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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Robinson  
**Respondent:** Transport for London  
**Heard at:** East London Hearing Centre  
**On:** 23 January 2024  
**Before:** Employment Judge Jones

## Representation

**Claimant:** in person  
**Respondent:** Mr J Davies (Counsel)

# JUDGMENT

1. **The Claimant withdrew his complaint of breach of contract.**
2. **The Claimant withdrew his Equal Pay complaint.**
3. **The complaints of age and race discrimination in this claim are struck out because it was not brought within the time limits set out in section 123 Equality Act 2010 and the Tribunal had no jurisdiction to extend time on a just and equitable basis.**
4. **The application to amend the claim to add a complaint of harassment was refused.**

# REASONS

1. This was a complaint of race, sex and age discrimination. The Claimant continues to be employed by the Respondent. The Claimant previously brought a claim against the Respondent for constructive unfair dismissal, age discrimination and for a statutory redundancy payment. That claim was settled via a COT3 agreement on 15 November 2018, which the Claimant signed on 14 December 2018.
2. One aspect of the resolution of that claim was that the Respondent would offer the Claimant employment in the role of Senior Project Manager in the

Major Project Directorate. It was agreed that the Claimant would be employed on the Respondent's standard terms and conditions of employment for that role, commencing on the Claimant's previous basic salary of £70,104. The Claimant's re-engagement started on 18 December 2018.

3. The complaints in this claim arise from the Claimants pay and conditions, from the date of his re-engagement.

The claim

4. The Claimant contacted ACAS on 21 November 2022. The ACAS Certificate was dated 2 January 2023. The claim, which contains allegations of sex, age and race discrimination, complaints of breach of contract and unlawful deduction of wages; was issued on 21 March 2023.
5. The Respondent defended the claim. The first hearing in this matter was a preliminary hearing before EJ Gardiner on 18 October 2023, at which both parties were present. The Claimant was and continues to be a litigant in person.
6. There was a discussion on the issues in the case at that hearing and EJ Gardiner set out the issues, as explained, in an appendix to the minutes of his hearing. He also made orders and set today's hearing. The Respondent applied to have this hearing converted to a public preliminary hearing so that the Tribunal could consider its application to strike out the Claimant's claim.

**The list of issues**

7. Today we started by discussing the list of issues using EJ Gardiner's list and an augmented list prepared by Respondent's Counsel, as follows:

CURRENT LIST OF FACTUAL ISSUES

*"The Claimant bases his complaints on the following events, listed in Chronological order:*

1. *Underpayment of base salary in his role from 18 December 2018 to 30 June 2020. This has been identified as an equal pay complaint. He compares the pay he received with the pay received by Kirsty Drury during the same period. He says that both he and Ms Drury were in the same team as Band 4 Managers and were doing like work or work of equal value.*
2. *Underpayment of base salary in his role from 1 July 2020 until 31 March 2021. The Claimant says he should have been paid £75,000, whilst performing the duties of a Principal Engineer Lead for Crossrail, reporting to Harvinder Bhati. Instead he contends he was paid less than the minimum required for such a role. The Claimant alleges this was:*

*a. Direct age discrimination – he compares the pay he received with the pay received by Guy Morrison, who was aged around 52 (The Claimant was 60).*

*b. Direct race discrimination – he compares the pay he received with the pay that a hypothetical non-white employee would have received for doing equivalent role.*

*3. Discrimination/Breach of Equal Pay requirements in the decision in April 2021 to pay him £75,000 for the Principal Engineer role he was allocated from that date. The Claimant alleges this was:*

*a. Direct age discrimination relying on the following as comparators: -*

*i. Andy Tunicliffe – about 50*

*ii. Andy Gordon – about 50*

*iii. Claire O’Shea – about 40*

*b. Direct race discrimination. He compares the pay he received with that received by:*

*i. Ademola Owoye – PEL Band 4*

*c. Breach of equal pay requirement. He claims he was performing like work or work of equal value with:*

*i. Claire O’Shea – Principal Engineer Band 4*

*4. In May 2021 the Claimant made a request for his role to be re-evaluated, but this was never granted. The Claimant alleges this was:*

*a. Direct sex discrimination- the Claimant compares his treatment with that of a hypothetical female comparator;*

*b. Direct race discrimination – the Claimant compares his treatment with that of a hypothetical non-white comparator.*

*5. The Claimant twice applied for promotion during 2022, but his applications were rejected on both occasions (the dates of the rejections to be clarified).*

*a. He applied for the Engineering Manager PEL role and he alleges his rejection was an act of age discrimination.*

