Case No: 2300849/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
sitting alone

BETWEEN:

Mr A Johnson

Claimant

and

Mr V Latchman

Respondent

ON: **10 January 2019**

Appearances:
For the Claimant: **Mr H Sheehan, Counsel**
For the Respondent: **Mr R Bhatt, Counsel**

JUDGMENT & COSTS ORDER

1. The claims of disability discrimination that had crystallised on 10 November 2016 were submitted out of time but it is just and equitable to extend time such that they may proceed.

2. The claimant is ordered to pay the sum of £500 to the respondent in respect of costs incurred by the respondent by the claimant's unreasonable conduct of part of the proceedings.

REASONS

1. This matter was listed for a preliminary hearing to deal with a variety of issues arising out of the claimant's original claims for unfair dismissal and disability discrimination. Since then the matters have narrowed following the withdrawal by the claimant of his unfair dismissal claim and the respondent's decision not to pursue some of his earlier applications. The remaining issues for me to consider are:

a. whether the claims of disability discrimination were submitted in time; and
b. the respondent's application for costs.

2. I spent some time discussing with Counsel the best way to proceed in respect of the time argument given that the claim of discrimination arising from disability (the treatment complained of being dismissal) has a clear date of crystallisation whereas the crystallisation of the claim that the respondent breached his duty to make reasonable adjustments is less clear. The claimant says there was a continuing practice from around November 2015 through to dismissal and therefore time started to run then but the respondent says there was not, or may not have been, a continuing act. In order to determine whether there was a continuing act much wider evidence would have to be heard.

3. Agreement was reached that I will decide on this occasion whether any of the claims that had crystallised on 10 November 2016 (whether arising from or reasonable adjustments) have been submitted in time and if not, whether time should be extended in the claimant's favour. It was further agreed that if any claims proceed beyond today then it will be open to the Tribunal dealing with the liability hearing to consider, with the benefit of hearing all the evidence, any remaining time issues in respect of any claims that had crystallised before that date (e.g. isolated acts).

Evidence

4. I heard evidence from the claimant and was referred to the relevant parts of two written witness statements he had prepared. The claimant had to leave the hearing by 1pm due to a medical appointment but thereafter we dealt only with submissions.

5. I have no doubt that the claimant was seeking to give his evidence in an open, honest and helpful way. He was, however, inconsistent in a number of respects and his oral evidence on occasion varied from his written statements. He also added significant and very relevant detail in his oral evidence that was missing from his written statements. I explain my findings in these respects below.

6. Full written and oral submissions were made by both parties and I had the benefit of an agreed bundle.

Relevant Law

7. <u>Time</u>

8. Any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the 2010 Act). Where the alleged discriminatory act is one of the failure to act, sections 123(3) & (4) provide that the failure occurs when the person in question decided on it and in the absence of evidence to the contrary, that

failure is taken to occur when that person does something inconsistent with doing the act, or otherwise on expiry of the period in which they might reasonably have been expected to do it.

9. It is clear that the burden is on the claimant to convince the Tribunal that the discretion should be exercised (Robertson v Bexley Community Centre [2003] IRLR 434) and that the Tribunal has a very wide discretion in determining whether to do so. It is entitled to consider anything that it considers relevant subject however to the principle that time limits are exercised strictly in employment cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so.

10. The Court of Appeal in Chief Constable of Lincolnshire Police v Caston ([2010] IRLR 327) has confirmed that when considering whether to exercise this discretion, Tribunals should adopt as a checklist the factors mentioned at section 33 of the Limitation Act 1980. Namely, the balance of prejudice together with all the circumstances of the case including:
    a. the length of and reasons for the delay;
    b. the extent to which the cogency of the evidence is likely to be affected by the delay;
    c. the extent to which the party sued had cooperated with any requests for information;
    d. the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and
    e. the steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action.

