EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103960/2018

Held in Glasgow on 17 and 18 September 2018

Employment Judge: Robert Gall

Mr DB Gabel	**Claimant** **Represented by:** **Mr J Murphie - Advocate**
Secretary Of State For Work And Pensions	**First Respondent** **Represented by:** **Ms L Cartwright - Solicitor**
Health & Safety Executive	**Second Respondent** **Represented by:** **Ms L Cartwright Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(1) The claims of direct discrimination and of indirect discrimination brought respectively in terms of sections 13, 15 and 19 of the Equality Act 2010 are brought after the end of the period of three months from the date of the Act to which the complaint relates and are therefore brought out of time.

(2) It is not considered just and equitable for time for presentation of the claim to be extended.

(3) The Tribunal has therefore no jurisdiction to deal with the claim which is dismissed.

REASONS

1. This case was set down for a Preliminary Hearing ("PH") following upon a case management PH. The PH set down for 17 and 18 September 2018 was to determine whether the claim was brought out of time. If it was held that it was brought out of time then the Tribunal would in that circumstance consider whether it was just and equitable to permit the claim to proceed.

2. At this PH, Mr Murphie, advocate, appeared for the claimant. Ms Cartwright, solicitor, appeared for the respondents. A Joint Bundle of Productions was lodged. Evidence was taken from the claimant in relation solely to supporting the proposition that, if the claim was timebarred, it was just and equitable to permit it to proceed.

Facts

3. The facts necessary to determine the issue of timebar are set out later in this Judgment

4. The following are those critical facts relating to regulatory provisions.

5. It was agreed that the Diving at Work Regulations 1997 ("The 1997 Regulations") applied to diver competence assessment organisations within Great Britain. It was agreed that the 1997 Regulations provided in Regulation 9 (2) that:

> *"No person shall be appointed or shall act as a supervisor unless he is competent and, where appropriate, suitably qualified to perform the functions of supervisor in respect of the diving operation which he is appointed to supervise."*

6. The second respondents are authorised in terms of the Regulation 14 of the 1997 Regulations to *"approve in writing such qualification as it considers*

suitable for the purpose of ensuring the adequate competence of divers for the purpose of Regulation 12 (1) (a)".

7. The approved Code of Practice for Commercial Diving Projects ("ACOP") provides that a supervisor must be suitably qualified. Under the provisions contained within the ACOP at paragraph 123 which appeared in page 213 of the bundle, the claimant met the definition of someone suitably qualified by reason of what was known as the *"grandfather rights"* – this was by virtue of him having acted as a supervisor of a diving operation in which the same diving techniques were used during the two year period before 1 July 1981.

8. The second respondents have issued a Protocol for diver competence assessment organisations. A copy of that appeared in the bundle. It was issued on 24 May 2011. It is referred to in this Judgment as the May 2011 Protocol.

9. In terms of the ACOP, paragraph 125, a diving contractor must consider competence of a person before appointing him as a supervisor. Assessment organisations are to follow the May 2011 Protocol. Paragraph 38 of that Protocol, at page 151 of the bundle states, in relation to supervisors under the heading of *"Minimum qualifications of supervisors"*:-

> *"Supervisors should:*
>
> - *have an HSE approved qualification of at least a level of the Unit or equivalent which the assessment course is intending to achieve"*

10. This is where the difficulty lies from the claimant's point of view. His diving qualifications are from the US Navy. Those qualifications do not constitute *"an HSE approved qualification".*

11. Although the claimant therefore has grandfather rights, and could work on a commercial diving project, he cannot be a diving supervisor within a HSE

diving school having regard to the 1997 Regulations, the ACOP and the May 2011 Protocol.

12. The claimant is disabled in terms of the Equality Act 2010 ("The 2010 Act"). Due to his disability he can no longer dive. Although he has *"grandfather rights",* on the basis that he does not have approved qualifications in terms of the 1997 Regulations, ACOP and the May 2011 Protocol, it has been confirmed to the claimant that he cannot be a diving assessor in an HSE diving school. To obtain the approved qualification he would require to have dived a certain number of times and a certain number of hours at the level to be under instruction or assessment.

13. Neither respondent was the employer of the claimant.

14. As detailed below requests have been made of the first and second respondents on the dates specified below in order to obtain authority for the claimant to act as a diving supervisor at an HSE diving school. Those requests were refused on the basis that the claimant did not have an approved qualification.

Respective positions of the parties

15. If the decisions of the respondents upon applications made relating to his ability to act as a diving supervisor at an HSE diving school are viewed in isolation, his claim is brought out of time i.e. more than three months after these acts. His position is however that the 1997 Regulations, ACOP and the May 2011 Protocol have been in place for many years now. The application of the May 2011 Protocol requiring a supervisor to have a diver certificate to act as a supervisor in HSE schools is *"conduct extending over a period",* the claimant maintains. That provision and its application has not changed over that time. The claim is therefore brought in time, in his view.

16. The discriminatory conduct which the claimant says has occurred is that the requirement for a supervisor to have a divers' certificate to act as a supervisor

in HSE schools is an **extra requirement** and a **higher standard** than the provisions under which *"grandfather rights"* are established. That higher standard is a PCP putting disabled people, including the claimant, at a particular disadvantage. It also involves less favourable treatment and constitutes unfavourable treatment, those being the claims in sections 13, 15 and 19 of the 2010 Act.

17. The respondents, on the other hand, say that each time what amounts to a refusal is given to the claimant, a potential ground of claim would exist. No claim has however been made within three months of that right arising and the claim therefore is timebarred.

Facts agreed

18. The claim was presented to the Employment Tribunal on 5 April 2018.

19. It was agreed that the 1997 Regulations, ACOP and the May 2011 Protocol had been in place since their respective dates of issue.

