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EMPLOYMENT TRIBUNALS

Claimant: Mr S Orton

Respondent: Jones Day and others

Heard at: London Central **On:** 7 April 2017

Before: Employment Judge Auerbach (sitting alone)

Representation

Claimant: In person

Respondent: Mr P Goulding, QC

REASONS

Introduction

1. The claim form was presented on 7 November 2016. At that time the Claimant was represented, but his representatives subsequently came off the record and he appeared before me at this hearing as a litigant in person.

2. The First Respondent is an international law firm. The Claimant is a solicitor specialising in capital markets work. He started with the First Respondent on 1 March 2001, employed as a trainee. He progressed to become a partner as of 1 January 2012. However, on 1 July 2014 he ceased to be a partner and reverted to the status of employee, being given, from that date, the title: "of Counsel". On 16 December 2015 the Claimant gave notice of resignation and his employment with the First Respondent ended on 4 March 2016. He took up a position with another law firm from 7 March 2016.

3. The complaints were all of disability discrimination. The claimed disability relied upon was described as gambling disorder. The Claimant complained of direct discrimination, discrimination arising from disability, failure to comply with the duty of reasonable adjustment, harassment and victimisation. At the hearing before me, it was agreed that the actual or alleged factual conduct complained of could be fairly summarised under five headings. These were as follows.

4. Firstly, the Claimant complained that when he ceased to be a partner and reverted to being an employee on 1 July 2014, this came about because he was "expelled" from the partnership – or, at any rate, one way or another, that this was imposed on him against his will. Secondly, he complained of the firm thereafter not readmitting him or, agreeing to readmit him, to partnership on some later date. Thirdly, he complained that the repayment terms of a loan, which the firm advanced to him in June 2014, were punitive. Fourthly, he complained that the firm failed to provide him with counselling or support in respect of his gambling disorder, in particular, because, around the time of events in summer 2014, it failed proactively to seek an Occupational Health report and advice regarding his condition and its implications. Fifthly, and finally, he alleged that Mr Elliott had made adverse comments about him to third parties.

5. The First Respondent is the firm itself: Jones Day. There were four other Respondents. They were: Mr Elliott, the partner in charge of the capital markets practice, based in London; Mary Ellen Powers, a partner and Head of Europe, but based in Washington DC; Stephen Brogan, the Global Managing Partner, also based in Washington; and John Phillips, partner and Head of the London office. Responses were entered on behalf of them all to the effect that all of the complaints were presented out of time, disputing the Claimant's disabled status at any time in fact and law, putting forward defences to the complaints on their merits and querying the inclusion of the four individual Respondents, particularly the Third Respondent.

6. The claim and response were considered by Employment Judge Snelson who directed that there should be a Preliminary Hearing (PH) to consider three matters. Firstly, the substantive issue of whether any or all of the complaints had been presented out of time, so that there was no jurisdiction to consider them. Secondly, whether the complaints or any of them should be struck out as having no reasonable prospect of success (under rule 37 of the Employment Tribunals Rules of Procedure 2013). Thirdly, whether the complaints or any of them should be made the subject of a deposit order as having little reasonable prospect of success (under rule 39).

7. That PH came before me. Before convening the hearing, I spent time reading the pleadings, written submissions tabled on both sides, and considering the bundles of documents and authorities. When the hearing convened, we spent some time discussing the matters that I would have to decide, how I would go about dealing with them and generally the conduct of the hearing, bearing in mind that, although he is a lawyer, the Claimant was a litigant in person.

8. In particular, it was noted that, as part of my consideration of the strike out and/or deposit thresholds, I could consider how matters stood in relation to the prospects of success of the Claimant overcoming any time obstacle and/or securing a finding at trial of disabled status, as well as the prospects of success of the underlying merits of the various claims.

9. There was also a discussion about whether I could or should adjudicate the time jurisdiction issue substantively at this present hearing. I noted in this connection that no witness statements had been tabled. The Claimant's initial response was that I ought not to adjudicate the time points at this hearing. Mr Goulding, in reply, submitted that there was no difficulty about determining these issues at this PH. Indeed, he submitted that I was bound to do so, as EJ Snelson

had decided that these issues should be considered at a PH, and nothing of substance had changed since he had taken that case management decision. As to evidence, Mr Goulding said he was content that I should treat the relevant parts of the Claimant's particulars of claim and skeleton argument, that asserted factual matters relevant to time issues, as if the Claimant had set out the same material in a witness statement; and, said Mr Goulding, for the purposes of these issues, he did not seek to contest those factual assertions by the Claimant.

10. Following that, the Claimant did not further press his objection, and in all the circumstances, I was satisfied that I both should and could fairly determine the substantive time points at this hearing.

11. Mr Goulding also set out in his opening submission that the Respondents had a concern about certain particular allegations made in the particulars of claim, and individuals named in connection with them, and that he wished me to consider an application for restrictions on publicity under rule 50. The present PH was, itself, conducted in public. However, it was agreed that no identifying reference need be made to these particular matters about which the Respondents were concerned, during submissions and argument on the substantive business of this PH. So, I could hear and determine the substantive matters for consideration first; and then, if the claims, or some of them remained live, consider the way forward in relation to the rule 50 application.

