EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4112768/18 Held at Aberdeen on 1 February 2019

Employment Judge: Mr N M Hosie (sitting alone)

Mr Abu Mamun	Claimant In Person:
Maritime and Coastguard Agency	Respondent Represented by: Ms A Hunter – Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

(1) the unfair dismissal claim is dismissed; and

(2) the Tribunal has jurisdiction to consider the discrimination claim.

REASONS

Introduction

1. Mr Mamun claimed he was unfairly dismissed and that he had suffered discrimination on the grounds of his race and religion and belief. The claim was denied in its entirety by the respondent ("MCA") and its solicitor also took

the preliminary point that the claim was time-barred. The case came before me, therefore, by way of a Preliminary Hearing to consider and determine the time-bar issue.

Unfair Dismissal Claim

2. To bring a "standard" unfair dismissal claim, an employee requires to have two years' continuous service. Mr Mamun accepted at the Preliminary Hearing that he had been employed by the respondent for less than two years. I advised him, therefore, that the Tribunal did not have jurisdiction to consider his unfair dismissal complaint and he agreed that it should be dismissed, for want of jurisdiction.

Time-Bar

The Evidence

3. So far as the remaining discrimination claim was concerned, I heard evidence from the claimant in relation to the time-bar issue. A joint bundle of documentary productions was lodged ("P") which included the claimant's Chronology (P32-33).

The Facts

4. Helpfully, in advance of the Hearing the parties had prepared an Agreed Statement of Facts, on the basis of which, the claimant's evidence and the documentary productions, I was able to make the following findings in fact, relevant to the time-bar issue with which I was concerned.

5. The claimant commenced employment with the respondent on 12 April 2016.

6. He was employed as a Grade MS1 Marine Surveyor. He was based at the respondent's Aberdeen office.

7. The claimant is a Bangladeshi National. He moved to the UK on or about 11 April 2016. At that time, he did not have a UK driving licence. He had a Bangladeshi driving licence.

8. The Driver Authorisation Form submitted by the claimant was approved by his line manager. The purpose of the Form is to authorise the employee to drive on official business. The claimant's Bangladeshi driving licence, valid until 9 November 2025, and his International Driving Permit, valid until 14 May 2017 were attached. The Form was duly signed off on 19 March 2017.

9. On 16 May 2017, the claimant was asked by his line manager to travel to Shetland. He was there to carry out inspections of a number of fishing vessels. In order to carry out his duties, the claimant was driving a hire car.

10. On 19 May 2017 around 5.30pm, the claimant was driving to the airport. He was involved in a car accident.

11. The claimant was out of the office on extended leave from 6 June until 15 July 2017.

12. The claimant obtained a UK provisional driving licence in April 2017.

13. On 15 August 2017 the claimant was suspended on full pay. He was advised that allegations of gross misconduct were being investigated. The allegations against the claimant were:

    (i) driving on MCA time without proper licence and insurance;
    (ii) damaging a hire car while not licensed to drive; and
    (iii) continuing to drive to work while not properly licenced.

The claimant was advised that these allegations may be considered to have brought the Agency's reputation into disrepute and may be found to have breached the Civil Service Code, Agency Values, MCA Driving At Work Policy and various road traffic acts.

14. Ranjiet Vandra, Senior Finance Business Partner, was appointed to carry out the investigation.

15. In October 2017, the claimant obtained a full UK driving licence.

16. On 29 November 2017 an Investigation Meeting took place.

17. Mr Vandra prepared an investigation report, dated 18 January 2018. He concluded that there was a disciplinary case to answer in respect of all allegations, apart from the alleged breach of the Civil Service Code. The Investigation Report highlighted that there were potential mitigating factors which the Decision Officer might wish to consider.

18. The Investigation Report was passed to Glen Richardson, Assistant Director: Business Governance, who was appointed as Decision Officer.

19. On 13 February 2018, the claimant raised a grievance in respect of the investigation report. As the grievance related to the disciplinary process, which had not yet been completed, the respondent decided that it was appropriate to discuss the matters within the grievance at the disciplinary hearing.