20. In relation to potential discriminatory acts, there were different instances where the claimant had been informed that he could not be a diving supervisor in an HSE diving school.

21. Specifically, in March of 2012, the claimant was informed by Mr Crombie of the second respondents that whilst a diving contractor could appoint diving supervisors, and while grandfather rights would appear to be met by Mr Gabel, the position was different in relation to appointment as a supervisor at an HSE diving school. To hold the position of supervisor at an HSE diving school required a person, including therefore Mr Gabel, to hold an approved qualification for diving at work in the UK. Mr Gabel's US Navy qualification was not such an approved qualification. He could therefore not be a diving supervisor at an HSE diving school. That is an alleged discriminatory act.

22. Any issue in this area can be referred to the ombudsman. The claimant took that step in July 2012 through his MP. In the later part of 2012, in October of

that year the latest, it was known to the claimant that the ombudsman had rejected his complaint.

23. By letter of 8 November 2014, the claimant wrote to the second respondents. He sought that they confirm that he met all of the requirements of the May 2011 Protocol. A copy of that letter appeared at pages 24 to 26 of the bundle. The reply to that letter appeared at pages 27 and 28 of the bundle. It was dated 8 December 2014. It stated that the second respondents *"would not object to your future appointment as an assessor and/or diving supervisor at an HSE diving school. However, it would still remain the responsibility of that employer to satisfy themselves that you were competent to undertake the role(s)."*

24. The claimant sought clarification of that reply in his letter of 2 January 2015 which appeared at pages 29 to 31 of the bundle. That clarification was given by letter from the second respondents of 11 February 2015. A copy of that letter appeared at pages 32 and 33 of the bundle. It summarised the position of the second respondents as being *"that for someone to act as a Diving Supervisor at a Diving School they must have a relevant, approved qualification for diving at work in the UK".* Earlier in the letter, it was stated that a Diving Supervisor working under the grandfather clause *"would not meet the terms of the May 2011 Protocol as they would not hold an approved qualification for diving in the UK.*" It was said that the terms of the Protocol required to be met for HSE to approve qualifications for a school.

25. A further exchange of correspondence occurred in September 2015. The relevant letters from the claimant and the reply to him appeared at pages 41-43 of the bundle.

26. In those letters, the claimant raised questions to which he wished answers. The respondents in their letter which is dated September 2015 and was in reply to the claimant's letter of 15 September 2015 wrote that *"whilst Mr Gabel can act as a Diving Supervisor for diving at work activities, if his disability prevents him obtaining an HSE approved diving qualification, he will not be*

able to act as a Diving Supervisor at a Diver Competency Assessment Organisation in the training of divers." This exchange in September 2015 is with the first respondents. It is the latest date at which it could be said that there was, absent any conduct extending over a period, any act of the first respondents which was potentially discriminatory.

27. Absent any conduct extending over a period, the last act of the second respondents which might found a claim occurred on 11 February 2015 when the letter was sent to Mr Gabel as stated above.

The issue

28. The issue in relation to this element of the PH was whether the claim was timebarred. That turned upon whether there was, by virtue of the 1997 Regulations, ACOP and the May 2011 Protocol remaining in place, conduct extending over a period.

Applicable law

29. Section 123 of the 2010 Act states that a complaint may not be brought after the end of:

> *"(a) the period of 3 months starting with the date of the act to which the complaint relates or*
> *(b) such other period as the employment tribunal thinks just and equitable."*
>
> *(3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period."*

30. There are various cases which deal with conduct extending over a period. These were the subject of submissions.

31. There can be a practice or a rule or policy which applies over a period and in accordance with which decisions are taken in specific instances. That can amount to conduct extending over a period. The case of ***Owusu v London Fire & Civil Defence Authority 1995 IRLR 574 ("Owusu")*** is illustrative of that. The case of ***Barclays Bank plc v Kapur & others 1991 IRLR 136 ("Kapur")*** is a case to similar effect.

32. Cases further illustrating that principle are:

- ***The Secretary of State for Work and Pensions (Jobcentre Plus) v S Jamil, W Qureshi and N Critchfield UK EAT/0097/13 ("Jamil")***
- ***Fairfield Maritime Limited v Parsoya UK EAT/0275/15 ("Parsoya")***
- ***Network Rail Infrastructure Limited v Mitchell UK EATS/0057/12 ("Mitchell")***

33. The cases just mentioned all relate to claims in the context of employment. Claims in the context of involvement of a supervisory or regulatory authority are:

- ***Rovenska v General Medical Council 1998 ICR 85 ("Rovenska")***
- ***Chaudhary v Royal College of Surgeons & others 2003 ICR 1510 ("Chaudhary")***

34. In the Court of Appeal decision in ***Chaudhary*** the following two paragraphs appear in the Judgment of Lord Justice Mummery:-

> *"66 I agree with the conclusion of the tribunal, which was upheld by the appeal tribunal, that Mr Chaudhary's complaint of race discrimination was not of an act extending over a period. His complaint of indirect discrimination was based on the application to his case of the requirement or condition that the*

registrar post, held by Mr Chaudhary at Manchester, should have been one that was approved by the specialist advisory committee. That requirement or condition was last applied to him when his appeal against the decision of the post graduate dean, Dr Platt, was dismissed by the appeal committee. It held that the Manchester post did not entitle him to transition to the new specialist registrar grade, as it was not recognised by the specialist advisory committee. The dismissal of the appeal was formally notified to Mr Chaudhary on 7 February 1997. Although the requirement or condition may have continued in existence for the purpose of being applied to appeals by other registrars seeking entry into the new grade, there was no continuing application of the requirement or condition to Mr Chaudhary in the period of three months prior to the issue of his proceedings. The period during which the condition or requirement was applicable to Mr Chaudhary's application for transition to the specialist registrar grade had ceased to operate when his appeal against refusal was decided. That was well before the three month period prior to presentation of his originating application.

67 As for the authorities cited, this case is covered by the reasoning of this court in ***Rovenska v General Medical Council 1998 ICR 85*** *based on the wording of section (1)(b) of the 1976 Act that indirect discrimination occurs when a person "applies" to another a discriminatory requirement or condition to his or her detriment. Cases such as* ***Rovenska*** *and the instant case, in which applications are made for registration by regulatory authorities and are rejected, are distinguishable from the cases in which an employer continuously applies a requirement or condition, in the form of a policy, rule, scheme or practice operated by him in respect of his employees throughout their employment: see* ***Barclays Bank plc v Kapur***

1991 ICR 208, Cast v Croydon College 1998 ICR 500 and Owuzu v London Fire & Civil Defence Authority 1995 IRLR 574."

Submissions

Submissions for the respondent

35. Ms Cartwright lodged written submissions. She spoke to those.

36. In those written submissions, Ms Cartwright detailed the definitions in terms of the 1997 Regulations, ACOP and the May 2011 Protocol. She confirmed that it was accepted that the provisions were potentially indirectly discriminatory in relation to the claimant. The respondents maintained however that the measures involved were a proportionate means of achieving a legitimate aim.

37. The acts potentially discriminatory dated back, Ms Cartwright said, to March 2012. The claimant said in his claim form that the email from Mr Crombie of 19 March 2012 was the discriminatory act of the second respondents. The claimant had pursued the matter to the ombudsman. The ombudsman had not upheld his position. By October 2012, it was clear that the ombudsman had rejected the complaint. There was no later act of the second respondents referred to by the claimant. He relied on the regulatory provisions as being a continuing act.

38. Although not in form ET1 Ms Cartwright highlighted, the claimant appeared now to be stating that in November 2014, the letter he had written to the second respondents and the reply of December 2014 from the second respondents founded a specific instance of discriminatory conduct. The respondents' position was ultimately clarified on 11 February 2015.

39. The first respondents had explained their position in September 2015 in response to the claimant's letter of 15 September 2015. It was apparently

said, albeit not in Form ET1, that there had been a specific discriminatory act by the first respondents.

40. A Court of Session action had been raised by the claimant on 26 March 2017. That was ultimately held to be unsuccessful in that the claim ought to have been made in the Employment Tribunal. The decision in that case was known to the claimant shortly after 10 November 2017 when it was issued.

41. Ms Cartwright recognised that the claimant maintained that the existence of regulatory standards constituted a continuing act. She highlighted however the case of ***Chaudhary***. She narrated the circumstances of that case and also the decision in and circumstances of ***Rovenska***. She highlighted the passage in the Judgment of Lord Justice Mummery in ***Chaudhary.*** That passage and the facts circumstances and outcome of the decisions in ***Chaudhary*** and ***Rovenska*** made it clear that different considerations applied in the circumstance of regulatory or qualifications bodies. The key factor was the time at which a decision of those bodies was intimated to the claimant. In this case, that was substantially before the date of three months prior to presentation of the claim. The ACAS certificate had been sought and obtained both on 9 March 2018. The claim was out of time and, subject to any extension of time limit granted, should not be permitted to proceed.

42. Ms Cartwright submitted that the cases to which the claimant was to refer in submission were all employment law cases. They illustrated the impact of the continuing relationship between the claimant and the respondents in those cases. There was an ongoing duty and relationship between the parties. They were all very different to the situation involved in this case. ***Chaudhary*** and ***Rovenska*** were clear in their terms. If a stipulation of the type involved here could found a claim <u>at any point</u>, a claimant could take whatever time they wished to present a claim to the Tribunal. That could not be right.

<u>Submissions for the claimant</u>

43. Mr Murphie also tended written submissions. He spoke to those.

44. Having highlighted the provisions of section 123 of the 2010 Act, Mr Murphie confirmed that the claimant relied upon there being conduct extending over a period. That conduct was, he said, application by the respondents of the May 2011 Protocol, ACOP and the 1997 Regulations. It had been confirmed in the letter of 8 December 2014, page 28 of the bundle, that the claimant would not satisfy the May 2011 Protocol on diver competence. That was unequivocally confirmed on 11 February 2015 in the correspondence which appeared at page 33 of the bundle.

45. Mr Murphie submitted that in applying the May 2011 Protocol and the higher standard than that under the law, a PCP was being applied which put disabled persons such as the claimant at a particular disadvantage. He had also been treated less favourably than others were or would be treated. He had also been treated unfavourably in consequence of his disability, said Mr Murphie.

46. Mr Murphie referred to ***Jamil***. In that case, the employer had resisted the claimant working closer to home as it would involve a transfer to the same branch at which her husband worked. It was held that there was a continuing duty to accommodate her needs and that continued not to be honoured. That was distinct from a one off decision not to accede to a request. The act had therefore continued.

47. In ***Parsoya***, there had been an underpayment made to an employee by the employer. Arrears had not been paid although future payments were made at the correct rate. Mr Murphie referred to paragraphs 32, 33 and 36 of the Judgment in that case. This Judgment and the comments in those paragraphs supported his position for the claimant that continued operation of a policy may found a continuing act of discrimination.

48. The case of ***Mitchell*** involved an employee who was assigned a status of "*performance improvement required*". That was held to be a continuing act. That case therefore also supported the view that a policy, rule, practice, scheme or regime was an act which extended over a period. Mr Murphie

recognised that this case dealt with different facts and circumstances from that of the claimant. He set out an example which he said highlighted the point made on behalf of the claimant. If a man and a woman applied for a post and the woman suspected sex discrimination was involved when her application was unsuccessful, that would clearly be a decision made and she would have three months from that point to bring her claim. On the other hand, what Mr Gabel's case involved was a policy being applied, not simply one or two decision making events. There was continued application and operation of a policy. That, submitted Mr Murphie, was exactly the situation which the terms of section 123 (3) of the 2010 Act were designed to deal with.