11. If a claimant argues that he was ignorant of his right to bring a complaint, the Tribunal has to consider whether it was reasonable for him to have been ignorant and to have remained so throughout the primary time limit (Perth and Kinross Council v Townsley EATS 0010/10)

12. There is also authority, albeit in the context of an extension of time for an unfair dismissal claim, that when considering compliance with the primary time limit one has to remember that the claimant has the entirety of the three months in order to submit their claim (ESSO Petroleum v Shultz [1999] ICR 1202, CA).

13. <u>Costs</u>

14. Costs do not follow the event in Tribunal proceedings and an award of costs is the exception and not the rule (Lord Justice Mummery in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78).

15. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013:

1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success.

16. The Court of Appeal held in Yerrakalva that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

17. The Tribunal is also assisted by the guidance note on costs attached to the Presidential Guidance on case management (as updated in 2018). This emphasises that awarding costs is not the norm in the Tribunal and that each case will turn on its own facts. Examples from decided cases include that it could be unreasonable where a party has based the claim or defence on something which is untrue. That is not the same as something which they have simply failed to prove. Nor does it mean something they reasonably misunderstood.

Findings of Fact

18. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.

19. The claimant says that he commenced employment with the respondent personally, a Director of Miragetek Global Resources Ltd ('the company'), in April 2014. The company is a very small employer with three employees.

20. The claimant is an accountant and consequently has an understanding of certain legal concepts including the difference between a director and a company together with the importance, albeit in other disciplines, of meeting deadlines and time limits. He did accept in his evidence that he has a general awareness and understanding of limitation periods but this was by reference to, for example, consumer disputes in the County Court for which he believed there was a seven-year limitation period. Accordingly he felt that he had, in his words, a wide berth in relation to his employment matters.

21. Later in 2014 he was diagnosed with polycystic kidney disease and commenced nightly dialysis which continues to date. If the dialysis works properly then he can function fully. If it is not, however, its impact ranges from at the very least disrupted sleep (as an alarm sounds and he has to contact a company in America for advice together with the resulting worry) to more serious consequences requiring hospitalisation.

22. The claimant was dismissed on 10 November 2016. His evidence as to when he first took advice regarding his employment rights was inconsistent. This was complicated by the fact that he gave much more detail in his oral evidence than in his two written witness statements, the second of which was prepared with the assistance of solicitors.

23. On balance I form the view that the claimant took no advice before he went on a pre-booked 3-week holiday to Jamaica on 24 November 2016.

24. Unfortunately whilst the claimant was away he became ill. On his return to this country he was immediately admitted to hospital where, initially at least, he was in intensive care. He was discharged on 30 December 2016 but was still clearly unwell and was re-admitted to hospital from 11 to 17 January 2019.

25. About a week after that the claimant started to take advice regarding his employment position. He spoke first by telephone to a generalist adviser at the Citizens' Advice Bureau. At some point he was advised to contact ACAS which he did.

26. The claimant's evidence was that he cannot recollect ACAS giving him any advice about time limits or the fact of early conciliation but that they gave him a pro forma letter before action to send to the respondent with a 28-day deadline for a response. He followed that advice and the letter was sent on 25 January 2017. The claimant says he sent it recorded delivery but was given no receipt by the Post Office. The respondent's position is that that letter was not received.

27. The 28-day deadline given in that letter expired on 22 February 2017. In the meantime, the primary limitation period in respect of any claims he had arising on 10 November 2016 expired on 9 February 2017. Unfortunately the claimant was again admitted to hospital from 13 to 15 February 2017 and 2 to 7 March 2017.

28. In support of his case that ACAS did not tell him about time limits, the claimant says that it would not make sense for them to have done so but also advise him to send a letter before action with a deadline for response that would expire after the primary time limit,

29. I find it highly unlikely in the extreme that in a conversation between an individual and ACAS about an employment dispute, ACAS would not mention the three-month time limit and particularly would not mention early conciliation. I also find it highly unlikely that ACAS would give a pro forma letter to an individual. That seems much more likely to have been done by the CAB. For that reason I asked the claimant if he was perhaps confused and that the conversations he ascribes to ACAS might in fact have been with the CAB. He said, however, that he was 'absolutely sure' that those conversations were with ACAS.