20. A disciplinary hearing took place on 19 February 2018. Mr Richardson adjourned the meeting. When the meeting was reconvened, Mr Richardson confirmed his decision in respect of the allegations against the claimant. He decided that the claimant had committed gross misconduct in respect of the allegation of 'continuing to drive to work while not properly licensed'. Mr Richardson confirmed that the claimant was being summarily dismissed for gross misconduct. The decision was confirmed in a letter, dated 26 February 2018 (P.63-66).

21. On 2 March 2018, the claimant raised a complaint that his grievance had not been handled at the disciplinary hearing.

22. On 12 March 2018, the claimant appealed the decision to dismiss him (P.67/68).

23. On 26 April, the Appeal Meeting took place. Julie-Anne Wood, Head of Maritime Operations, heard the Appeal. Following the Appeal Hearing, the claimant submitted a "right up" with details of his position.

24. The claimant's Appeal was not upheld. Ms Wood wrote to the claimant to confirm her decision (P.80/81). Her letter was wrongly dated 9 April 2018. There was a dispute as to the date when the letter was sent. The claimant maintained that it was not sent until 15 May whereas the respondent maintained that it was sent on 11 May. I deal with this conflict below.

The Employment Tribunal Process

25. The claimant gave his evidence at the Preliminary Hearing in a measured, consistent and convincing manner and presented as credible and reliable.

26. So far as the correct date of the Appeal outcome letter was concerned (P.80/81), he maintained that he did not receive it until 15 May, whereas the respondent's position was that it was sent on 11 May. However, the claimant produced a copy of the envelope which contained the Appeal outcome letter and it is dated 14 May (P.82). On the basis of this and the claimant's own evidence, I find in fact that he received the Appeal outcome letter on 15 May which was late as the claimant had been informed that the outcome would be communicated to him "within 5 working days" of the Appeal Meeting on 26 April (P.74). However, this did not have a material bearing on the time-bar issue.

27. On the advice of his trade union, the claimant completed the "Early Conciliation Notification Form" ("the Notification") and tried to send it online to ACAS on 16 May, but he was unable to do so. He telephoned ACAS to inform them of his difficulty. As they could not detect a technical problem, they advised him to try again which he did the next day, on 17 May, again without success (P.53/54).

28. Accordingly, as advised by ACAS, he sent the Notification by post. On 17 May, he went to his local Post Office and arranged for the Form to be sent by Recorded Delivery to ACAS in Nottingham at 12.44pm (P.55).

29. The claimant maintained that he was advised at the Post Office that it would be delivered the following day, and he maintained that it had been as the ACAS office opened at 8am (P.83).

30. However, the respondent's solicitor produced a "Track and Trace" of the "item" (P56-58) which she had instructed. This recorded that the Notification was delivered to ACAS and signed for at 07:44am on Monday 21 May, rather than Friday 18 May, as the claimant maintained.

31. ACAS sent an e-mail to the claimant on 21 May to confirm that the Notification had been received that day (P.85).

32. The ACAS "Early Conciliation Certificate", which was issued on 21 June, also recorded that the Notification had been received on 21 May (P.18).

33. There is no guarantee that a recorded delivery letter will be delivered within 24 hours. Royal Mail does have a "guaranteed next day delivery service", which can be tracked, but it is more expensive. The claimant chose to send the ACAS notification by Recorded Delivery. I was not persuaded that the claimant was advised at the Post Office that the letter would definitely be delivered the following day.

34. I was satisfied, on the evidence, that the EC Notification Form was received by ACAS on Monday 21 May 2018 and I so find, in fact.

Early Conciliation Certificate

35. The Certificate records that it was issued by ACAS on 21 June (P.18). The claimant maintained that he did not receive it until 26 June. He telephoned ACAS that day to ask about the Certificate. He was advised that it had been sent to him by e-mail on 21 June and the ACAS Conciliator forwarded the e-mail which had been sent to him (P.59).

36. The claimant submitted his claim form to the Tribunal and it was received on 25 July 2018.

Advice

37. The claimant had the benefit of trade union advice from around 1 September 2017 after he was suspended, and he had trade union representation at the Investigation, Disciplinary and Appeal Meetings. His trade union was not involved after the Appeal. He took further advice from the CAB and a solicitor thereafter but claimed that he was not advised of time limits.

