

Tribunal able to hear very late disability discrimination claim from candidate whose job offer was pulled because she was on antidepressants

An Employment Tribunal has ruled that a claimant may proceed with a disability discrimination claim which is over two years out of time, because she was unaware of the time limit and lacked confidence to pursue her claim without advice. The claim concerns the withdrawal of a job offer made to the claimant because she was taking anti-depressants at the time.

What happened in this case?

In June 2019, the Claimant, Ms Mackenzie, applied to the Police Scotland to become a police officer. She received a provisional offer of appointment as a probationary police constable, which was subject to six conditions. One of the conditions was that she was certified as physically and mentally fit to perform the duties of a police officer. The offer letter stated that a failure to meet any of the six conditions may result in her start date being deferred or the provisional offer being withdrawn altogether.

In December 2019, the Claimant was medically assessed by an occupational health nurse. The Claimant disclosed that she

was taking anti-depressants. The Claimant was told that applicants for the role of probationary police officer had to be free of anti-depressants for a period of two years before they could be considered for appointment (the “two-year rule”). As a result, the nurse told the Claimant that she could not be passed as fit and that she would need to be free of anti-depressants for two years before she could reapply.

A few days later, Inspector Davidson from the Police Scotland telephoned the Claimant and he apologised for the decision and said that he hoped she would reapply in two years. He wrote to her a few days later, confirming that she had not passed the medical assessment and withdrawing the provisional offer of appointment.

On 19 February 2020, the Claimant registered a complaint with Police Scotland. She was redirected to Optima Health, the occupational health service provider to Police Scotland. On 8 April 2020, Optima responded, stating that the two-year rule represented the opinion of several Force Medical Advisers and was needed to “...*demonstrate a period of ongoing stability prior to starting what is recognised to be a psychologically and emotionally draining job*”.

The Claimant made multiple attempts at seeking legal advice, with no success. In November 2021, she read a newspaper article about another candidate who had had a provisional offer withdrawn by Police Scotland because of the two-year rule. She made contact with the solicitor representing the other candidate and she eventually submitted a disability discrimination claim on 31 October 2022 – over two years after the time limit for doing so had expired.

A hearing was held to decide whether the time limit should be extended in order to allow her claim to proceed.

What was decided?

The Claimant argued that the delay in lodging her claim was caused by multiple factors including:

- the fact she was not aware of the time limit;
- the impact of the withdrawal of the job offer on her health;
- the delay in dealing with her complaint;
- the coronavirus pandemic;
- her lack of financial resources; and
- her struggle to obtain legal advice.

The Tribunal did not accept that the Claimant's mental health or financial resources had played any real part in the delay. Further, there was no delay on the part of Police Scotland or Optima Health after 8 April 2020. It was accepted that she had struggled to get legal advice, but it was clear

that by late 2021 she had understood that she had the right to bring a discrimination claim and that she could present the claim herself. The pandemic created some difficulties for the Claimant at home, but this was still not a reason not to have brought her claim earlier.

The Tribunal concluded that the real reasons for the delay in presenting the claim were that the Claimant was unaware of the time limit and that she lacked confidence to bring a claim without being advised that it had merit. The Tribunal accepted that it was reasonable for the Claimant not to have been aware of the time limit, in circumstances where her efforts to obtain advice had been unsuccessful. As soon as the Claimant had seen the newspaper article, her confidence was bolstered, and she immediately contacted the solicitor named in the article and presented her claim.

Although there had been a very long delay, the Tribunal did not consider Police Scotland would suffer prejudice, given that the kernel of the case was the operation of the two-year rule and its application to the Claimant. The Tribunal held that the contemporaneous documentation should provide a *“reliable point of reference”* for any witnesses giving evidence. The Tribunal also weighed the overall merits of the claim into the balance, noting that its *“tentative view”* was that there was at least a *“triable issue”* in the case.

Police Scotland later sought a reconsideration of the Tribunal's decision but was unsuccessful. The claim will now proceed to a Preliminary Hearing to determine whether the Claimant was disabled at the relevant time.

What does this mean for employers?

This decision highlights the latitude that Employment Tribunals have to extend time in discrimination claims. In many employment claims, such as unfair dismissal claims, time limits may only be extended where it can be shown that it was “not reasonably practicable” to have presented the claim in time. This is high bar, and it is difficult for claimants to secure extensions. In contrast, in discrimination claims (and some other types of claim), Employment Judges have a wide discretion to extend claims provided it is “just and equitable” to do so.

It remains to be seen whether the Claimant will succeed with her substantive claim. Assuming she is found to have been disabled at the relevant time (which seems quite likely), the claim will proceed to a full hearing either later this year or next year. The Claimant has claimed both direct and indirect disability discrimination, as well as discrimination arising from disability. As far as the latter two claims are concerned, Police Scotland would need to be ready to show that the two-year rule was a proportionate means of achieving a legitimate aim.

While it may be legitimate to require a sustained period of stability before starting such a demanding role, the question of whether a blanket rule refusing employment to those taking antidepressants (and for two years afterwards) is a proportionate means of achieving that aim is questionable. Particularly given that one of the reasons for taking antidepressants is to facilitate sustained mental stability. The two-year rule effectively shuts people with depression or anxiety out of the role, or forces them to forego medication and thereby *jeopardise* their mental

stability in order to meet the requirement of the rule. There may be less discriminatory ways of achieving the aim such as providing counselling or mentoring to new recruits and/or having regular occupational health assessments once in post to test stability. Most employers would be unable to justify such a rule but the particular demands on probationary police constables are likely to be key when analysing justification in this case.

[Mackenzie v The Chief Constable of the Police Service of Scotland](#)

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