*b. He applied for the Business Digital PEL role and he alleges his rejection was an act of direct age discrimination. The person who was successful was early 30s. The Claimant was told by Harvinder Bhati that was not innovative.*

*Given the date on which the proceedings were issued (21 March 2023), with Early conciliation between 21 November 2022 and 2 January 2023, there may also be issues of whether the various claims were issued with the require statutory time limits and if not, whether it would be just and equitable to extend time to enable these claims to be determined on their merits.”*

8. The following withdrawals, clarification, and confirmation were made by the Claimant in our discussion today.

#### Equal Pay

9. The Claimant clarified that he was not pursuing a complaint that he should have been paid the same as Kirsty Drury. The Claimant was clear today that he is not pursuing an Equal Pay complaint using Kirsty Drury as his comparator. His complaint is that he believes that when she asked for her job to be re-evaluated, the Respondent agreed and arranged for her job to be re-evaluated. This resulted in an increase in her wage. In comparison, when he asked for his job to be re-evaluated, the Respondent refused. This is therefore a complaint of sex discrimination as it is the Claimant's belief that the Respondent agreed to Ms Drury's request for re-evaluation because she is a woman and refused his request because he is a man.
10. He also clarified that he is no longer pursuing an Equal Pay complaint using Claire O'Shea as a comparator, now that he can see from the disclosure provided by the Respondent, that she was always paid less than he was.
11. In the circumstances, the Claimant withdrew his Equal Pay complaint.

#### Age Discrimination

12. In the age discrimination complaint, the Claimant relies on Andy Tuncliffe and Andy Gordon as comparators. The Respondent has provided dates of birth details for these two individuals and the Claimant is now aware that they are two and four years younger than him.
13. The Claimant applied for the Engineering Manager PEL role and the Business Digital PEL role in or around August/September 2022. The Claimant alleges that the Respondent's decision not to appoint him to either of those roles was also age discrimination.
14. Those were the latest allegations of discrimination in the case.

#### Breach of contract

15. The Claimant is still employed by the Respondent. The Tribunal's jurisdiction to consider complaints of breach of contract is set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Article 3 states that proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and to determine; (b) the claim is not one to which article 5 applies; and (c) the claim arises or is outstanding on the termination of the employee's employment.
16. In this case, the Claimant seeks to pursue a claim for breach of contract while he remains employed by the Respondent. This is his complaint that

the Respondent has breached the terms of the COT3 which he signed on 14 December 2018. Once we discussed this today the Claimant appreciated that the Tribunal did not have jurisdiction to hear his complaint as he remains in employment with the Respondent.

17. In the circumstances, the Claimant withdrew his complaint of breach of contract.

Application to amend the claim

18. The Claimant wrote to the Tribunal on 30 October to amend his claim to add a complaint of harassment and a complaint of victimisation. In today's hearing the Claimant clarified that his complaint is essentially that because of his previous Employment Tribunal Proceedings against the Respondent, the Respondent decided to downgrade his performance from Grade 3 to Grade 2, which resulted in a reduction in his bonus.
19. The Claimant confirmed that he was not seeking to complain that the managers who assessed his performance created a hostile working environment for him by downgrading his performance. He believed that it had been done as a response to his previous claim.
20. The Claimant confirmed that he was only seeking to add a complaint of victimisation to his claim.
21. Once the Claimant clarified his claims, the Respondent undertook to prepare a final list of issues, which will be sent to the Claimant and the Tribunal in due course.
22. The Respondent then proceeded with its application for strikeout of the claim.
23. Following those withdrawals, the complaints that remain from the list of issues set out above, are as follows:

23.1 Underpayment of salary from 18 December 2018 to 30 June 2020. This is now pleaded as unlawful deduction of wages.

23.2 Underpayment of salary from 1 July 2020 to 31 March 2021. This is pleaded as age and race discrimination.

23.3 Underpayment of salary in the decision to pay him £75,000 for the role of Principal engineer from April 2021. This is pleaded as age and race discrimination.

23.4 The Respondent's refusal to re-evaluate his role when he asked in May 2021. This is pleaded as direct sex and race discrimination.

23.5 The Respondent's decision not to appoint him to the role of Engineering Manager PEL or Business Digital PEL role both of which he alleges were acts of age discrimination. The Claimant could not remember when he applied for these jobs but recalled that it was late

summer. After discussion in the hearing, it was agreed that the latest date on which the Respondent could possibly have refused to appoint him would be 30 September 2022.

Application for strikeout

24. The Respondent submitted that all the complaints in the claim, set out at paragraph 23 above are out of time and that the Tribunal has no jurisdiction to hear them.
25. The Claimant resisted the application and instead, asked the Tribunal to extend time on a just and equitable basis so that he could continue with his case.