38. On 15 May 2018, when he was advised that his Appeal had been unsuccessful, he was aware of the three-month time limit for notifying ACAS. He was aware that it ran from the date of dismissal on 19 February. This meant that it had to be received by ACAS no later than 18 May, but he thought that the date of posting was the correct date.

39. He maintained that he was unaware that he had one month to submit his claim form to the Employment Tribunal, from the date of issue of the EC Certificate on 21 June.

Respondent's Submissions

40. The respondent's solicitor submitted that there were two issues to be considered: -

(i) was the claim out of time; and

(ii) if it was, should I exercise my discretion and allow the claim to proceed on the basis that it is "just and equitable" to do so.

41. In support of her submissions the respondent's solicitor referred to the following cases: -

Wall's Meat Co. Ltd v. Khan [1978] IRLR 499
Porter v. Bandridge Ltd [1978] IRLR 271
Palmer & Another v. Southend-On-Sea Borough Council [1984] IRLR 119
London Underground v. Noel [1999] IRLR 621
Consignia Plc v. Sealy [2002] IRLR 624
Apelogun-Gabriels v. London Borough of Lambeth [2002] IRLR 116
Robertson v. Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434
Sodexo Health Care Services Ltd v. Harmer UKEATS/0079/08/BI
Rathakrishnan v. Pizza Express (Restaurants) Ltd [2016] IRLR 278
Abertawe Bro Morgannwg University Local Health Board v. Morgan [2018] IRLR 1050.

42. The claimant does not accept that his claim was out of time. However, his discrimination complaints relate to his dismissal and it was not disputed that the effective date of termination was 19 February 2018.

43. The respondent's solicitor submitted, with reference to the ACAS Certificate (P.18) and the Royal Mail "Track and Trace", (P.56-58) that ACAS received the Notification on 21 May 2018.

44. The Notification required to be "presented" to ACAS within three months of the date of the act complained of, namely the dismissal on 19 February and this meant that it was out of time.

45. The respondent's solicitor submitted, with reference to **Consignia** at para. 31, that "presented" meant the date on which ACAS *received* the form, not the date it was posted.

46. In any event, even if the date of presentation was the date of posting, in terms of **Consignia** the letter would be delivered "in the ordinary course of post" which in the case of first-class post is the "second day after it was posted" (para. 31(4)). Applying that principle, the claim is still out of time as the claimant posted the letter on 17 May and it would not have been deemed to have been received until 19 May, one day late.

47. The respondent's primary position, therefore, was that the claim was out of time.

48. In any event, in terms of Rule 9(3) of the Early Conciliation Rules of Procedure, the ACAS Early Conciliation Certificate, if sent by e-mail is deemed to have been received on the day it was sent.

49. The Certificate in the present case was issued on 21 June (P.18) and sent by e-mail to the claimant on that date (P.59).

50. The respondent's solicitor submitted, therefore, that even if the claimant was unaware of the e-mail, it is deemed to have been received on that date.

51. The claimant then had one month in which to present his claim form to the Employment Tribunal. It was not presented until 25 July 2018. It was therefore out of time.

"Just and Equitable Extension"

52. The respondent's solicitor then went on to address the issue of whether I should exercise my discretion and allow the claim to proceed, although out of time, on the basis that it was "just and equitable" to do so, in terms of s.123 of the Equality Act 2010. She submitted that I should not do so.

53. She reminded me, with reference to **Robertson** at para. 25 that, *"the exercise of discretion is the exception rather than the rule"* and that the onus was on the claimant to establish that the discretion should be exercised and that the exercise of discretion is the exception rather that the rule.

54. She referred to the following passage from the Judgment of the Court of Appeal in **Abertawe** at para. 19: -

"*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).*"

55. She submitted that, in part, the claim relates to a change in the "counter terrorism policy" in June/July 2017. However, the claimant did not complain at the time and the claim form was some ten weeks out of time.

56. The claimant had failed to give any explanation for the delay, apart from maintaining that it was in time; he offered no explanation of why it could not have been submitted earlier, particularly as he knew all the relevant facts required to bring the claim.

Advice

57. The claimant had the benefit of advice from his trade union, the CAB and a solicitor. He does not allege that he was misled by that advice. The

respondent's solicitor submitted that it was not credible that no one told him that he had one month to submit his claim from the date of receipt of the Early Conciliation Certificate.