12. Rule 39 enables the Tribunal to order a deposit, in respect of "any specific allegation or argument" found to have little reasonable prospect of success, of a maximum amount of £1000. Mr Goulding indicated that the Respondents sought up to five deposits, of £1000 each, being one each in respect of those complaints relating to each of the five factual topics. The Claimant did not dispute that it would be open to me to order up to five distinct deposits on that basis; and in the course of submissions he indicated that he would have the means to pay deposits up to the total amount of £5000 sought.

13. It was agreed that, having read the written submissions, I would hear oral submissions on all three matters – the time jurisdiction point, the strike out application and the deposit application – and then give one decision covering all of that ground, as appropriate, depending of course on how my decision on one aspect might affect the position in relation to another.

14. Oral submissions were completed during the morning. In the afternoon I gave an oral reasoned decision. My written judgment was subsequently promulgated. Mr Goulding also requested written reasons, and the Claimant also later wrote in requesting these. They are now provided.

Jurisdiction – Time

15. I turn first to the question of whether some or all of these claims should be dismissed as having been brought out of time.

16. As already noted, I was satisfied that I should determine this issue, as it had been listed for such determination, and nothing material had changed since that case management decision was taken. But I was also satisfied that, in any event, I could properly and fairly determine it. In particular, in view of Mr Goulding's concession, I could proceed on the basis that the relevant facts

asserted by the Claimant were true, just as if they had been set out by him in an unchallenged witness statement. I also concluded, for reasons I will explain, that this is not a case where the outcome on this point might turn on whether one or more ostensibly distinct alleged acts of discrimination, might together be found to amount to conduct extending over a period, but which could not be fairly determined outside of the context of a decision at a full merits hearing.

Chronology

17. I set out at this stage some background chronology of factual matters.

18. The Claimant was born in June 1978. From around his late teens he had a gambling problem. In late 2012, possibly going into 2013, he had some counselling for this through an organisation called GamCare.

19. In 2014 the Claimant was facing a substantial tax liability; specifically, there was a payment due on 10 June 2014. Certainly in part, if not wholly, because of his gambling activity, he did not have the resources to meet this tax bill. In these circumstances, he entered into discussions with the First Respondent firm about his situation, and the possibility of receiving a loan from the firm.

20. As part of these discussions, there were discussions about his status going forward, and, in particular, about his reverting from the status of partner to the status of employee, and going on to PAYE. That in fact did happen on 1 July 2014. Central to the substantive case, was a dispute between the parties about how those discussions went, and whether this change of status was something that was, in some sense, imposed on the Claimant against his will.

21. During June 2014, in the context of these discussions, the Claimant sent some emails to Messrs Elliott and Phillips. These in summary expressed gratitude for the support he had received from the firm. An email of 10 June included the observation, that, through discussions with someone called Alex: "… I've managed to actually understand what I've done and what you have done for me and I know I will get through this. Calling it a disease now feels like an excuse to me. I will get over this and I will move on." The Claimant put himself on the waiting list for support from a gambling clinic around this time; and he arranged to be seen privately on 25 June by a specialist from the clinic.

22. A loan agreement between the Claimant and the firm was concluded on 24 June 2014. This provided for repayment of the sums advanced by instalments, but also included a clause entitling the firm to demand immediate repayment of any outstanding sums, in the event of the Claimant's resignation from the firm.

23. On 1 July 2014, as already mentioned, the Claimant's status changed from partner to employee, and he continued to work for the firm, with the title "of Counsel".

24. The Claimant had a course of counselling sessions between January and March 2015. It is his case that he came to understand, or at the very least believe, during this period, that the root cause of his gambling behaviour was in fact something that should be regarded as a medical impairment.

25. On 11 February 2015 the Claimant sent an update email to Messrs Philips and Elliott. The tone was upbeat. It began: "Hi both – I just wanted to update you on how my treatment is going. I had my fourth weekly group session last night and my first joint session with Alex last Tuesday. I have been leaving each session with increased hope for a full and lasting recovery."

26. A little further on in this email the Claimant wrote: "By way of background, in 2013, gambling addiction was classified by the fifth edition of the mental illness handbook (DSM-V) as a mental health issue. This puts it in the same bracket as drug addiction. Prior to 2013 it was characterised as an impulse disorder and put on a par with kleptomania and pyromania. The effect that gambling has on my brain is apparently akin to cocaine and the fault lies in my brain where my reward system has gone completely awry." He referred, further on in the same email, to his change in perspective; and he wrote that he could now see that in time "I can actually zero out my desire to gamble, and lead a normal life without someone watching over my finances – I can't tell you how good that feels."

27. Over the summer of 2015, in further discussions, the Claimant indicated that he was in talks with another firm about the possibility of joining them. He was also, in this period, however, seeking some consideration, reassurance or confirmation, as to whether or when he could or would be considered eligible to re-join the partnership of the First Respondent. In response, he was asked to confirm that any talks with the other potential new employer were no longer live, so that he could be considered for possible rejoining of the partnership in 2016.

28. Some time in the second half of 2015, however, the Claimant decided that he was going to resign, with a view to taking up a position that he had been offered with another firm, once his notice had expired. This in turn led to discussions about the possibility of amending the loan agreement, and in particular the trigger clause that would otherwise cause all outstanding sums to become immediately due for repayment in the event of his resignation. Around this time, the Claimant had some advice from an employment lawyer, although that advice was concerned with these immediate matters, and was not, I accepted, concerned with any question of possible disability discrimination.

29. On 16 December 2015, the Claimant, having firmly decided to take up the position with the new firm, once he was free to do so, gave formal notice of resignation of his employment with the First Respondent. Also on 16 December 2015, as a result of the discussions that had taken place leading up to this point, amendments were agreed to the terms of the loan agreement. Further, during the notice period following his resignation, further amendments to the loan agreement were agreed, and put into effect on 22 January 2016. The net effect of the amendments was that the Claimant's resignation did not, after all, cause all outstanding sums to become due. There was also a restructuring of the remaining monthly repayment instalments, so that the loan would still have to be fully paid off by the same end date, but now by lower instalments for a number of months, rising to higher instalments in the latter stages.

30. The Claimant's employment with the First Respondent duly came to an end on 4 March 2016.

31. The Claimant at some point contemplated challenging the terms of the loan agreement under the Consumer Credit Act (CCA). I was told at the present

hearing that he was indeed pursuing such a challenge in the County Court. However, on 19 April 2016, when he canvassed the possibility of a CCA challenge with a partner of the First Respondent, the suggestion was made to him that it sounded like what he was complaining of was more akin to a claim of discrimination. Following that discussion, on 27 April 2016, the Claimant then contracted the employment lawyer who had advised him the previous year. That lawyer in turn referred him to another employment and discrimination lawyer on 3 May, who the Claimant then contacted on 4 May and saw on 19 May.

32. That lawyer's firm, didlaw, wrote to Mr Brogan, in his capacity as Managing Partner of the First Respondent, on 15 July 2016. This was a formal letter before action. It stated that didlaw were advising the Claimant on his various claims against the firm because of disability, and that they were writing to set out the basis of those claims. The remainder of the letter was divided into various sections, including: one headed "Expulsion from the partnership of the Firm"; one setting out background; one making references to a betting club; a section headed "Detriment(s)", specifically relating to the loan terms; and a section setting out why it was considered that the Claimant's gambling disorder amounted to a disability. A further section headed "Discrimination" set out various alleged treatment and the different types of discrimination covered by the Equality Act 2010 that was said to be involved, giving the basis for his claims.

33. The letter went on specifically to assert that the conduct complained of continued to have an impact and amounted to conduct extending over a period. It asserted that "[t]he Employment Tribunals therefore have jurisdiction to hear Mr Orton's claims." The letter also referred to a Data Subject Access Request which had been raised. The letter described itself as a preamble to formal litigation. It included an invitation to discussions. It concluded: "We will wait 14 days from the date of this letter before issuing and look forward to hearing from you."

34. On 28 July 2016, the First Respondent replied to that letter, expressing surprise and disappointment and asserting that the firm had done nothing wrong. It also raised the issue of limitation, stating that the Claimant "could and should" have brought any Equality Act claim "within the appropriate limitation period of 3 months from the date his status changed" and setting out why it would be asserted that there had been no continuing conduct and that it would not be just and equitable to extend time. It stated that if it was asserted that there had been any discrimination up to the date of the end of employment, that, too, was out of time; and that there was no arguable basis on which it could be asserted that there was discrimination ongoing after that date. It concluded by stating that the claim was misconceived.

35. The ACAS Early Conciliation period in respect of all five Respondents began on 13 September and concluded on 11 October 2016.

36. As already noted, the Claim Form was presented on 7 November 2016.

Primary Time Limit

37. The starting point when considering limitation is that section 123(1)(a) **Equality Act 2010** makes provision to the effect that proceedings on a complaint to the Employment Tribunal may not be brought after the end of "the period of 3

months starting with the date of the act to which the complaint relates". This may be referred to as the primary time limit.

38. I considered first when the primary time limit started to run in relation to each of the matters complained of in this case. As to the complaints relating to what was alleged to have been the expulsion or forced withdrawal of the Claimant from partnership status, that change of status happened on 1 July 2014. That must therefore be the latest date of the alleged conduct to which those complaints relate. Accordingly, the complaints relating to that had been presented more than two years after the expiry of the primary time limit.

39. The complaints concerning non-re-admission to partnership, were in effect of a failure to take a decision about whether to readmit the Claimant and/or about a putative decision not to do so. In that connection, section 123(4) provides that, in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when they do an act inconsistent with doing it, or on the expiry of the period in which they might reasonably have been expected to do it. So, the long stop start date for the limitation period would, in this respect, be the latest date on which the Claimant could have expected a decision about whether to readmit him to partnership to be taken, if it was to be taken at all.

40. As I have recorded, this topic was under discussion with the Claimant in the summer of 2015 with the suggestion at one point of possible consideration of a re-admission date of January 2016. In submissions, however, the Claimant said that the reality was that, because of financial considerations, it would not have been on the cards for him to be readmitted in 2016 or indeed in 2017 or until 2018. He sought to rely on that scenario to support the suggestion that this was a complaint alleging conduct that was ongoing or continuing beyond the summer of 2015.