30. On balance for the reasons I have said, I find that whoever gave that advice to the claimant it was not ACAS but I find that from shortly before 25 January 2017 the claimant was attempting to get appropriate advice from somewhere and was following it.

31. In any event, the claimant said that after the 28-day deadline had expired he went back to ACAS and they advised him to issue a claim. Again he says they gave him no advice about nor mentioned early conciliation or time

limits. I simply cannot accept that ACAS would have a conversation with an individual about issuing a Tribunal claim without mentioning the need for an early conciliation process.

32. The claimant completed a claim form in manuscript, claiming unfair dismissal and disability discrimination. He delivered it by hand to this office on 27 March 2017. At box 2.3 he said that did not have an early conciliation certificate number and that his complaint was one of unfair dismissal with an application for interim relief. This was plainly incorrect on the face of the form and, given the guidance that appears on the form about the need for a certificate, should have been obvious to the claimant.

33. The claim was consequently rejected together with the standard covering letter advising of the need to obtain an early conciliation certificate.

34. The claimant subsequently provided a certificate which records the date of receipt of notification as 3 April 2017, the same date as the issue of the certificate itself. I am of the view that if ACAS had been contacted by the claimant before that date they would have correctly recorded that on the certificate. The rejection of claim was reconsidered and the claim was allowed to proceed with an issue date of 5 April 2017.

35. At a preliminary hearing on 20 July 2017, which the claimant attended in person, a further preliminary hearing was listed for 1 December 2017 to deal with time and other issues including whether the claimant was an employee or self-employed. The claimant was ordered to provide a witness statement no later than 27 October 2017 setting out, inter alia, why he said he was an employee of the respondent. EJ Martin encouraged the claimant to seek legal advice and suggested he contacted the CAB, a law centre or the Free Representation Unit.

36. The claimant submitted a witness statement on 23 October 2017. Paragraph 14 of that statement said:

> 'It is suggested that my case should be thrown out on the basis that I was not actually employed by [the company]. In retrospect it is clear that Mr Latchman was using me as an employee of the Company by giving me the title of Accounts manager for the company, providing the desk, computer and office to carry out that function. He was not paying me holiday pay and other benefits of being an employee but treating me exactly as if I was one. Also I was never given any written or verbal notice of whom I was actually employed by, resulting in my application being non-specific.'

The meaning of that paragraph is unclear.

37. The claimant, for reasons that do not need reciting now and which are now accepted as respondent as reasonable, did not attend that hearing in December and accordingly the Judgment for the respondent issued at that hearing was later reconsidered (unopposed by the respondent), vacated and today's hearing listed. The respondent had however instructed Mr Bhatt to attend that hearing and he had, quite properly, prepared lengthy submissions dealing with the not always straightforward (page 40) issues that were due to be considered. One issue in particular concerned section

18A of the Employment Tribunals Act 1996 and the implications of the claimant commencing proceedings against what the respondent said was the wrong respondent.

38. The claimant first took legal advice between April and July 2018 once he knew he would have funds available from the sale of his home. (Solicitors came on the record for the claimant on 20 July 2018.)

Application for Costs

39. On 5 February 2018 (page 44) the respondent made an application for costs. He relied upon the claims being out of time, being made against the wrong respondent and the claimant being self-employed. A statement of the costs sought, (£2,875 - inclusive of disbursements but excluding VAT) was set out in a letter dated 7 August 2018.

40. The withdrawal of the unfair dismissal claim referred to above was done by letter from the claimant's solicitors dated 25 September 2018. (page 80)

41. The respondent's position on costs, in summary, is that the claimant knew full well that he was employed by the company and not the respondent personally and therefore he ought to have known that any unfair dismissal claim should be brought against the company. Naming the respondent as personally liable meant the case spiralled into other preliminary issues thus extending the previous hearing and incurring significant additional cost for the respondent. Further, the claimant was specifically advised to seek further advice by Judge Martin in July 2017 but he did not withdraw the unfair dismissal claim until September 2018.

