



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Smith

**Respondent:** The Co-operative Academies Trust

**Heard at:** Leeds (by CVP videolink)      **On:** 27 September 2024

**Before:** Employment Judge Deeley

## Appearances

For the claimant: Mr Flood (Counsel)

For the respondent: Mr Williams (Counsel)

## JUDGMENT

1. The Tribunal concluded that it is not just and equitable to extend the time limits and the claimant's claim is therefore struck out because the Tribunal does not have jurisdiction to hear the claim.

## EXTENDED REASONS

### Background

2. This claim has previously been case managed during a Preliminary Hearing on 10 June 2024 by Employment Judge Buckley, who arranged today's hearing to consider the questions set out below:
  - 2.1 Were the claims of failure to make reasonable adjustments and discrimination arising from disability presented within the relevant time limits? Judge Buckley noted that time ran:
    - 2.1.1 for the latest of the reasonable adjustments allegations from 25 July 2023; and
    - 2.1.2 for the latest of the discrimination arising from disability allegations, from the respondent issuing the claimant with a final written warning on 8 June 2023.

- 2.2 Would it be just and equitable to extend the time limit for presenting the claims of failure to make reasonable adjustments and discrimination arising from disability?
- 2.3 Did the claimant have a disability as defined in the Equality Act 2010 when the alleged discrimination happened (i.e. March 2020 to August 2023)?
3. Judge Buckley also gave orders relating to a potential application to amend by the claimant. The claimant submitted an application to amend his claim on 12 July 2024. This amendment application referred to:
  - 3.1 a complaint of unfair dismissal (relating to a failure to follow any process in relation to the termination of the claimant's employment at the end of his fixed term contract on 31 August 2023) and an alternative complaint of a failure to pay statutory redundancy pay;
  - 3.2 a complaint of discrimination arising from disability, relating to the failure to consider suitable alternative roles for the claimant when his fixed term contract was coming to an end; and
  - 3.3 a further complaint of failure to make reasonable adjustments.
4. The claimant withdrew the part of his amendment application relating to a further complaint of failure to make reasonable adjustments at the hearing today.
5. The parties' representatives agreed at the start of today's hearing that if the existing claim were struck out during this hearing, then the claimant could not pursue his application to amend his claim. This is because the Tribunal would not have jurisdiction (or the 'power') to consider an amendment to a claim that had been struck out.
6. The respondent conceded before this hearing took place that the claimant's condition of anxiety and depression amounted to a disability from the beginning of September 2022. However, they did not accept that it amounted to a disability from March 2020 to September 2022 (which was the start of the events that the claimant complained of). In addition, the respondent did not accept that they had knowledge or constructive knowledge of the claimant's disability at any time.

### **Tribunal procedure**

7. The documents that I considered during the hearing today consisted of:
  - 7.1 a hearing file, including the claimant's disability impact statement and application to amend his claim;
  - 7.2 a second statement from the claimant dated 20 September 2024; and
  - 7.3 the respondent's skeleton argument.
8. I heard oral evidence from the claimant and submissions from both parties during this preliminary hearing. I gave the parties brief oral reasons for my decision at the end of today's hearing. I informed the parties that I would provide extended reasons in writing to assist them to consider my decision.

## CLAIMANT'S APPLICATION TO EXTEND TIME LIMITS FOR HIS EXISTING TRIBUNAL CLAIM

### *Key legal principles*

9. The discrimination time limits provisions of the Equality Act 2010 (the “EQA”) are set out at s123 of the EQA, which states:

*“1) Proceedings.....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.”*

10. I considered the legal principles set out below, in addition to those set out in the respondent's helpful skeleton argument and both representatives' oral submissions. I have not reproduced the contents of the skeleton argument and submissions in full in the interests of brevity.
11. I note that conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (*Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96, CA at paragraphs 51-52).
12. Judge Buckley referred the parties to the case of *Fernandes v DWP* [2023] EAT 114. The EAT in *Fernandes* held that in a claim for failure to make reasonable adjustments, in the absence of any finding that an employer has made a specific decision not to alleviate a disadvantage, or has acted inconsistently with the duty to make adjustments, the time limit runs from the date at which it would be reasonable for the employee, on the facts known to them, to conclude that the employer is not going to comply with the duty.
13. The Court of Appeal in *Robertson v Bexley Community Centre* [2003] IRLR 434 stated that it is for the claimant seeking an extension of time to persuade the Tribunal that this should be granted. The Court of Appeal noted that:
- “When tribunals consider their discretion to consider a claim out of time on just and equitable grounds 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 discretion is the exception rather than the rule.”*
14. The Court of Appeal held in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640:
- “...the factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay*