**Law**

26. In deciding this matter, the Tribunal considered the following law.
27. Section 123 Equality Act 2010 states as follows: -
  - (i) *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 complaints relates, or (b) such other period as the employment tribunal things just and equitable.*
28. Time limits are strictly imposed in employment cases and there is no presumption that a Tribunal should exercise its discretion to extend time. The exercise of the discretion is the exception, rather than the rule (*Robertson v Bexley Community Centre* [2003] IRLR 434). The onus is always on the Claimant to persuade the Tribunal that it is just and equitable to do so.
29. The Tribunal therefore has a broad discretion to extend the time limit where it considers it '*just and equitable*' so to do. In determining whether or not this is an appropriate case to apply its discretion, a tribunal may find it useful to consider the principles as set out in the case of *British Coal Corporation v Keeble*. This is not a checklist, and the tribunal is not required to consider all of these factors. The only requirement is that it does not leave a significant factor out of account (*Southwark Borough Council v Afolabi* [2003] IRLR 220). The factors referred to in *Keeble* are as follows:-
  - (a) the length and reasons for the delay;
  - (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
  - (c) the extent to which the part sued had cooperated with any requests for information
  - (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and
  - (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

30. In the case of *Adedeji v University Hospitals Birmingham NHS Foundation* [2021] EWCA Civ 23, the Court of Appeal stated that '*The best approach for a tribunal in considering the exercise of the discretion under s 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, including in particular .... "the length of, and the reasons for, the delay"*'. Also, that '*rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language*'.
31. The more recent authorities agree that the most important factors to consider are (a) the length and reasons for the delay, (b) the prejudice which each party would suffer as a result of granting or refusing to grant an extension and (c) the potential merits of the claim.
32. Although the Claimant did not give sworn evidence, he did submit that the reason he did not bring his claim sooner was because he decided to wait and exhaust the Respondent's internal grievance procedures before doing so. The Claimant brought this claim the day after he received the outcome of the grievance appeal from the Respondent. It was not clear to the Tribunal whether the grievance had been about all of the matters in this claim as if it were only about the failure to appoint to the two roles applied for in 2022, it would not assist the Claimant in explaining the delay in bringing the allegations related to 2018 – 2021. The Tribunal assumed for the purposes of today's hearing that the grievance related to all these matters.
33. It was not the Claimant's case that he was wrongly advised by his trade union or solicitor. It was also not his case that he was unaware of the three-month time limit. The Tribunal also considered the fact that the Claimant had previously brought a discrimination claim against the Respondent. That claim was brought in time. The Claimant was therefore aware of the time limits in the employment tribunals.
34. Delay caused by the Claimant's invoking the internal grievance procedure is one of the factors that the Tribunal has to weigh in the balance, along with all the other circumstances. It is not the deciding factor. In the case of *Robinson v The Post Office* [2000] IRLR 804 EAT, the court held that missing a primary time limit because there is an ongoing internal grievance will not normally be a good reason '*of itself and without more*', to exercise the just and equitable discretion to extend time. This is not a rule as each case would turn on its facts. Thus, consideration would be required of the extent of the lateness and the prejudice, if any, caused to a respondent. In cases involving a delay whilst a claimant pursues internal processes, HHJ Auerbach in the case of *Wells Cathedral School Ltd v Souter EA-2020-000801* (previously UKEAT/0836/20 (20 July 2021 unreported) described the need to strike a balance between the desire to encourage the internal resolution of disputes without the need to issue a tribunal claim, and the need for finality in legal proceedings, especially where any delay causes unfairness to the Respondent.

35. In the case of *Robinson* the tribunal refused to grant an extension even though there was no evidence of prejudice to the respondent, if it had been granted. The tribunal was concerned that the claimant had been aware of the time limit but had refused to issue his claim, even after he had advice from his trade union to do so. In the similar case of *Souter* where the claimant had delayed issuing his claim because of an internal process, the EAT confirmed the tribunal's decision to grant an extension in circumstances where it was convinced that the claimant had been genuinely engaged in pursuing his grievance to avoid bringing tribunal proceedings and it was aware that the out of time allegations would still need to be considered as part of the unfair dismissal complaint. The tribunal also considered it significant that there was unlikely to be any forensic prejudice to the respondent because most of the allegations concerned written documents which had already been collated and considered as part of the grievance process. These two cases show the need to consider the particular circumstance of a case when deciding whether or not to exercise this discretion.

### **Decision**

36. The Respondent seeks a strike out of the Claimant's claim on the basis that it was issued well outside of the relevant statutory time limits. The Claimant opposes the Respondent's application and seeks instead an extension of time on a just and equitable basis to allow him to continue with his claim.
37. In his submissions to the Tribunal, the Claimant referred to the case of *Hendricks v the Commissioner of Police for the Metropolis* [2003] IRLR 96 as authority for his application to extend time. However, that case relates to whether the claimant can rely on a series of out of time allegations as one continuing act together with more recent allegations or whether they are all to be considered as separate allegations, each having their own date by which a complaint about them should be issued. The Court of Appeal's decision was that a series of connected acts can be considered as part of one continuing act, so that time begins to run from the last alleged act. This was not this issue in this case as the Tribunal considered time to run from the last allegation against the Respondent which was the failure to appoint to the jobs the Claimant applied for in the summer of 2022. In this case, the Claimant was unable to provide a date when he made those application but stated that it is likely that he made those in the summer of 2022.
38. The Claimant's complaints contain allegations going back to the start of his re-engagement with the Respondent in 2018. It is likely that the Claimant has been unhappy about his terms and conditions, since his re-engagement. He complains about his pay, his job, his applications for other roles and the fact that they were unsuccessful.
39. The Claimant brought an employment tribunal claim against the Respondent in 2018 alleging discrimination. That claim was brought in time.
40. The most recent allegation is that the Respondent failed to appoint the Claimant to two jobs in the summer of 2022.



41. The Claimant submitted that time should run from the date on which he received the outcome of his grievance appeal; but that is not the subject of complaint in this case. The Claimant makes no complaint about the outcome of the grievance appeal apart from his disagreement with it. Although the Claimant is clearly unhappy about the outcome of the grievance and the grievance appeal, which he received on 20 March 2023, there are no allegations in the claim about the grievance outcome or about the grievance process. Therefore, time does not run from March 2023.
42. The ACAS conciliation certificate was dated 2 January 2023 and the claim was issued in the employment tribunal on 21 March 2023. For the purposes of this application, the Tribunal assumes that there is a likelihood of a continuing act and that all these allegations are linked and therefore to be considered as one, ending on 30 September 2022. In those circumstances, the claim was brought 6 months outside of the relevant time limits.
43. Time therefore started to run from the latest allegation, which is treated as 30 September 2022.
44. Complaints of unlawful deduction of wages, sex, age and race discrimination, are all to be brought to the employment tribunal within 3 months of the act or failure to act, happened. The complaints in this claim ought to have been brought before 29 December 2022
45. The Claimant contacted ACAS on 21 November 2022 to begin the process. It is likely that at the time, he was unhappy about the answers that he had been given about his pay and job title and was considering taking action in the employment tribunal. The ACAS certificate was obtained on 2 January 2023. However, the Claimant did not bring his claim to the employment tribunal until 21 March 2023.
46. It is therefore this Tribunal's judgment that the claim is out of time. All complaints that relate to the incidents that occurred before 7 November 2022 are out of time. That is all of the complaints in the claim.
47. The Tribunal then went on to consider whether to use its discretion to extend time on a just and equitable basis to allow him to continue with these complaints.
48. The length of time that the Claimant has taken to bring these complaints varies as follows:
  - (1) the race discrimination complaint in which he compares his pay to that of a black PEL Band 4, relates to April 2021 and his race and age discrimination complaints regarding his pay while on Crossrail was for the period 1 July 2020 – 31 March 2021 (2 years out of time in March 2023)
  - (2) His age discrimination complaint where he compares his pay to that of two other PEL Managers, who he thought were in a different age group from him relates to the period beginning April 2021 (2 years out of time

in March 2023). There is also a sex discrimination complaint related to that time.