49. Mr Murphie emphasised that section 19 did not distinguish between the two situations of an employer and supervisory regulatory body. There required to be one approach to what was or was not indirect discrimination. Further, in the cases of ***Chaudhary*** and ***Rovenska*** there had been an appeal procedure where there had been engagement between the claimants and the parties who became respondents. Mr Gabel had however been met with a brick wall. He had been told, in effect, *"There is the condition. You do not satisfy it. Go away."* He had been faced with a blanket policy with there being no consideration of his particular case. In short, a state of affairs had been created which continued.

Brief reply from the respondents

50. Ms Cartwright said that there had in fact been an appeal procedure in relation to Mr Gabel. The route to be followed was to take the matter to the ombudsman. That had been a course adopted by Mr Gabel. His approach to the ombudsman resulted in the complaint not being upheld. Ms Cartwright reiterated that ***Chaudhary*** and ***Rovenska*** should be followed. Mr Gabel ought to have raised this claim when the ombudsman refused his appeal at the very latest.

Discussion and decision

51. The essential facts relative to this element in the case were not in dispute. What the issue before me boiled down to was whether time for presentation

of a claim to the Employment Tribunal did not begin to run as there was what was said to be a discriminatory policy in place. If that was so then the claim was presented in time. If, on the other hand, I was to conclude that the critical time was when it became known to Mr Gabel that the interpretation of the 1997 Regulations, ACOP and the May 2011 Protocol was that he could not become a diving supervisor in an HSE diving school, then his claim clearly had been presented out of time.

52. This was not therefore a case where it was said that one act within the period of three months prior to presentation of the claim was linked to other acts prior to that, that proposition being disputed. The position in this case was quite stark.

53. I recognise and accept that the 2010 Act does not distinguish between the identity of an alleged discriminator. If an act is discriminatory, then it is discriminatory.

54. Where however, as here, a claimant does not rely upon a specific instance as having occurred within the period of three months prior to presentation of a claim to the Tribunal, the issue becomes one of determining whether there had been *"conduct extending over a period"?*

55. In the cases to which Mr Murphie referred, the context is that of employment where there is a continuing relationship between the parties. In ***Kapur*** and ***Owusu*** the conduct of the employer was such that there was a policy, rule or practice in accordance with which decisions were taken from time to time. In ***Parsoya*** the issue was paying a reduced salary to certain employees who had potential immigration issues. Although the employer had rectified that underpayment, it had not made payment of the arrears despite promising so to do. It was considered that discrimination had continued.

56. In reviewing the authorities and in reaching a conclusion, I found the cases of ***Rovenska*** and ***Chaudhary***, in particular ***Chaudhary,*** to be very persuasive. Lord Justice Mummery is clear in paragraphs 66 and 67 in ***Chaudhary*** that

the scenario detailed there is distinguishable from cases in which an employer continuously implies a requirement or condition.

57. I considered the fact that Lord Justice Mummery is referring to applications being made for registration by regulatory authorities, those applications being rejected. That is slightly different to the situation in this case. In my view however the difference is relatively small. The regulatory bodies are not employers. The respondents in this case are not employers. There is no continuing relationship between the regulatory bodies and the claimants in ***Rovenska*** and ***Chaudhary***. That was also the position in this case. The regulatory bodies set out the standards which must be met by someone applying to them. The respondents in this case had the 1997 Regulations, ACOP and the May 2011 Protocol by which they determined requirements for being a diving supervisor in an HSE diving school, having regard to his/her qualifications. The claimant did not fall into the category of those having qualifications in terms of those Regulations, ACOP and the May 2011 Protocol.

58. It is true that the 1997 Regulations, ACOP and May 2011 Protocol were constant in the period. That however was also the position with the requirements pertaining in the cases of ***Rovenska*** and ***Chaudhary***. That fact did not of itself result in there being conduct extending over a period in those cases and does not, I have concluded, in this case.

59. Further, the reference to *"conduct"* means that, in my view, there requires to be more than a provision. The cases to which Mr Murphie referred me are instances where the practice or policy was illustrated by behaviour on an ongoing basis, or certainly regular behaviour. In the situation of Mr Gabel, there were approaches made and clarification given that Mr Gabel did not meet the criteria to become a diving supervisor in an HSE diving school. Those were, I concluded, rejections much in the same way as had occurred in ***Rovenska*** and ***Chaudhary.***

60. My analysis therefore of the case law, and in particular my reading of ***Chaudhary***, led me to the conclusion that in this case, there had not been conduct extending over a period. The claim has therefore been presented out of time.

Just and equitable extension

61. Having determined that the claim was presented out of time, I then turned to consider whether the claim was to be permitted to proceed. Having missed the period of three months from the date of the act to which the complaint relates, the question is whether the Employment Tribunal thinks it just and equitable that the period for presentation of the claim be extended to permit it to proceed when presented. The onus is on a claimant to persuade the Tribunal of that.

62. As mentioned above, evidence was taken from the claimant as to the circumstances which led him to lodge his claim when he did. He therefore had the opportunity to give evidence about anything which he considered relevant in his attempt to persuade the Tribunal that it was just and equitable for time to be extended to permit his claim to proceed.

63. The following were found to be the relevant and essential facts in relation to the issue of time being extended to enable the claim to proceed.

64. The claimant was employed with the US Navy until 1991. He had been a senior diving instructor and supervisor with them. His retirement was a medical one due to an injury which had affected him. He is disabled in terms of the 2010 Act. His disability is physical impairment rather than a mental impairment. In 1991, his medical retirement from the US Navy was a temporary one. That became a permanent medical retirement in 1996.