58. The claimant's position is that he did not know about the one-month time limit. It was submitted that this alleged ignorance was not reasonable. In support of this submission, the respondent's solicitor referred me to the following passage from the Judgment of the EAT in **Sodexo** at para. 25: -

"*25. Had the Tribunal approached this case correctly, it would have gone on to ask itself whether, in the circumstances, the claimant was reasonably ignorant of the time limit in her case being due to expire on 4 March 2008. The only answer to that question was, no. The cause of her ignorance was assumption on her part which was not induced by any advice or information given to her about time limits and which was made in circumstances where she made no enquiries into the matter notwithstanding an awareness of the existence of the three month time limit. There was no basis on which the Tribunal could properly grant the extension she sought.*"

Ongoing Appeal

59. The respondent's solicitor submitted, on the basis of **Apelogun**, that there was no principle that the just and equitable provision could be exercised as a consequence of an ongoing Appeal.

Prejudice

60. It was accepted that were I to dismiss the claim for want of jurisdiction the prejudice to the claimant would be clear: he would be unable to pursue the claim further. However, were I to exercise my discretion and allow the claim to proceed, the respondent would have to continue to defend the claim and this would involve considerable time and expense. The respondent's solicitor submitted that when considering the balance of prejudice, I should have regard to the apparent merits of the claim. In support of her submission, she referred to the Judgment of Judge Peter Clark in **Rathakrishnan** and his view

that, when considering the balance of prejudice, the potential merit of the claim was a relevant consideration.

61. The respondent's solicitor submitted the claim is lacking in specification. The claimant alleges a "cleansing operation" which was "targeted at Bangladeshi Muslims". However, in his submission to the Tribunal, he accepts that the Policy applies to every person, not just Bangladeshi Muslims (P.32-39). It was submitted, that on the face of it, the claim has no merit and there may also be a time-bar point in relation to the complaint of indirect discrimination.

Claimant's Submissions

62. The claimant was unrepresented. His oral submissions at the Hearing were brief. He told me that there was no complaint about the standard of his work, as such and yet he was dismissed summarily. He had raised numerous points at his Appeal, but they went unanswered. He submitted that it was "clear from the body language of the Appeal Manager that she didn't want to uphold his Appeal".

63. However, there was included with the documentary productions, not only his Chronology (P32/33), but also his written submissions on the time-bar point (P34) and the merits of the claim (P36-49) where he referred to documents, ("Exhibits"), he alone had lodged.

Decision

Was the Claim out of Time?

64. The general rule is that claims of work-related discrimination under the Equality Act 2010 ("the 2010 Act") must be presented to the Employment Tribunal within the period of three months starting with the date of the act complained of (s.123(1)(a)).

65. However, the Early Conciliation Regulations 2014 provide for the time limits for bringing relevant proceedings to be extended. In short, the clock stops running when ACAS receives the EC Notification Form and starts to run again the day after the claimant receives the EC Certificate. The claimant then has a further one month from the date of receipt of the EC Certificate to present the claim.

66. In the present case the "clock started to run" on 19 February 2018 when the claimant was dismissed summarily. This meant that the EC Notification had to be received by ACAS by no later than 18 May 2018.

67. I found in fact that the Notification was not received by ACAS until 21 May 2018. I was satisfied that the submissions by the respondent's solicitor in this regard were well-founded. It is the date of receipt by ACAS which is significant and, in any event, even if the Notification is posted, as it was in this case on 17 May, the case law is clear that the calculation date is two days thereafter which meant that as the claimant posted the Notification Form on 17 May it would still have been out of time.

68. The EC Certificate narrates that the Notification was received on 21 May 2018. This was consistent with the "Track and Trace" which the respondent's solicitor instructed (P.56-58) and of course, although the claimant posted the Notification on 17 May there was no guarantee that it would be delivered the following day.

69. On that basis alone, therefore, I was satisfied that the claim was out of time.

70. In any event, the claimant had one month from the date of issue of the Certificate to present his claim. Despite the claimant's evidence that he did not receive the e-mail from ACAS, I was satisfied that it was sent to him by e-mail on 21 June (P.59). It is clear from Rule 9 of the EC Rules of Procedure that an EC Certificate *"will be deemed received – if sent by e-mail, on the day it is sent".*

71. The claim was also out of time, therefore, for that reason.

"Just and Equitable Extension"

72. The remaining issue for me, therefore, was whether I should exercise my discretion to extend the time limit on the basis that it was "just and equitable" to do so, in terms of s.123(1)(b) of the 2010 Act.