- (3) The Claimant has a sex discrimination complaint where he alleges that the Respondent did not grant him a job re-evaluation when he requested this in 2021 whereas, it did do so for Ms Drury. He also compares his treatment to a hypothetical comparator. (2 years out of time in March 2023)
  - (4) The latest complaint in this case is the allegation that the failure to appoint the Claimant by 30 September 202, for the two roles he had applied for, were acts of sex, age and race discrimination. The Claimant did not identify which protected characteristic/s he relied on for that complaint. (6 months out of time by March 2023).
49. Although the Claimant acted promptly when he received the grievance appeal outcome, it was not clear to the Tribunal why, having got the ACAS certificate on 2 January 2023, when it would have been clear that it was not possible to resolve this dispute amicably or by means other than the Employment Tribunal; the Claimant waited a further 2 months before issuing his claim.
  50. The Tribunal bears in mind that this is a litigant in person and also, someone who has previously brought a discrimination complaint in the employment tribunal against the same Respondent. He had trade union assistance at some stage in the internal process. He did not submit that he was unaware of the relevant time limits or that he had been incorrectly advised. It is likely that he was aware of the relevant time limits.
  51. The Claimant first emailed to complain about his pay on 17 July 2022, approximately 8 months before bringing his claim to the employment tribunal. The grievance was raised on 5 August 2022.
  52. The Respondent confirmed that as far as forensic prejudice was concerned, it would not be overly prejudiced as it had conducted an investigation into the grievance and had documents that it would use to defend this claim. It also has relevant witnesses. I was not told that anyone significant had left the Respondent's employment or that there would have been any difficulty in this regard.
  53. However, there is also litigation prejudice in that if this Tribunal uses its discretion to extend time, the Respondent will face a claim that it would otherwise not have to deal with. On the other hand, if time is not extended, the Claimant will not be able to bring these complaints in any other forum as he has exhausted the internal processes.
  54. There were no specific submissions on the strength of the claim although the Respondent also applied in the alternative for deposit orders on the basis that the Claimant's complaints had little reasonable prospects of success.

55. In deciding whether to extend time on a just and equitable basis, the Tribunal also considered the strength of these complaints. The Claimant complains of sex discrimination in his pay in comparison to Claire O'Shea, a female colleague. The Respondent's recent disclosure shows that she was paid less than him throughout her employment. He complains of age discrimination when it is likely from the disclosure recently provided by the Respondent that two of his comparators Mr Tuncliffe and Mr Gordon, were only two years younger than him, thereby making it highly unlikely that he will be able to prove that age was a factor in the decision on the level of his wage. He compares his pay in 2021 to that of a black colleague, Mr Owoeye who the Respondent agrees was paid more than him and he does not accept the Respondent's explanations for that difference.
56. The Tribunal considers that the complaints of age discrimination have little reasonable prospects of success since it is highly unlikely that the Claimant will be able to prove facts from which a Tribunal can infer that the reason for the difference in wage between the Claimant and the individuals who were two years younger than him, was his age. The age difference between them is miniscule and unlikely to make a difference to an employer, if at all.
57. Taking all matters set out above into consideration, it is this Tribunal's judgment that the Claimant delayed for 2 months after receipt of the ACAS certificate before issuing the claim. The Claimant waited 2 years before bringing most of his complaints and 7 months before bringing the last allegations regarding the jobs that he had applied for.
58. There was no requirement for him to wait until he received the outcome of the grievance appeal before bringing his complaint in the employment tribunal. It is reasonable for this Tribunal to conclude that the Claimant was aware of the time limits involved and that there was insufficient reason for him to bring his claim outside of those time limits. The Tribunal has not been given sufficient grounds on which to base an exercise of its discretion to extend time beyond the relevant time limits. The Claimant has failed to persuade this Tribunal to extend time in this case.
59. In the circumstances, it is this Tribunal's judgment, that it has no jurisdiction to hear the Claimant's existing complaints in this claim and they are struck out.

*Application to amend*

60. The Claimant applied on 30 October 2023 to amend his claim to include a complaint that on 14 June 2023, two of his managers met to determine grades for the team. In that meeting, they downgraded him from a 3 to a 2, leading to a reduced bonus. It is the Claimant's complaint that this was done as an act of victimisation because the Claimant issued a complaint of discrimination against the Respondent in the employment tribunal in 2018. The Claimant confirmed in today's hearing that he was not seeking to add a complaint that this was also an act of harassment. He only wishes to raise it as an act of victimisation.

61. The application is therefore to add a complaint of victimisation to the existing case. There is no complaint relating to the performance review process as part of the existing claim. This is therefore a completely new complaint. There is no ACAS certificate relating to this claim. This is not an application to add further detail to an existing complaint. It is an amendment to add a completely new complaint.
62. The Tribunal cannot allow this amendment for the following reasons:
63. Firstly, the Tribunal has just struck out the original claim and therefore it is not possible to amend a claim that no longer exists.
64. Secondly, this application to amend is to add a complaint that is also out of time. The decision to downgrade the Claimant was made on 14 June 2023. The Claimant was told about it on that day. Although he asked about adding complaints at the preliminary hearing on 18 October, he did not make an application to amend until 30 October. This complaint should have been brought by 13 September 2023.
65. For these reasons the application to amend is not granted.
66. The Claimant's complaints are struck out and any forthcoming hearing dates are vacated.

**Employment Judge Jones**

**8 February 2024**