65. In 1992, the claimant applied to HSE for a diving certificate. He was informed by HSE that this could not be issued to him as he needed to attend the appropriate school. He involved his MP but it did not prove possible to obtain a certificate at that point.

66. In 2006, a professional diving academy took on the claimant to teach first aid at work courses. In 2007, he commenced giving classroom lectures in diving within that professional diving academy and was a nominated instructor for an underwater welding course.

67. He became self employed in 2007. He delivered first aid at work courses with the professional diving academy, also acting as an instructor in aspects of commercial diving there, together with the underwater welding courses.

68. In July 2009, in addition to the matters just mentioned, the claimant was subcontracted to fulfil the role of an assessor in offshore diving practices. That remained his role until 2010. He has been unemployed since 2011.

69. In March 2012, there was an exchange of correspondence between the claimant and the second respondents, HSE. That related to the possibility that the claimant work as a diving supervisor. A copy of that correspondence appeared at pages 2 to 9 of the bundle.

70. At this point it occurred to the claimant that he had a potential legal claim or ground of action under the 2010 Act. He did not, however, seek any legal advice upon that point in relation to pursuing any potential claim.

71. In that correspondence, as detailed above, HSE expressed their decision to the claimant that a supervisor required to be a suitably qualified diver. They referred to ACOP, paragraph 123. The claimant did not have "*an approved qualification"*.

72. The claimant involved his MP as a result of the view expressed by HSE. The claimant's MP wrote to HSE on 30 May 2012, a copy of that letter appearing at pages 8 and 9 of the bundle.

73. At this time the claimant considered taking legal steps to assert his rights. He considered raising action seeking judicial review. He became aware that

prior to that, he had to proceed to the ombudsman. He took that step. That was in June 2012.

74. The ombudsman did not uphold the claimant's referral to him. The claimant questioned that, and a further investigation was carried out by the ombudsman. The outcome of that was however that the view earlier expressed was adhered to. This decision of the ombudsman upon this second approach was taken in October 2012. The claimant became aware of that outcome at that point.

75. It remained the claimant's view that the position of HSE was inappropriate and wrong. He made contact in 2013 with a firm of solicitors to discuss a potential application for a judicial review. The advice he received, which he believes to have been from an advocate, possibly a QC, was that he should contact HSE and inform them that he met the grandfather clause within the 1997 Regulations and ACOP.

76. This step was taken by the claimant in terms of his letter of 8 November 2014, pages 24 to 26 of the bundle. The reply received to that letter was dated 8 December 2014 and appeared at pages 27 and 28 of the bundle. HSE adhered to their position. These letters are referred to above.

77. The claimant did not believe that the points he had raised had been addressed by HSE. He therefore wrote to them once more. His letter was dated 2 January 2015 and appeared at pages 29 to 31 of the bundle.

78. During this time the claimant took no legal steps to seek to enforce his rights as he saw them or to seek to address the wrong as he saw it. He did not ever proceed with an application for judicial review.

79. In 2013 and 2014, the claimant was seeking legal aid in order to pursue an application for judicial review. He had advice from solicitors and also from an advocate, possibly a QC, around this time. His application for legal aid in connection with possible judicial review was refused, that being intimated by letter of 24 July 2014, a copy of which appeared at page 21 of the bundle.

Although that letter is addressed to the second respondents, the claimant was made aware of the outcome of his application at around the same time. The claimant wrote the letter of 8 November 2014 referred to above, appearing at pages 24 to 26 of the bundle, on the advice of his advocate/QC. The letter of 2 January 2015 referred to above was also written with the benefit of legal advice. The response to that letter from the claimant was issued on 11 February. A copy of it appeared at page 33. The second respondents adhered to their position that the claimant needed approved qualifications in order to become a diving supervisor and that the grandfather clause did not of itself qualify him to become a diving supervisor at an HSE diving school.

80. In February 2015, the claimant's MP wrote to the first respondents. That letter was dated 22 February 2015. A copy of it appears at page 34 of the bundle. In that letter, the claimant's MP says:-

> *"Mr Gabel has a disability, but he points out this does not in any way impact on his ability to act as a supervisor. He believes that HSE are acting in breach of the Equality Act 2010."*

81. The claimant was aware that he had possible rights under the 2010 Act at this point, although he also had been of the view that a claim under its terms might be possible in March 2012 as detailed above.

82. The claimant continued to instruct his solicitors and to receive advice from them around this time. He raised with them the possibility of a claim under the 2010 Act.

83. In his letter of 15 September 2015, the claimant's MP wrote to the Secretary of State for Work and Pensions, the first respondent, setting out the claimant's position. That letter was responded to by a letter dated September of 2015, there being no specific date appearing on it. A copy of that letter of reply appeared at pages 43 and 44. That was the sole correspondence with the first respondents prior to the claimant raising a claim in the Court of Session, as mentioned below.

84. The solicitors for the claimant again wrote to the second respondents, this in terms of their letter of 21 December 2015, a copy of which appeared at pages 47 and 48 of the bundle. They set out the claimant's position once more. A reply was sent to the claimant's solicitors on 24 February 2016. A copy of that reply appeared at pages 49 and 50.

85. Between time of receipt of that letter of 24 February 2016 through to December 2016, the claimant's solicitors were seeking on his behalf advice from an advocate/QC in relation to a potential application for judicial review. The claimant did not see any such advice. In December 2016, the claimant's solicitors withdrew from acting on his behalf. He had been informed by his solicitors that the application for judicial review was timebarred.

86. After the claimant's solicitors withdrew from acting, the claimant considered his own position. He looked more carefully at the 2010 Act. He believed there had been a breach of that Act. His view was that the Court of Session had jurisdiction in relation to what he viewed as *"an offence"* under the Act.

