she believes that this tribunal is the forum for the claim which she originally wished to pursue, one of negligence against the respondent based on an allegation that it failed to take steps to prevent (or indeed acted in such a way as to cause) the deterioration in her mental health. She accepted that the catalyst for starting early conciliation was the rejection of that claim by the respondent's insurers. She said in her evidence that she did not know what was the difference between the claim of negligence and the claims in this tribunal. While she was able to summarise in answer to questions what she believed were her claims under the various sections of the 2010 Act identified by EJ Kemp, it is clear that their merit is at least questionable. The claimant's belief as to forum and the questionable merit of the claims were factors which I weighed against exercising discretion in her favour.

54. The primary period for a consideration of the question of delay is between 6 June and 11 November. The obvious point is that early conciliation began just over two months after the end of the period noted in section 123. That period in itself is not a material factor weighing against the claimant. More relevant however is the issue of the reason for that delay. In that period the claimant had discussed with Mr McCourt and with lawyers an "*employment claim*". She was at least aware that there was a time limit within which it should be brought. There was no evidence about what steps she took to learn what that period might be. The only reason for the delay was, as she said in part of her evidence, the fact that the catalyst for starting early conciliation was the rejection of the claim by the insurer. There was no reason why early conciliation or the presentation of the ET1 could not have started within this period. The fact that the claimant held off until after 5 November is an indicator that she thought that her stress claim could be brought in this tribunal. Regrettably for her it cannot.

55. Prejudice to the respondent and to a fair hearing caused by stale evidence seems to me to be marginal. While the evidence would require to cover a period beginning now over two and a half years ago, for a significant time within it (about 8 months) the claimant was absent from work. In my view (albeit based on scant material) a fair hearing would be possible. Prejudice to the claimant is obvious; the loss of her claims in this forum. However, two points occur to me. First, what is lost is the ability to litigate claims which have questionable merit. That mitigates the prejudice to her. Second, the claimant has not lost her ability or right to litigate the claim which she intimated in July 2021, a claim of negligence causing her stress. That is a claim which can be brought in a court. In that forum, she can apply for legal aid. In her ET1, she said that she is not able to pay for a solicitor. If that claim has reasonable prospects of success she may be able to bring it in the sheriff court with the benefit of legal aid. That potential also mitigates the prejudice to her where this claim does not progress.

56. The tribunal has no jurisdiction to hear this claim. The judgment reflects my view on the issue.

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**Employment Judge:** **R Bradley**
**Date of Judgment:** **27 May 2022**
10 **Entered in register:** **30 May 2022**
**and copied to parties**