73. The respondent's solicitor referred me to the relevant case law.

74. I also found the guidance in **British Coal Corporation v. Keeble & Others [1997] IRLR 336** to be helpful. In that case, the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33 of the Limitation Act 1980. That section deals with the exercise of discretion in Civil Courts in personal injury cases and requires the Court to consider various factors.

Prejudice

75. When considering the balance of prejudice, were I to exercise my discretion and allow the claim to proceed the prejudice to the respondent would be that it would have to defend the claim and incur further expense and I was mindful that the claim would appear to be lacking specification and will require to be

amended. However, the claimant would lose his right of action completely, as there will be no other remedy open to him. In my view the balance of prejudice favoured the claimant.

Length of Time

76. The claim was several weeks out of time. However, with reference to **Abertawe**, I was of the view that this would not affect the cogency of the evidence and that it would still be possible to have a "fair trial". There had already been a full investigation during the disciplinary process.

Merits of the Claim

77. I accepted, with reference to **Rathakrishnan**, that this was a relevant consideration. However, I was hesitant, given the nature of the claim, to express any view on the likely outcome, based solely on the pleadings to date and bearing in mind that the claimant is not represented. While I was mindful that the claim is lacking in specification, there was included with the documentary productions the claimant's written "submissions" which were extensive (P36-49). Also, the case law on discrimination claims makes it clear that such cases are "fact sensitive" meaning that in most cases the merits can only be properly assessed and determined by hearing evidence and will only be struck out as having no reasonable prospects of success, on the basis of the written pleadings alone, prior to a Final Hearing, in exceptional cases.

Conduct of the Claimant

78. In my view, this was an important factor in the exercise of my discretion. The claimant presented as entirely credible and reliable when he gave evidence about his endeavours to initiate the claim. He was by no means inactive or casual. He was proactive and was clearly trying to do his best. He has no

experience of Employment Tribunal proceedings. Some latitude must therefore be afforded to him, having regard to the "overriding objective" in the Rules of Procedure.

79. The claimant was aware of the three-month time limit and he did try to submit the ACAS Notification online at first on 17 May, within the time limit (P.53/54) but was unable to do so. There was no suggestion that he was at fault. He then telephoned ACAS and was advised that he should try to submit the Notification online again which he did the following day, still within the time limit but again unfortunately, without success. The following day, he arranged for the Notification to be sent by first class post in the belief that it would be received by ACAS the following day. However, there was no guarantee. He was mistaken and could have ensured "next day delivery" by paying more, but he thought he was in time as he had posted the Notification within the time limit.

80. I accepted his evidence that he did not receive the ACAS Certificate until 26 June (although it is deemed to have been received by him on 21 June). He still had sufficient time to present his claim, but he failed to do so. However, I accepted his evidence that he was not aware that he had one month in which to present his claim. That said, he could have discovered this by reasonable enquiry.

Advice

81. The claimant did have the benefit of advice from his trade union, the CAB and a solicitor and I had regard to this in arriving at my view.

82. I was also mindful, as the respondent's solicitor drew to my attention the EAT made it clear in **Robertson** that the exercise of the just and equitable discretion *"is the exception rather than the rule*". However, **Robertson** also makes it clear that Tribunals have a wide discretion to extend the time limit

and the just and equitable escape clause is wider than that relating to unfair dismissal claims which require a claimant who has submitted a claim form out of time to show that it was not "reasonably practicable" to comply with the normal time limit.

83. The decision was a narrow one, but in all the circumstances and having regard in particular to the claimant's proactivity, his unsuccessful endeavours to present his claim in time by which time he was not represented, the nature of the claim, and my view that the delay would not affect the cogency of the evidence, I decided it would be just and equitable to exercise my discretion and allow the discrimination claim to proceed, although out of time. Accordingly, the Tribunal does have jurisdiction to consider the claim.

Employment Judge: **Nicol Hosie**
Date of Judgment: **15 February 2019**
Entered in the Register **18 February 2019**
And Copied to Parties: