

No explanation for delay? Not decisive, rules EAT

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1. In the case of [Owen v Network Rail Infrastructure Ltd \[2023\] EAT 106](#), the EAT considered the just and equitable extension of time under the Equality Act 2010. It held that the failure to provide a reason for lateness was a relevant factor to weigh in the balance, but not necessarily decisive.

Background

2. The Claimant worked as a signaller for the Respondent. On 5 November 2015 she moved to the signal centre at Wimbledon. From this point onwards, until she went off sick on 31 May 2021, she alleged that she was subjected to various forms of sex-related discrimination.
3. She first raised concerns in a meeting on 8 June 2017 and subsequently raised a formal grievance on 3 November 2017. Her grievance appeal was eventually rejected in February 2020. She then began ACAS early conciliation on 20 March 2020 and a certificate was issued on 4 May 2020. Her claim form was presented on 4 June 2020. She complained both about alleged conduct in the period from November 2015 to May 2017 (allegations 1-25), and matters between the commencement of her grievance on 3 November 2017 and the conclusion of her grievance appeal on 17 February 2020 (allegations 26-34).

Judgment at first instance

4. The Tribunal accepted in its entirety the Claimant's factual account of the matters having occurred during the period up to May 2017, namely allegations 1-25. However, it went on to reject allegations 26-34 on their merits. The tribunal concluded that the rejection of complaints 26-34 on their merits meant that there was '*no continuing act of*

discrimination’ which could bring items 1-25 in time. It therefore went on to consider the just and equitable extension test, which appears at para 74 of the judgment;

The Tribunal has reluctantly concluded that the Claimant has provided no evidence on which it can exercise its discretion to extend time. It accepts the submissions made by the Respondent that the Claimant must give some explanation. It is not sufficient for her representative to give reasons in submissions, this is not evidence. The Tribunal accepts that the Respondent chose not to call witnesses and the reasons for this are set out earlier in this judgment. However, this does not detract from the fact that the Claimant has not provided any explanation as to why she did not present her claim earlier. It is inevitable that the length of time between the allegations and the presentation of the claim will prejudice witnesses. For the Claimant, the matters were significant and memorable. For the other witnesses it is likely that the matters were not of significance given it appears that this type of behaviour had been common for some time. Without explanation from the Claimant, it is not possible for the Tribunal to extend time. Therefore, the Claimant’s claims are dismissed.

5. Effectively the Tribunal held that the Claimant must give some explanation for the delay in bringing the claims, and she failed to do so. On this basis her claims were dismissed.

Grounds of appeal

6. The Claimant appealed the decision on five grounds. These can be summarised as follows;
 - a. **Ground 1** – *That the tribunal erred in stating that the claimant “has provided no evidence on which it can exercise its discretion to extend time” and that it “is not sufficient for her representative to give reasons in submissions, this is not evidence.”* This centred on the suggestion that evidence on extension of time did not only have to be in the form of witness evidence.
 - b. **Ground 2** -*That the tribunal erred when it concluded: “Without explanation from the Claimant, it is not possible for the Tribunal to extend time. Therefore, the Claimant’s claims are dismissed”.* Namely, it erred by considering that the presence of some explanation for the delay was, as a matter of law, a pre-requisite for the extension of time.

- c. **Ground 3** – *That the tribunal erred by failing properly to consider the balance of prejudice. In particular, that the prejudice to the Claimant that would be occasioned by dismissing the claims was not weighed, and the tribunal erred in holding that the delay in presenting the claim had caused the respondent prejudice, given that the respondent had chosen not to call witnesses for reasons that were unrelated to the delay.*

- d. **Ground 4** – *That if the tribunal was concerned that it may find that the complaints were out of time, and by the fact that the claimant had not addressed the time point in her written or oral evidence, the proper thing was to raise that with the parties, and allow her the opportunity to give further evidence on the subject.*

- e. **Ground 5** – *The tribunal erred by failing to address the claimant’s case on the burden of proof in relation to the complaints that related to the conduct of the grievance investigator/decision-maker.*

Conclusions of EAT

Ground 1 – Not upheld

- 7. Ground 1 was not upheld. The EAT considered that the judgment indicated that the Tribunal had not just focused solely on witness evidence as they explicitly stated that there was ‘*no evidence adduced either by oral testimony or documentary evidence*’. It further went on to conclude that this was not a case where the Claimant was not in a position to give evidence on time points, as it was an obvious issue from the time span of complaints and the list of issues itself. It specifically noted that if it had been the Claimant’s case that she has not presented her case earlier due to ill health or awaiting the final grievance, she could have presented evidence to support that case.

Ground 2 – Upheld

- 8. Ground 2 was upheld. It was accepted by Counsel for both parties that the Tribunal’s conclusion that in absence of any evidence of the reason for the delay, it was bound to refuse to extend time, was not the law. The EAT noted that there had been conflicting decisions of the EAT on the point;

*[36] As recently as *Concentrix CVG Intelligent Contact Limited v Obi* [2022] EAT 149; [2023] ICR 1, it was contested again before the EAT, on the footing that*

neither Morgan nor Adedeji had definitively settled the point. The EAT concluded in that case that there is no rule of law that, in the absence of any explanation in the evidence for the delay in presenting the claim, the tribunal is bound to refuse an extension (as opposed to treating this as a relevant consideration). But the decision in Obi was only given on 4 May 2022, in point of time after the tribunal heard submissions in the present case (and was not published until after the present tribunal gave its reserved decision).

9. Whilst the failure to refer to this point did not mean the Tribunal had necessarily got it wrong, the EAT concluded that the judgment read as if the Tribunal considered that their hands were tied. Therefore, the decision was reached on the basis that the tribunal considered they were bound to dismiss the claims due to an absence of explanation for the delay, which was legally flawed.

Ground 3 – Partially upheld

10. Ground 3 was partially upheld. The EAT concluded that just because the judgment did not explicitly refer to prejudice to the claimant, this did not show that it was not taken into account. Furthermore, in respect of prejudice to the Respondent, it was emphasised that it was not necessary to show that the delay on the part of the Claimant caused the disadvantage. However, it was necessary to show the delay on the part of the Claimant caused it. The EAT noted that whilst the tribunal referred to the Respondent not calling witnesses and the effect on memories, it did not clearly set out the impact of these things or whether both made a contribution to the disadvantage. The EAT therefore concluded that the reasoning of the tribunal on this aspect was unsatisfactory and unclear;

[43] *At the very least the tribunal needed to explain more clearly whether it concluded that the fact that the delay on the part of the claimant meant that the respondent had not been able to gather evidence sooner, may also have played, or did play, a part in the respondent's decision not to call the witnesses, or some of them; or otherwise why, or how, it also took this aspect into account.*

Ground 4 – Not upheld

11. Ground 4 was not upheld. The EAT considered that there were plainly time limit points in the case and that the Claimant was not ambushed by them. The EAT noted the following in respect of the suggestion that the Judge should have asked questions on time limits;

[45] *Unsurprisingly Mr Holloway did not raise, when cross-examining the claimant, a point on which she had given no evidence. He also fairly made the point to us that, if she had asserted in her witness evidence that the delay was on account of ill health and/or because she wished to await the final outcome of the grievance, there were a number of points of challenge that he might have taken up with her. It was not incumbent on the tribunal proactively to flag the point up during evidence or invite the claimant to give evidence on it; in fact, we are inclined to think, the tribunal would have crossed the line of descending into the arena, had it done so.*

Ground 5 – Not upheld

12. The EAT concluded that the Tribunal has reached its decision without any error in relation to the burden of proof, therefore this ground was not upheld.

Discussion

13. The case of Owen ultimately confirms previous decisions of the EAT; that the lack of an explanation as to why a claim is brought late is not a pre-requisite to extension of time being granted, but is of particular relevance (***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640***).
14. Within its analysis the EAT has provided some helpful learning points and reminders for both Claimants and Respondents when dealing with just and equitable extension arguments.

Tips for Claimants

15. It is important for Claimants to engage with the question of time limits in their evidence.
- a. Claimants should be alive to the possibility of time limit issues being raised at final hearings. This includes cases where there is a possibility that later ‘in times’ claims are not upheld, therefore rendering a Claimant unable to argue that there is a ‘continuing act’ which would bring historic claims in time.
 - b. The list of issues often gives an indication as to whether time limits remain an outstanding issue, although this should not be relied upon.
 - c. If the Claimant has an explanation as to why a claim was not brought earlier, this should be given in witness evidence.

- d. Documentary or other evidence should be provided to support this explanation if possible. However, reliance should not be placed solely on this evidence.
- e. Claimants should not wait until the Judge or Respondent raises the issue to give an explanation, as they made not do so.

Tips for Respondents

16. It is important for Respondents to be aware that the fact that a Claimant has failed to give an explanation for the delay is not necessarily determinative.
17. However, a Respondent is not required to plug gaps in the Claimant's case if they have failed to give an explanation for the delay. It is useful for Respondents to be aware of the following thoughts of HHJ Auerbach in respect of Tribunal's raising this point of their own volition; [45] *'it was not incumbent on the tribunal proactively to flag the point up during evidence or invite the claimant to give evidence on it; in fact, we are inclined to think, the tribunal would have crossed the line of descending into the arena, had it done so.'*
18. Nevertheless, Respondents should consider any real prejudice to them caused by an extension of time application. Thought should be given to the particular circumstances of the case, and the impact on the Respondent, particularly in respect of witness evidence. Specific evidence on this question, if possible, would likely be helpful.

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