42. Submissions for the claimant were that as a litigant in person until July 2018 he should not be judged by the same high standards as professionally represented parties. Further, the position regarding his employment was not clear and it was conceivable that the respondent had retained the claimant personally and that his claim of unfair dismissal could have survived the various preliminary issues raised by the respondent. It was not unreasonable to not immediately withdraw that claim, he waited until he had professional legal advice and that parties are to be encouraged to limit their claims to those likely to win. Finally, the respondent's costs were incurred in advance of the December 2017 hearing so there was no causal link between them and the claimant's delay in withdrawing. Overall, it is said that the claimant did not act unreasonably.

Conclusions

43. Time: On balance I find that although the claim issued on 5 April 2017 was plainly out of time in respect of claims that had crystallised on 10 November 2016, it is just and equitable to extend the limitation period so as to bring the claim in time.

44. There were undoubtedly periods between the claimant's dismissal and his eventual successful presentation of his claim when the claimant could have

taken effective action earlier than he did – in particular the two weeks at the very beginning of the limitation period before he went on holiday and the last three weeks. Otherwise, although there were periods when he was out of hospital, he was undoubtedly unwell and/or in recovery for significant parts of those periods. It is not possible to put an exact figure on it but I conclude that the vast majority of the limitation period found the claimant either out of the country, in hospital or recovering.

45. In that last 3-week period it is clear that the claimant did seek advice. He went to the CAB at least once and perhaps more. He took steps with regard to his claim by sending a detailed letter before action within the primary period.

46. After that primary period the claimant was hospitalised twice but again took advice, albeit that it is not clear as to the robustness of that advice, and by 27 March 2017 had made his first attempt to submit a claim. When that claim was rejected the claimant acted promptly in remedying the issue.

47. This is clearly not a case where the claimant has sat on his hands notwithstanding his serious medical condition.

48. I am very conscious of the impact of the significant delay between the events in question and the likely future hearing on the cogency of the evidence. Much of that delay, however, has occurred after successful presentation of the claim on 5 April 2017 and therefore is not relevant to the exercise of this discretion. As at that date the events were still relatively recent. Further, the claimant had set out his complaints in detail in his letter to the respondent on 25 January 2017, and the respondent has therefore had the opportunity since then to keep any relevant documents and to record his own recollection of relevant events.

49. As noted above, this decision does not bind any future Tribunal in respect of whether time should be extended in respect of complaints regarding acts prior to 10 November 2016.

50. Costs: I am mindful that the claimant is a litigant in person but he is an accountant with an understanding of the legal concept of personality. Further, he was expressly on notice from the July 2017 hearing that the identity of the respondent was in issue and was advised to take advice and directed to possible sources of free advice. Notwithstanding that, the claimant did not clarify his position with certainty until the unfair dismissal claim was withdrawn in September 2018. Accordingly the respondent incurred wasted costs specifically in respect of that issue in preparation for the December 2017 hearing and thereafter until September 2018. The claimant had the opportunity to clarify his position between July and December 2017 and he did not do so even in his October 2017 statement. I conclude that this was unreasonable behaviour by the claimant in the way he conducted that part of the proceedings and it is appropriate to make an Order for costs in the respondent's favour in that respect.

51. I do not consider it reasonable to award all the costs sought as in December 2017 time and merits were still in issue and I conclude that it is likely that there would still have been a hearing (and therefore brief fees incurred). The respondent could have avoided incurring a proportion of the costs sought however if the claimant had acted reasonably in clarifying his claim. The statement of costs is not, unsurprisingly, broken down by reference to each issue and I therefore adopt a pragmatic approach of summarily assessing the wasted costs attributable to the claimant's unreasonable failure to clarify at **£500.**

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Employment Judge K Andrews
Date: 24 January 2019