87. The claimant drafted a summons. A copy of that appeared at pages 52 to 64. He presented the summons in mid April 2017.

88. In his research into the 2010 Act prior to preparing and presenting this summons, the claimant had noticed reference to Employment Tribunals and to a three month time limit for claims to be made. His view was that the objections he had taken to what he saw as the wrongful behaviour by the first and second respondents were sufficient to interrupt time running.

89. The claim lodged at the Court of Session was defended. The claimant received the defences to the claim. A copy of the closed record, incorporating therefore those defences, appeared at pages 65 to 81 of the bundle. These defences were received by the claimant around mid May of 2017.

90. In terms of the defences lodged, answer 1 states:

"Explained and averred that proceedings relating to a contravention of the Equality Act 2010 ("EA") must be brought in accordance with Part 9: section 113 (1). So far as material to this action, it divides jurisdiction in Scotland between the sheriff and the employment tribunal. So far as material to this action, a complaint relating to a contravention of section 53 of the EA must be brought in an Employment Tribunal: EA section 113 (1) and 120 (1) (a). It must be brought within three months of the contravention: EA, section 123 (1). The pursuer's averments in this action are of contraventions of section 53 of the EA that took place more than three months before the action was raised. The action is incompetent and timebarred."

91. Notwithstanding this line of defence being set out by the respondents, the claimant regarded his claim lodged in the Court of Session as being raised in the correct forum and as being proper and appropriate. He did not think of proceeding with a claim in the Employment Tribunal whether as a precaution or otherwise.

92. The claim in the Court of Session proceeded to a hearing at which legal arguments were made. Lord Woolman issued a Judgment in the case. A copy of that Judgment appeared at pages 85 to 89 of the bundle. It was issued, as confirmed by the copy interlocutors appearing at page 84 of the bundle, on 10 November 2017. Lord Woolman dismissed the action.

93. In course of his Judgment, Lord Woolman said at paragraph 9 (page 88 of the bundle), having disposed of the action on the basis that jurisdiction lay with the Employment Tribunal:

"9 Question 2: is the claim timebarred? Under section 123 of the 2010 Act, an applicant must bring a claim within three months of the act at which he complains. In this instance, the last date mentioned in the closed record is the last half of July (article 20 of Condescendence). As that is significantly before the three month time period mentioned in section 123, I hold that the

action is timebarred. Mr Gabel has not asked this court to exercise its just and equitable discretion to extend the three month period. I therefore offer no view on that point. It is, in any event, inappropriate that I should do so. If Mr Gabel applies to the Employment Tribunal, it will be a matter for that court to exercise its discretion in that regard."

94. Having received the Judgment from the Court of Session, the claimant presented this claim to the Employment Tribunal some five months thereafter. In that five month period, the claimant sought advice from solicitors. He was told by some solicitors that they did not do work under the legal aid scheme. He ultimately contacted what he refers to as the "Glasgow Law Clinic". That is believed to be a reference to the Strathclyde University Law Clinic.

95. The claimant met with students for advice at the end of November or early December 2017. He was informed by them that they would require to speak to their supervisor regarding his case. He heard from them on 9 February 2018. They stated that they were not in a position to assist him.

96. The claimant contacted his current solicitors in February to obtain advice. They made contact with ACAS on his behalf on 9 March 2018. This was in terms of the Early Conciliation provisions. ACAS issued the certificate under those provisions that day. The claim was then presented to the Employment Tribunal on 5 April 2018.

The issue

97. The issue for the Tribunal was whether the claim, having been determined as having been presented late, would be permitted to proceed. This turned upon whether the Tribunal thought that it was just and equitable for that to occur.

Applicable law

98. The terms of section 123 of the 2010 Act have been set out above insofar as they provide for the possibility of the Tribunal permitting a claim presented

late to proceed. The test is whether the Tribunal thinks that to be just and equitable.

99. There are various relevant cases in this area. The key ones are:

- ***Robertson v Bexley Community Centre T/A Leisure Link 2003 IRLR 434 ("Robertson")***
- ***British Coal Corporation v Keeble & others 1997 IRLR 336 ("Keeble")***
- ***Director of Public Prosecutions & another v Marshall 1998 ICR 518 ("Marshall")***
- ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 EWCA Civ 640 ("Morgan")***

100. These cases confirm that the onus is on the claimant to persuade the Employment Tribunal that it is just and equitable to extend time. They also confirm that discretion being used to extend time is the exception rather than the rule.

101. There is no set formula detailing particular matters which require to be considered by the Tribunal in reaching its view on whether or not to exercise its discretion and allow time to be extended. A Tribunal in general, however, appropriately has regard to the extent of the delay and the reasons for that delay, whether there is any concern as to evidence having been affected by the delay, the extent to which the respondent in the case has cooperated with any requests for information or documentation, the swiftness with which a claimant lodges a claim once they know the facts giving rise to a potential claim, the advice which a claimant may have had during the period and the steps taken by a claimant to obtain such advice. A Tribunal should also have regard to the prejudice suffered on the one hand if the claim is not permitted to proceed and the prejudice suffered on the other hand if it is permitted to proceed.

102. It is wrong slavishly to follow the items just mentioned. The Court of Appeal in ***Morgan*** states at paragraph 19, having highlighted that the Tribunal has an extremely wide discretion:-

> *"That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are:*
> *(a) the length of, and reasons for, the delay and*
> *(b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)"*

103. The case of ***Morgan*** also states that there is no requirement for an Employment Tribunal to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour.

Submissions

Submissions for the claimant

104. Mr Murphie referred to ***Morgan***. He said that in that case, similar to the present case, there had been a lengthy delay in bringing a claim for disability discrimination. It was six years in ***Morgan.*** That case emphasised that the Tribunal had a wide discretion and should consider every significant factor. He highlighted the passage quoted above stating that it was not necessary that a Tribunal had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time.

105. That principle, submitted Mr Murphie, was hugely important for Mr Gabel. The claimant had ultimately found the correct forum for his deeply held concerns. He had however been *"round the houses"* before that. He had corresponded. He had involved MPs. He had been to the Parliamentary Ombudsman. He had proceeded with a Court of Session action. These efforts were misdirected and potentially misguided. He had however sought justice throughout. He had difficulty in navigating around the Scottish legal system

but had been very persistent. There was no evidence, Mr Murphie said, of prejudice to the respondents if the matter was to proceed. On the other hand, there would be severe prejudice to the claimant. His career would be denied to him. It was also of importance that the respondents had known for some time that the claimant was taking the stance which he had.

106. Mr Murphie also highlighted the public sector duty in terms of section 149 of the 2010 Act. It was incumbent on public bodies to have due regard to the need to eliminate discrimination and to advance equality. There was a public interest therefore in allowing this matter to proceed.

Submissions for the respondents

107. Ms Cartwright highlighted the case of ***Marshall.*** That case saw reference to factors as set out above.

108. In this case, the respondents could not be criticised for not cooperating with any requests for information. On the other hand, looking at the factors considered to be relevant, the claimant had fallen down in relation to the promptness with which he had taken action when he knew of that possibility. In 2015, he had been well aware of the respondents' position. Nothing had happened for two years. He had legal advice during that time. The Court of Session action had ultimately proceeded. Notice was given to the claimant in the defences that he had raised the claim in the wrong place. The issue of timebar was also highlighted to him. That was in May of 2017. Almost a year passed before the claim was presented to the Employment Tribunal. The Court of Session decision was issued in November of 2017. It then took four months until the ACAS certificate was sought. Even when it was granted on 9 March 2018, almost a further month passed before the claim was presented.

109. Applying ***Robertson***, the Tribunal should find that the claimant had not discharged the onus on him and that the exception which occurred from time to time of discretion being exercised should not occur.

110. Ms Cartwright rehearsed the facts. The claimant knew of the respondents' position by 19 March 2012. The course he had opted to follow was that of potentially proceeding with judicial review. He applied to the parliamentary ombudsman. The final outcome of the application to the ombudsman was known by October of 2012. Legal advice was then taken through solicitors. Legal aid was apparently sought. That was confirmed as having been refused in July 2014. By November 2014 the claimant had counsel's opinion. That was to write to the respondents setting out its position. The claimant did that on 8 November 2014. He received a reply a month later. A further query was raised by him in January 2015 with the response to that being issued on 11 February 2015. Nothing further was then done by the claimant.

111. It appeared that the claimant had an issue of some sort with his solicitors. They withdrew from acting for him in December 2016.

112. At that point, the claimant's evidence was that he researched the 2010 Act. His claim was raised in the Court of Session in March 2017. The defences lodged made the position plain to the claimant. He insisted on proceeding with that action however. The Judgment issued on 10 November 2017 highlighted both timebar and the jurisdiction of the Employment Tribunal in this matter. The claim was not lodged until over four months later.

113. In examining this history, Ms Cartwright said that the claim had not been lodged as soon as was possible. There was a considerable delay. The evidence was affected. Correspondence had become more difficult to trace. It had not been possible to trace one element of correspondence. One witness had retired.

114. In those circumstances the Tribunal should not exercise its discretion. The claim should not be permitted to proceed.

Discussion and decision

115. In considering the facts and law in this case in order to reach a conclusion as to whether the claim would be permitted to proceed, I was conscious that the

issue for me was whether it was just and equitable that the claim be permitted to proceed rather than whether it was not reasonably practicable for the claimant to present the claim within time.

116. I mention this point at the outset of this passage in the Judgment as there was clearly much involvement by the claimant with his solicitors until around December 2016. Had the test been whether it was or was not reasonably practicable to present the claim within the required period, that would have been a critical and potentially decisive element. That is not so however when the question is determined on the basis of whether it is just and equitable that the claim proceeds.

117. It is certainly the case that substantial time has passed since the grounds of claim occurred. At no time in giving evidence or in correspondence has it been suggested that the claimant allowed time to pass thinking in his own mind that he had the comfort of there being conduct extending over a period due to the 1997 Regulations, ACOP and May 2011 Protocol constituting a policy in place throughout the time.

118. It seems to have been the case that the claimant was guided to an extent by legal advice during the bulk of the time when a claim might potentially have been made. Apparently both solicitors and counsel were of the opinion that judicial review was the course to be followed with questions being asked and pressure being applied by the claimant's MP.

119. It is relevant to note that the claimant's disability involved a physical impairment. It was not said that there was any mental impairment which might have explained delay or confusion on his part.

120. The claimant is clearly an intelligent man. He researched the 2010 Act. Without the benefit of solicitors, he prepared a Court of Session summons which cogently sets out his position. From reading the correspondence into which he entered and which was produced in the bundle, and indeed from hearing his evidence, he is clearly intelligent and indeed articulate.

121. It was accepted by the claimant in evidence that he was aware of the 2010 Act in 2012. He was aware of the possibility of a claim under the 2010 Act at that point.

122. The point at issue is clearly of high significance as far as the claimant is concerned. He has been precluded from working as a diving supervisor at an HSE diving school. That has occurred in circumstances where he maintains there had been indirect discrimination, direct discrimination and discrimination arising from disability. The protected characteristic in relation to each of these elements is disability. It is accepted by the respondents that the provisions of the ACOP are indirectly discriminatory as far as the claimant is concerned. The respondents maintain however that there is a legitimate aim and that the provisions are a proportionate means of achieving that. The merits of both the claim and defence are not determined. There is no element of "likelihood of success" or otherwise which weighs in my determination.

123. Regard is appropriately had by a Tribunal in this situation to prejudice to one party if the claim is permitted to proceed on the one hand or if the claim is not permitted to proceed on the other.

124. Looking to that point, if unsuccessful at this PH the claimant would be precluded from proceeding with the claim to the Employment Tribunal. A potential claim for what might be significant compensation would no longer be possible. If the claim was permitted to proceed, the respondents would face a claim which was brought sometime after the events which give rise to it occurred. Relevant correspondence appears, to some extent at least, to be untraceable. One witness has retired. That said, the case turns upon interpretation of the 1997 Regulations, the rationale for and application of the provisions of those provisions, the May 2011 Protocol and ACOP. It does not turn upon a particular incident or incidents, where the issue might be one of *"who said what"*.

125. The respondents have not been obstructive or lacking in cooperation in dealing with the issues over the piece.

126. I have had regard to all of the above elements in weighing up the issue of whether it is just and equitable to extend time to enable the claim to proceed. I have borne in mine the position in ***Robertson*** as set out above that it is for the claimant to persuade the Tribunal to exercise its discretion. The exercise of discretion by the Tribunal is likely to be the exception rather than the rule, case law confirms. I have also kept in mind ***Morgan***. As I read ***Morgan***, the Court is reminding Employment Tribunals that the test is what is just and equitable in all the circumstances and that the Tribunal should not simply stop and proceed to find that it is not just and equitable to extend time if the view of the Tribunal is that there was no good reason for delay. It may be the case, notwithstanding that, that it is just and equitable to extend time. It all depends upon the facts and circumstances of the case.

127. A significant period of time elapsed when the claimant was alive to the issue and to the possibility of a claim under the 2010 Act. His awareness goes back to 2012. His MP in February 2015 in the letter at page 34 mentions specifically on his behalf that the claimant has a disability and that the claimant believes that the second respondents were acting in breach of the 2010 Act.

128. Despite these elements, and his ready access to legal advice from both his solicitor and counsel, there is no advancement by or on behalf of the claimant of the claim under the 2010 Act. The evidence from the claimant in relation to this matter was in my view somewhat curious. I accept that he may have had advice as to corresponding with the respondents and indeed as to the potential route being that of judicial review. He knew however in October 2012 that correspondence had not taken him anywhere and that the ombudsman had rejected his complaint, having taken the same view when asked to look at the matter once more. The claimant had an awareness of the 2010 Act at this point and was of the view that he had a potential claim under that Act yet he took no steps to instruct such a claim. He raised with his

solicitor his view that the respondents were in breach of the 2010 Act. No claim followed.

129. Legal aid to pursue an application for judicial review was refused in December 2014. That was therefore a closed door at that point. It appears that there was no pressing by the claimant of his advisors to pursue what he understood to be rights and potential remedies open to him in terms of the 2010 Act.

130. Time moved on with apparently little happening until ultimately the claimant's solicitors withdrew from acting on his behalf around December 2016. By this time the claimant had been informed that an application for judicial review was out of time.

131. The claimant carried out some further research reading the 2010 Act and looking at a website with information on its provisions.

132. The Court of Session summons was prepared by the claimant and issued. By mid May of 2017, the claimant was aware that one of the main lines of defence was that the action had been raised in the wrong forum and that a claim was in any event timebarred. He did not take advice upon this point. He argued the case in the Court of Session. His claim was confirmed as having been brought in the wrong forum by the Judgment dated 10 November 2017. Lord Woolman also held that the claim was timebarred.

133. In evidence the claimant said that he thought the decision meant he had three months from it being issued in which to lodge his Employment Tribunal claim. It is entirely unclear to me why the terms of the Judgment would lead him to that view. The passage in the Judgment quoted above does not, in my view, provide any ground for the impression that "*the clock is ticking*". Rather it is quite clear in saying that the action is timebarred. The Judgment also highlights the extension available if it is considered just and equitable for that to be applied.

134. Although Mr Gabel sought advice from Strathclyde University Law Clinic, there was no evidence from him that he had pressed them to give that advice

within a short period. Even on the basis that he said in evidence his view was that he had three months from 10 November in which to bring the claim to the Employment Tribunal, matters lay with the Law Clinic until 9 February when they responded, he said. He had spelt out his grounds of claim in his Court of Sessions summons. The Judgment of Lord Woolman stated in clear terms that the claim ought to have been brought before an Employment Tribunal and was timebarred with discretion existing as to possible extension of that time. The claim to the Employment Tribunal was not however presented until 5 April 2018. I was aware from his evidence that Mr Gabel had been seeking representation. He ultimately obtained that. On 9 March 2018 the claimant notified ACAS in terms of the Early Conciliation procedure. The certificate was issued by ACAS that day. That cleared the way to an Employment Tribunal claim being presented. It took however until 5 April 2018 for the claim to be presented to the Employment Tribunal.

135. I was very conscious of ensuring that insofar as there might potentially be *"blame"* attached to advisors either for delay or for the line of *"attack"* pursued by the claimant, I was not holding the claimant at fault for those elements.

136. Weighing all the facts and circumstances however and having regard to the matters which are relevant to the decision I have to make and which are clarified through the cases referred to above, and applying the principles which emerge from case law, I concluded, albeit with a degree of hesitation, that it was not just and equitable to extend the time within which the claim could be brought. The history to the matter and the time which has passed without any relevant claim being made notwithstanding awareness of the provisions and the rights available to him, led me to refuse Mr Gabel's application to extend time.

137. The claim cannot therefore proceed in those circumstances, being timebarred.

Employment Judge: Robert Gall
Date of Judgment: 09 October 2018
Entered in register: 11 October 2018
and copied to parties