41. However, it is a clear fact that the Claimant decided to resign from the firm, and then formally gave notice to that effect during December 2015 with a view to joining another firm once the notice period had expired. It was not suggested by him that it was any part of his case that, having given in his notice, he was still, even after that, seeking or expecting the First Respondent's partners to readmit him, or consider doing so, in the remaining months of his relationship with the firm, while he worked out his notice. Nor, had it been asserted, could it possibly be said that he could reasonably have expected them to take a decision about that after the date on which he gave notice.

42. I concluded, therefore, that the latest possible date on which it could reasonably be argued that time began to run in respect of complaints on this topic, was the date on which the Claimant gave notice: 16 December 2015. So the complaints relating to this aspect were presented more than seven months outside the primary time limit. For the reasons I have given, in my judgment, that is the latest date from which the primary limit ran; but even if I was wrong about that, it is inconceivable that he could have reasonably thought his readmission might yet be considered after the actual end of his employment, on 4 March 2016 (shortly following which he started with the other firm). Even if, contrary to my view, the primary time limit only ran from as late as *that* date, such complaints were still presented some five months after the expiry of the primary time limit.

43. The third topic of complaint was the loan repayment terms: as to instalment terms – timing and amounts – and possibly as to interest as well. These terms were last varied, or set, on 22 January 2016.

44. Section 123(3)(a) provides that, for the purposes of that section, conduct done over a period is to be treated as done at the end of that period. The Claimant argued that this treatment fell to be regarded as conduct extending over the *repayment period* of the loan, because he continued to experience the ongoing effects of the instalment and payment terms that had been set, over that ongoing period; indeed, he said, he has yet to experience the worst, which is to come when the amount of the monthly payments ramps up in 2018.

45. However, I agreed with Mr Goulding that this is not the correct analysis. The alleged discriminatory conduct of which complaint is made here, is conduct by, or in relation to, the *setting* of the terms (or the revised or amended terms). The latest date on which such conduct can have occurred was 22 January 2016. The fact that the Claimant has been obliged to pay (and, unless something changes) will continue to be obliged to pay, various sums on various dates since then, are *consequences or effects* of the original conduct by which the terms were set, but are not indicative of further or ongoing conduct, or otherwise of conduct extending over a period. I agreed with Mr Goulding that, in this respect, the facts of this case are analogous to those in **Sougrin v Haringey Health Authority** [1992] ICR 650 (CA). There, the complaint was about the decision to award the claimant in that case a particular pay grade. The level of pay that she received thereafter was a consequence of that one-off act, not indicative of there being a continuing act of discrimination.

46. I add that there was no suggestion in this case that there had been, after 22 January 2016, any later specific request to renegotiate, which was specifically refused or not entertained, or any further interaction giving rise to a further act of discrimination in this respect.

47. Accordingly, I concluded that, in this regard, the three-month primary time limit ran, at the latest, from 22 January 2016. So complaints in relation to this alleged treatment were presented more than six months after the expiry of the primary time limit.

48. I turn to the complaints of failure to refer the Defendant to Occupational Health (OH) or counselling. The time of the events to which these complaints specifically refer is the summer of 2014, when the loan was being negotiated, and the change of status was under discussion. I was mindful, however, that there was, here, a complaint of failure to comply with the duty of reasonable adjustment. In some cases in which the discrimination is said to take that form, it may be argued that, once engaged, the duty was ongoing. The premise of that argument, in a given case, will be that it continued, over an ongoing period, to be reasonable to expect the employer to take the step, by way of reasonable adjustment, which was not taken. Where the Tribunal so finds, then the case will properly fall to be regarded as one of an act continuing over a period.[1] In the present case the Claimant did not, in fact, put his case that way. Nevertheless, I thought it prudent, and fair, to consider whether that analysis might apply.

[1] See, in particular, *Matuszowicz v Kingston Upon Hull City Council* [2009] IRLR 288 (CA).

49. However, there is no rule of law that in every case of complaint of failure to comply with the duty of reasonable adjustment, the conduct complained of falls to be treated as done over a period. Whether that is the right analysis depends on how the particular claim is put, and the facts of the particular case.

50. In the present case, on consideration, it was clear, looking at both his particulars of claim and his skeleton argument, that the focus of the Claimant's complaint in this regard was on what he claimed was the failure of the firm to be proactive in seeking OH advice and offering him greater support by way of adjustment, at the time of what he described, at one point as his "crisis" over the summer of 2014, being the time when the loan agreement and the departure from the partnership were under discussion and were put into effect, and the time when, according to the Claimant, his affliction with the compulsion to gamble and/or his mental health generally, reached their lowest point.

51. It was at *that* time, or during that particular period, and in particular before concluding the loan agreement and the change of status, that the Claimant contended that the firm ought, by way of reasonable adjustment, to seek OH advice and support, specifically in relation to the management of that situation, and those decisions and/or then acted on such advice to support the Claimant. It was not in fact contended that there was an ongoing expectation that it would take such steps during a continuing and open-ended period thereafter.

52. I concluded that this was not, therefore, a complaint of continuing conduct over an open-ended and continuing period, but of a failure to make an adjustment, which, it was claimed, should have been made in the summer of 2014. This complaint too, was therefore presented long after the expiry of the primary time limit.

53. But even if I was wrong about that, this conduct could not be said to be ongoing past the date of the Claimant's resignation, or, on any view, beyond the date of his actual departure from the firm; and even on that most favourable view of the Claimant's case on time on this aspect (which I did not think was right), the complaint was still presented some months after the expiry of the time limit.

Statements by Mr Elliott – Primary Time Limit and Prospects of Success

54. Finally, there was the matter of the alleged victimisation or harassment by way of statements made by Mr Elliott. This was raised in the particulars of claim in the following terms. Paragraph 56 provides: "Since leaving the Respondent[2] the Claimant understands that Mr Elliott has been heard telling former colleagues that the Claimant is a liar and that he betrayed the Respondent firm. The ongoing impact of this on reputation and prospects for the Claimant in the legal market cannot be under estimated. Such comments constitute post-termination victimisation."

55. Paragraph 66 refers again to this, as follows: "… the Respondent, by means of Mr Elliott telling former colleagues of the Claimant that he is a liar, is subjecting the Claimant to harassment within the meaning of section 26 …" and it then cites the elements of the definition of harassment, claims alternatively that this is

[2] Plainly meant as a reference to "the First Respondent" firm.

victimisation and refers also to section 108 (which concerns liability in relation to relationships that have ended).

56. Finally, paragraph 67 of the particulars of claim, addressing time limit issues, asserts that "[t]he most recent event described in this claim is the harassment and/or victimisation, which it is alleged is continuing post termination."

57. Mr Goulding submitted that this complaint in fact faced two difficulties. First, he submitted, there were no particulars of when the alleged treatment was said to have occurred, beyond, at best, that it had occurred some time after the end of the employment. But that was not sufficient to establish that the alleged conduct had occurred sufficiently recently for the claim relating to it to have been presented within the primary time limit. Secondly, he submitted, so lacking was this complaint in particulars, that it did not, in any event, put forward a reasonably arguable complaint of victimisation or harassment – so that it should, in any event, be struck out as having no reasonable prospect of success.

58. Further, this was not a new argument. In the grounds of resistance the Respondents had pleaded (at paragraph 44) that no proper particulars had been given of this allegation and that it was "embarrassing for want of particularity and liable to be struck out." But no further particulars had been provided.

59. On these points my conclusions were these. First, the sense of these passages is that, on one or more occasions since the employment ended, Mr Elliott has said something to former colleagues to the effect that the Claimant was a liar and had betrayed the firm. However, Mr Goulding was right to say that no date or dates or even approximate time periods (beyond it being post-termination) were given. Nor were any other particulars given, such as to which colleagues the remarks were allegedly made, on what occasion or occasions, or in what context, or who the Claimant heard this from, how or when. In so far as the complaint was of victimisation, no particulars were given of the protected act (or anticipated protected act) relied upon, nor of the basis for asserting that any such remarks were because of such actual or feared protected act. In so far it was of harassment no particulars had been given of the context, circumstances or features, which would fulfil the elements of the definition.

60. Further, although the particulars of claim assert that the alleged treatment was "continuing post-termination", the nature of the allegations is of remarks made on one or more occasions, and no particulars are given as to the basis for asserting, not merely that such remarks were made on one or more particular occasions post-termination, but that there was continuing conduct of this sort.

61. Further, the Respondents had indeed put the Claimant on notice in the grounds of resistance that they considered this allegation liable to be struck out for want of particulars, and reiterated this in their skeleton argument for this present hearing, but no further particulars were provided by the Claimant, whether prior to or at this present hearing.

62. I concluded that both Mr Goulding's submissions were well founded. The complaint was not sufficiently particularised to establish a case that it had (whether or not on the basis of conduct extending over a period) been presented within the primary time limit. Further, so deficient was it in both factual

particulars, and particulars of why the alleged conduct was said to amount, in law, to victimisation or harassment, that it had no reasonable prospect of success in any event. Accordingly, I concluded that it should, for that reason, be struck out.

Time – Conduct Extending Over a Period – Effect of ACAS EC

63. For the reasons I have given, all of the other complaints (relating to the first four factual areas) had, viewed each in turn, been presented well outside of the expiry of the respective primary time limits. Even if they could, as a group, be viewed as part of a single course of conduct over a period of time, this would not assist the Claimant's position, because, even viewed as a group, and on the most generous view of the latest date on which time began to run, the complaints in relation to them had still been presented outside of the primary time limit.

64. I should also note that, even had I not struck out the complaints relating to alleged post-employment treatment, and even had it been established that *those* complaints had been presented within the primary time limit relating to them, there would have been a further issue as to whether any of the earlier complaints could be said to form part of conduct extending over a period, together with those complaints. But, in the event, that was not an issue that I needed to determine.

65. In certain cases, the effect of section 140A of the 2010 Act is that the length of the primary time limit is extended, by the application of certain rules there set out, which are parasitical upon the start and end dates of compulsory ACAS Early Conciliation (EC). However, these provisions have no such effect where the start date of ACAS EC falls after the ordinary expiry date of that time limit.[3]

Time – Just and Equitable Extension

66. Section 123(1)(b) of the 2010 Act provides a different mechanism by which the ordinary three-month period may be extended. It empowers the Tribunal to substitute such other period as it thinks just and equitable. If, therefore, the Tribunal finds, in a given case, that a longer period than three months – which is at least as long as would expire only on or after the date of presentation of the claim form – is just and equitable, then the complaint will, after all, be found to have been presented in time.

67. Although the language in which the 2010 Act gives this effect is different from that of the predecessor legislation, the power to extend time to present a discrimination claim if the Tribunal considers it just and equitable to do so is not new; and there is a well-established body of case law guidance in relation to it. A number of points can be noted, and a number of authorities illustrate them.

68. First, the jurisdiction is a wide and flexible one. The test of what is just and equitable is not as constrained or narrow in its language as that of whether it was "not reasonably practicable" to present a complaint within the primary time limit, which applies in respect of unfair dismissal and certain other complaints. Secondly, however, the starting point is still that the onus is on a claimant to make out a case that it is for *some* sufficient reason just and equitable to extend the primary time limit by the requisite amount (**Robertson** [2003] IRLR 434). But,

[3] See now, however, note 4, below.

as other authorities note, the Tribunal only has to be satisfied that it is just and equitable to do so. It does not have to be persuaded that the circumstances are, somehow, exceptional.

69. Next, the Tribunal must exercise the power judicially, taking into account considerations that are relevant to the given case, and not taking into account irrelevant considerations. But it follows that there should be a multi-factorial approach tailored to the given case; and there is no one definitive list of relevant considerations applicable to every case. So, while the matters mentioned in section 33 of the Limitation Act 1980 (concerned with limitation in the civil jurisdiction) may be a useful check list for a Tribunal reflecting on what are the relevant factors in the case before it, it is not a definitive list (**Keeble** [1997] IRLR 336, **Afolabi** [2003] IRLR 320).

70. When considering what is just and equitable the Tribunal must weigh up the balance of prejudice to *both* sides in either allowing or not allowing an extension. So far as the question of potential prejudice to a respondent is concerned, Mr Goulding drew attention to the following passage of useful guidance in **Miller v Ministry of Justice**, UKEAT/0003/15, 15 March 2016

12. … There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. As I understood their arguments, neither Mr Allen nor Mr Sugarman suggested that a lack of forensic prejudice to a Respondent was a decisive factor, by itself, in favour of an extension of time. But both argued, in slightly different ways, that the ET was bound in every case, in Mr Allen's phrase, "to balance off" the relative prejudice to the parties, and that, if the ET did not do so expressly, that was an error of law, even if there was, otherwise, no good reason to extend time.

13. It seems to me that it is not necessary for me to deal with that bald submission, because, as I explain below, the EJ did, to the extent that he was required to, take into account prejudice to both sides. But if I had needed to, I would have rejected that submission. It is clear from paragraph 50 of Pill LJ's judgment in **DCA v Jones** that it is for the ET to decide, on the facts of any particular case, which potentially relevant factor or factors is or are actually relevant to the exercise of its discretion in any case. **DCA v Jones** also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET. I do not read the decision of the EAT in **DPP v Marshall** [1998] ICR 518 (and in particular pages 527H-528G, which were relied on by Mr Allen and Mr Sugarman) as contradicting this approach; but if it does, I bear in mind that the observations relied on are from the EAT, and pre-date **DCA v Jones**.

71. The parties raised various particular features of the present case, which each of them argued was relevant to the question of just and equitable extension,

and I considered them all. The particular features that I regarded as significant in the balancing exercise were as follows.

72. Firstly, though he is not an employment lawyer, and not a litigator, the Claimant is a practising solicitor, and an experienced one. He did not dispute that he appreciated, as a general proposition, that time limits apply to the commencement of litigation, and they are important. That said, I accepted that the time limits for presentation of claims of this sort were not part of his background knowledge, and indeed he did not have any background familiarity, at the outset of matters, with the Equality Act at all.

73. Secondly, however, as I have recorded, in or around early 2015 the Claimant came to appreciate, or at any rate, believe, that his gambling disorder fell to be regarded as a medical condition or impairment. Thirdly, the Claimant did have access to advice in December 2015 from an employment lawyer. I accept that the disability discrimination issue was not discussed or in contemplation at *that* time, but when he went to that lawyer the gambling disorder and its effects on his work situation was very much a feature of the overall circumstances of his particular employment problem. Furthermore, he thereby established contact with an employment lawyer, who he knew he could go back to, if he felt he needed more advice in this area, as indeed he in due course did.

74. The next relevant consideration was the fact that the possibility that his concerns could be viewed as giving rise to an issue of unlawful discrimination was, as I have recorded, actually flagged up to the Claimant by a partner of the First Respondent in April 2016; and, indeed, this prompted him to actually go and see an employment and discrimination lawyer in May. The Claimant, by this time, at the latest, had been alerted to the possibility of bringing a claim of discrimination, knew what he was concerned about, and the essential facts of his situation, and had full access to a lawyer who could advise on limitation, and the full ability to issue his claims at any time. Further, given, not least, that the matters he wished to complain about dated back to the summer of 2014, and that his employment had ended in early March 2015, the time issue would have been apparent to any specialist in the field.

75. Nevertheless, the letter before action was not sent until a further two months or so down the line, on 15 July 2016. The contents, as I have described, fully articulated what he said were the essential factual and legal premises of his claims. They also reflected the fact that his advisers were fully alive to the fact that the claims raised limitation issues. The letter also indicated that, in the absence of satisfactory resolution, proceedings would be issued after 14 days. It did not suggest that the Claimant would face any difficulty or obstacle in doing so, or any other reason why it would be desirable or necessary to wait longer. Further, the First Respondent's reply made clear that it considered that any claims would already be out of time, and set out fully its analysis of the position on limitation. The Claimant and his lawyers were therefore very fully on notice of this by the end of July 2016. Yet the claim was still not presented until more than three months later.

76. The failure to issue the claims considerably sooner than they were could not therefore be put down to problems of ignorance of the law, or the essential facts relied upon, lack of advice, resource, or other practical obstacles or difficulties.

77. The Claimant, however, raised the following particular features which he submitted weighed in the scales on his side. Firstly, he referred to his Data Protection Act subject access requests. The letter before action of 15 July 2016, as I have noted, referred to this, and sought a response by the statutory deadline of 31 July 2016. The Claimant said that he had in fact had to follow up with a further request and had only got further and final answers to the questions he had raised in October 2016. Secondly, said the Claimant, the First Respondent had never properly explained to him why (according to it) he was not readmitted to partnership. The first time, he said, he was given any reasons for that was in the grounds of resistance to his claim, and those reasons were themselves unconvincing and inadequate.

78. The burden of these submissions was to the effect that it was just and equitable to extend time because the Claimant lacked information in the hands of the Respondents, and because they were slow to provide it. However, the Claimant did not, in his submissions, explain or identify any salient material or crucial facts that he learned only as a result of the responses to his data protection requests, which caused him to appreciate that he might have the basis for a discrimination claim, which he had not appreciated before. Though this was not a point made by the Claimant in submissions, I do note that his particulars of claim refer to some correspondence which emerged, dating from the time of the original loan, touching on Mr Elliott's appreciation of his mental state in summer 2014 – but it was already the Claimant's case that the firm was well aware of his mental health issues in summer 2014, yet failed sufficiently to act on them.

79. In short, the Claimant knew all the main salient and material facts, he knew what conduct or alleged treatment he was wishing to complain of, and he knew what the basis of his claims that it amounted to unlawful discrimination would be, before he had received any replies to his subject access requests. He also knew all of this before he received the grounds of resistance to the claim itself. In some cases the giving of a specific explanation for the treatment complained of which is obviously untrue, or appears otherwise to be unconvincing or inadequate, may be the thing that causes a person to suspect for the first time that they have a good claim (in some cases, having regard also to the potential for statutory shifting of the burden of proof). But, here, on the Claimant's case, it had long been his view that he had never been given any proper explanation for the failure to readmit him to partnership, and for many months his view that this involved disability discrimination. The (on his case) inadequate explanation given in the grounds of resistance, after he presented his claim, might have fortified him in his belief that he was on the right track, but could not serve retroactively to explain why he did not present his claims sooner than he in fact did.

80. The Claimant also referred, once again, to the ongoing impact of the loan repayment regime. I have already referred to his argument that this meant that there was an act of discrimination extending over a period – which I have rejected. But he also argued that the ongoing obligation to make loan repayments, continuing into the future, also supported it being just and equitable to extend time. However, once again, this is not a new feature of the factual landscape or the Claimant's state of knowledge. The final shape of the repayment terms was set in January 2016, and he also knew by then that he would be leaving the First Respondent, and joining his new firm, in March 2016.

81. The Claimant also said that there had been informal discussions, in an attempt to achieve a negotiated resolution, prior to his presenting his claim form. However, when the letter before action was written he and his solicitors were already plainly (and rightly) aware of the potential limitation issues, and the reply to that letter can have left them in no doubt that the Respondents fully intended to take the point if it came to litigation. There was no suggestion, for example, of there having been any later mutual understanding that forbearance would give more breathing space for ongoing meaningful discussions. Nor was this case akin to that, for example, of an existing employee who is reluctant to threaten or pursue litigation while they await the outcome of some internal process.

82. The Claimant submitted that there would be no real prejudice to the Respondents in this case, by extending time to the date of presentation of the claims, and so allowing the litigation to proceed to a trial on the merits. As to what, in **Miller**, was called forensic prejudice, he argued that in this case the Respondents would suffer none. He submitted that the factual territory only went back three years, there was a good deal of documentary record (in the form of email trails and so forth) and the key events were sufficiently colourful or unusual that recollections were likely to be good.

83. Mr Goulding, in response to a question from me, confirmed that this was not a case where a witness had become unavailable, incapacitated, or died or anything of that sort. However, he submitted that there *were*, contrary to the Claimant's suggestion, a number of important areas of factual dispute, which would turn on witnesses' memories, which were bound not to be as fresh as they would have been, had the various claims been presented in time, or, certainly, considerably sooner than they had been. Mr Goulding went through a list of specific examples drawn from the rival pleadings, including disputed episodes events going back to 2009, a number of disputes about how the discussions unfolded in the summer of 2014, and so forth. He also noted that the Claimant had complained to the SRA that Mr Elliott's stance involved deliberate misleading of the Tribunal amounting to misconduct (the Claimant confirmed that he had so complained). So, said Mr Goulding, there was even more riding on this issue.

84. The Claimant submitted in reply that Mr Goulding exaggerated the significance or importance of the particular areas of factual dispute that he had highlighted, to the bigger picture of the main issues in the case, and/or the likely difficulties of recollection that would be experienced.

85. This is not a case where I would have been persuaded that matters were so stale, and the effect on recollections so profound, that the Tribunal should be considering striking out the claims because they are no longer capable of a fair trial; but I did accept that there would be *some* more than trivial prejudice to the Respondents, resulting from the passage of time since the events in question, and their dependency on witness recollections. There *were* some disputes of fact, where witness evidence about how the discussions unfolded, *would* be potentially important.

86. This was so, particularly in relation to the claims that there was discrimination in the setting of the terms of the loan in June 2014, and in his being allegedly forced out of partnership. His case, in summary, was that advantage was taken of his financial circumstances and his ill health, to drive hard terms, and drive him out, at a time when the reaction should, rather, have

been one of support for a disabled colleague. The Respondents' perspective was diametrically opposed to that. They say that they were hugely supportive, in particular by their willingness to advance him a substantial loan at all. They rely on the tone of his emails at the time – but one point of dispute is whether at least one of those emails was written under direction or drafted for him. I considered that the Tribunal's appreciation of the witness evidence as to how events unfolded during this period could well be significant to its conclusions about whether there was detrimental, less favourable and/or unfavourable treatment.

87. Although I was not persuaded to the degree of the full breadth and heft that Mr Goulding put behind his submissions on this point, I did therefore consider that this feature weighed in the balance to some appreciable degree on the Respondents' side as an element of potential real forensic prejudice to them.

88. I also considered that this is a case where the prejudice to the Respondents of losing the limitation defence, and being obliged to defend this litigation on its merits, had further real weight in the balance on their side. One of the functions of limitation periods is to enable people to have a measure of certainty, so that they can move forward and get on with their lives – whether personal or professional – without the shadow of potential litigation hanging over them. To be the victim of discrimination is a serious matter, but so it is to be accused of it. There were four personal Respondents to this claim – and these individuals were all professionally and personally at risk, even had they not been named as such.

89. In this context, the element of the number of months or years by which these various claims were presented outside of the primary time limits, itself weighs into the balance on the Respondents' side – because the more time passes after a primary time limit has expired, the more weight should be given to a party's expectation that the shadow of potential litigation has fallen away. This also needs to be set in the context of the fact that the primary time limit is itself three months, so there is an overall general expectation in this field, that parties can expect to be able to move on within a commensurate timescale.

90. The Claimant also submitted that the First Respondent is one of the largest law firms in the world and that none of the Respondents would be in a worse financial position by having to respond to the claim outside of time limits. But I did not agree that there would be no financial impact on them from having to continue to defend this litigation, nor that the presumed deep pockets of the First Respondent should weigh in the Claimant's favour in this exercise.

91. Mr Goulding also submitted that the claims were so weak that their poor merits was a further factor in the scales on the Respondents' side. He argued, in particular, that the Claimant's claim that his gambling disorder was a disability in law, was weak, and that his claim that he had been subjected to detrimental treatment in the summer of 2014 was an inversion of the truth. I considered that the balance of justice and equity on the time point was, in any event, firmly on the Respondents' side. So I did not need to form a considered view on whether the underlying claims were as very weak as Mr Goulding argued; but for completeness I record that I did not think them so compellingly *strong* as to cause the balance to tip the scales the other way to the Claimant's side.

92. I was, in conclusion, not persuaded that it was just and equitable to extend time in relation to any of these claims to the extent that would be necessary to make them in time on the day when they were in fact presented.[4]

Outcome

93. For the foregoing reasons all the claims were dismissed, and, in the case of those relating to post-employment treatment, struck out. All of the other applications for strike out and/or deposit orders therefore fell away.

94. I indicated at the hearing that I might not have been prepared to hold that the Claimant's claim to disabled status in summer 2014 was so weak, as such, as to have no, or little, reasonable prospect of success; but that I considered that the case that he was still a disabled person following completion of his counselling course in early 2015 and by the time he left the First Respondent, was so weak that, had I not struck out the post-employment claims, they would have attracted a deposit order. However, these points do not form any part of my actual decision, given that I did not, in the event, have to adjudicate the other strike out applications, nor the alternative applications for deposit orders.

95. In view of the foregoing decisions I also did not need to consider further Mr Goulding's application for rule 50 restrictions in relation to certain alleged episodes.

Employment Judge Auerbach
5 May 2017

[4] While preparing these written reasons, it has occurred to me that it could be argued that the correct construction of the relevant provisions is that, if it is, at least, just and equitable to extend time up to the start date of ACAS EC, then section 140A *will* confer a further extension from that point. However, the Claimant did not so argue at the hearing; and, even assuming that point in his favour, for the same reasons why I did not consider it just and equitable to extend time to the date of presentation, nor would it have been just and equitable to extend it to the earlier date of the start of ACAS EC process.