*and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*

15. The Court of Appeal in *Adedeji v University College Hospital Birmingham NHS Trust* [2021] EWCA Civ23 again considered the approach that the Employment Tribunal should take in relation to the just and equitable test. The Court of Appeal emphasised that there is no need to go through every factor set out in the s33 Limitation Act 1980 'checklist' recommended in *British Coal Corporation v Keeble* [1997] IRLR 336. Underhill LJ stated at paragraph 38 of his judgment:

*"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 particular case which it considers relevant to whether it is just and equitable to extend time"*.

16. The Tribunal must consider the potential prejudice to the parties of any decision on time limits, including the merits of the claim (*Donald v AVC Media Enterprises Ltd* EAT/00016/14). I also note that in the recent case of *Secretary of State for Justice v Johnson* [2022] EAT1, the EAT applied *Adedeji* and noted that the Employment Tribunal should consider the effect that extending the time limit would have on the respondent's ability to defend the claim where events took place some time ago.
17. The relevant dates for the purposes of considering the time limit question for the claimant's existing claim are as follows:
  - 17.1 the claimant was issued with a final written warning on 8 June 2023, following the disciplinary hearing. This is the last of the claimant's discrimination arising from disability complaints;
  - 17.2 25 July 2023 was the claimant's last working day for the respondent before his contract terminated at the end of the school year on 31 August 2023. The parties agreed that this was the last possible date for the time limit to run from when considering his reasonable adjustments complaints;
  - 17.3 the claimant undertook ACAS early claim conciliation from 10 November to 22 December 2023 and presented his Tribunal claim on 22 January 2024;
  - 17.4 any allegations that took place prior to 11 August 2023 are therefore outside of the Tribunal's primary time limit.

### ***Claimant's evidence regarding delay***

18. The claimant's witness statements did not address directly the question of why he delayed initiating ACAS early claim conciliation and/or presenting his claim to the Tribunal. I gave the claimant's representative leave to ask supplementary questions on this issue and the claimant also gave further evidence during cross-examination. The claimant stated that:
  - 18.1 he accepted that the respondent was entitled to investigate the complaint that led to his disciplinary action and that he 'accepted and acquiesced' with the decision to issue him a final written warning;
  - 18.2 his trade union did not advise him on any potential claim that he may have, instead suggesting after his disciplinary hearing in June 2023 that he should 'move on' and 'try and get another job';
  - 18.3 he focussed on applying for other roles, submitting seven applications in total and attending three interviews (one of which took place in May 2023

- shortly before his disciplinary hearing). However, he was unsuccessful after each interview because he was required to disclose his final written warning to potential employers;
- 18.4 he had telephone discussions with ACAS during the two weeks before he filled in the form to commence early claim conciliation. The claimant stated that he attempted to provide an outline of the events since March 2020 to ACAS during a phone call, but that the call was not long enough to go through everything;
  - 18.5 he did not realise that his previous roles with the respondent's other Academies counted towards his continuous service with the respondent. He told ACAS that he had worked for the respondent for less than two years when they asked about his length of service; and
  - 18.6 his discussions with ACAS centred on the question of whether the respondent could issue an 18 month warning when he only had three months of his fixed term contract remaining;
  - 18.7 he did not seek legal advice until nearly a year later after the preliminary hearing in June 2024, when he discussed matters with his family and instructed his current solicitors.
19. I also note that:
- 19.1 he did not fully understand his mental health condition in the Summer of 2023, he was exhausted after an accumulation of events and spent most of his days sleeping and battling suicidal thoughts;
  - 19.2 the claimant stated that he wrote (with his father's assistance) a detailed letter questioning the reasoning behind the decision behind providing an 18 month final written warning to the respondent's HR Manager, Mr Ricketts, shortly after he contacted ACAS in November 2023. That letter stated that the claimant was in 'good health', although the claimant stated that his health had improved in the sense that he was no longer sleeping on the sofa during the day or struggling with suicidal thoughts:  
*"I am currently in good health and have, with a variety of support, been on a journey of recovery – I am in a position where I am able to ask these questions and return to work";*
  - 19.3 the claimant's GP records show that he did not have any contact with the doctor from July 2023 to February 2024. The claimant stated that he did not take any medication during that time because he was concerned about the side effects of that medication.
20. The claimant's evidence demonstrates that during the period from 25 July 2023 until he initiated ACAS early claim conciliation:
- 20.1 he was able to apply for other jobs and attended two interviews;
  - 20.2 he was not taking medication and did not attend the GP during that period;
  - 20.3 he discussed his claim in detail with his father and had telephone calls with ACAS prior to initiating early claim conciliation; and
  - 20.4 he was in contact with his trade union during this period.

### **Balance of prejudice**

21. I must also consider the balance of prejudice to the parties. If I do not extend the time limits, the claimant will not be able to proceed with his claim. The claimant was until recently a litigant in person. He contacted his current solicitors after the

preliminary hearing on 10 June 2024. However, the respondent would suffer prejudice in having to deal with complaints that are substantially out of time, if I extend the time limit for the claimant to bring his claim. The background to the claimant's claim dates back over four years as at the date of this Judgment. I note that during this hearing the claimant struggled to recall the dates and conversations with ACAS that took place around November 2023. Inevitably, the respondent's witnesses' recollection of events will also be significantly affected by the passage of time.

22. I am required to consider the merits of the claimant's complaints as part of the balance of prejudice to the parties. I am not making any findings of fact, but have to take a broad view of the merits of the complaints.
23. I note in relation to the claimant's existing claim that:
- 23.1 the claimant complains that the respondent failed to make reasonable adjustments for his deteriorating mental health during the investigation process and failed to take it into account fully when issuing a sanction of a final written warning;
- 23.2 however, the claimant stated in his evidence at this hearing that he accepts that the respondent was entitled to investigate the complaint that led to his disciplinary action and that he 'accepted and acquiesced' with the decision to issue him a final written warning;
- 23.3 the claimant states that he did not appeal against his final written warning or raise a grievance because, as he states in his email letter to Mr Ricketts (HR Manager) of 23 November 2023:

*"Immediately after the Disciplinary Panel reached their decision, I had a conversation with my NEU Representative. We discussed the decision and my options going forward. The first option, to appeal the decision would most likely have been rejected and at worst there was an attached risk of dismissal. I could have submitted a formal grievance, however it's most likely that it would not be dealt with expediently and not be resolved in the remaining months of my contract."*

24. I have concluded that the claimant's prospects of success are low in relation to the complaints set out in his existing claim. In the claimant's evidence to this hearing, it became apparent that the claimant's main complaint relates to the termination of his contract whilst he was still under an 18 month final written warning. The claimant stated:

*"If I was in permanent employment, I would be working during my 18 month final written warning – I would be supported and given help. I've just been dismissed and cast aside"*.

25. The claimant also stated that this was the key question that he raised with ACAS during their telephone calls, prior to initiating early claim conciliation:

*"I kept asking how I could be given an 18 month final written warning with 3 months remaining on my contract of employment."*

26. I note that the claimant is very unhappy that his employment terminated whilst he was still subject to a final written warning and that this had a significant impact on his ability to find another job. However, I cannot take account of the complaints set out in the claimant's amendment application, when considering the merits of the existing claim. This is because they do not form part of the existing claim.
27. I also note that the claimant stated during in his evidence to this hearing that he did not appreciate the significance of his previous service with the respondent. He stated that when ACAS asked him about his length of service, he told them that he was working under a fixed term contract and did not tell them about his previous roles. I accept that the claimant did not understand the employment legislation relating to continuous service. However, this did not impede his ability to bring his existing claim within the Tribunal's normal time limits.

***Conclusion***

28. Having considered the matters set out above, I have concluded that it would not be just and equitable to extend the time limits for the claimant to bring his claim.
29. The claimant's claim is therefore struck out because the Tribunal does not have the jurisdiction to hear his claim.

**Employment Judge Deeley  
Date: 30 September 2024**