EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Martin Dove	v	**The Chief Constable of Thames Valley Police**

PRELIMINARY HEARING

Heard at: Watford **On:** 11 December 2018

Before: Employment Judge Bedeau

Appearances:
For the Claimant: In person
For the Respondents: Miss A Meredith – Counsel

RESERVED REASONS

JUDGMENT having been given orally and sent to the parties on 17 January 2019 and the respondent having requested written reasons on 22 January 2019, reasons are hereby given.

1. By a claim form presented to the Tribunal on 6 July 2017, the claimant made general claims of disability discrimination.

2. In the response, presented to the Tribunal on 14 September 2017, the respondent asserted that the claim form was presented out of time, therefore, the Tribunal does not have jurisdiction to hear and determine the claims. Further, the claimant was dismissed for unsatisfactory performance following the application of its procedure and his appeal to the Police Appeal Tribunal was unsuccessful.

The Issues

3. At the preliminary hearing held in private on 17 May 2018, Employment Judge Vowles, clarified the claims as discrimination arising in consequence of disability, section 15, and failure to make reasonable adjustments, section 20, Equality Act 2010. The Judge gave orders that the claimant should provide further information in respect of his claims. In addition, he ruled that "no other claims or issues will be considered without permission of the Tribunal." The case was listed for a full merits hearing on 18-22 March 2019 before a full Tribunal at Reading.

4. The Judge also set the case down for a further preliminary hearing, in public, today, for a judge to hear and determine the following issues:

    4.1 Whether the claimant was, at all material times, a disabled person within the meaning of section 6, Equality Act 2010;

    4.2 Whether any clarification of the claims is necessary; and

    4.3 Any applications by either party.

5. On 11 September 2018, the respondent's representatives applied to add a further issue to be heard and determined, namely that the claims to be struck out as the claim form had been presented outside of the limitation period. Alternatively, the claims were scandalous, vexatious or have no reasonable prospect of success. Further and/or alternatively, they have little reasonable prospect of success and a deposit should be ordered.

6. On 3 October 2018, Employment Judge Gumbiti-Zimuto ordered that that issue should be considered at this preliminary hearing.

7. EJ Vowles, in the case management orders, stated:

> *"The respondent's applications for strike out of the claim, or for a deposit order were refused. Neither order was justified in the present circumstances."*

8. Ms Meredith, counsel on behalf of the respondent, submitted, correctly, that the learned judge was dealing with case management matters in private, therefore, the tribunal had no power to hear and determine a strike out application. Before me the claimant referred the judge's ruling and contended that the strike out application had already been considered by the judge. I noted, however, that the application in respect of the out of time issue was made after the preliminary hearing and that it was specifically ordered by EJ Gumbiti-Zimuto, that it be considered at this hearing.

The evidence

9. I heard evidence from the claimant in relation out of time matter. No oral evidence was called on behalf of the respondent. In addition, I was referred to a bundle of documents.

Findings of Fact

10. The respondent is the police force for the Thames Valley area. In relation to unsatisfactory performance, it applies the Police (Performance) Regulations 2012 to police officers which also covers attendance.

11. The claimant commenced work for the respondent on 30 April 1990 as a police constable. There is no dispute that he has been the subject of the respondent's Unsatisfactory Performance and Attendance Procedure. He was on sick leave from June and returned to work on 4 September 2014 when he was placed on recuperative duties with the aim of facilitating his return to full-time service. He was again on sick leave from 3 September 2015, returning to work on 14 September 2016. During that time, he was put on a Stage 1 Unsatisfactory Performance and Attendance. A meeting took place on 10 November 2015, when he was issued with a Written Improvement Notice. He was later placed on stage 2 of the procedure on 3 February 2016 for his absence from work due to sickness. He could have appealed Stages 1 and 2 of the procedure but he did not do so.

12. On 12 January 2016, he applied for ill-health retirement, but it was not approved by the medical practitioner. As the claimant remained on sick leave, his absence meant that he was now subject to Stage 3 of the procedure with the possibility that his engagement with the respondent may be terminated. The Stage 3 meeting was held on 14 October 2016, at which he attended together with a Police Federation representative. He informed the panel that a biopsy revealed a cancerous lump in his bladder which was removed on 23 September 2016 and that no further treatment was necessary. He stated that he would be returning to work within 2 weeks on reduced hours which would steadily increase to enable him to engage in full-time duties within 3 months following his return. The panel, consequently, extended the final Written Improvement Notice and scheduled a review meeting on 12 February 2017. He returned to work on 14 November 2016 on reduced hours working 5 hours a day.

13. On 9 January 2017, he attended a Stage 3 review meeting as he had failed to satisfy the final Written Improvement Notice requirements. Working 4-5 hours a day meant that he was largely undeployable. He also failed to produce medical evidence to substantiate his medical condition, namely the cancerous lump in his bladder that was removed. He put forward a reasonable adjustments plan.

14. On 16 January 2017, the Stage 3 meeting was reconvened. The claimant attended accompanied by a Federation representative. The claimant discussed part-time work and medical retirement. His failure to return to normal working hours, despite his earlier reassurances, led the panel to conclude that his attendance was unsatisfactory and that he should be dismissed on 28 days' notice. His last day at work being 12 February 2017.

15. I was satisfied that throughout the internal Unsatisfactory Performance and Attendance Procedure, the claimant was represented by a Police Federation representative.

16. On 19 December 2016, he lodged a grievance citing that his diagnoses of sleep apnoea, bladder cancer, gout, on-going abdomen and kidney pain, namely

diverticulosis, meant that he was a disabled person and entitled to reasonable adjustments. His grievance comprised of 6 pages was closely typed text in which he suggested that the respondent should consider flexible working.

17. The outcome of the grievance process was communicated to him on 12 January 2017. It was not found that he had been discriminated against and that reasonable adjustments were made in line with the limited medical evidence he disclosed.

18. In cross-examination he said that he returned to work in November 2016 and was engaged in e-learning on the respondent's computer system. One of the topics, diversity, attracted his attention and he decided to engage in further research when he discovered information relevant to the treatment of a disabled person and the term *"reasonable adjustments".* He considered himself a disabled person who had been discriminated against. He had a discussion with a Police Federation representative about putting in a grievance and on the 19 December 2016, he drafted and submitted his grievance. He stated during his research he read about Employment Tribunals and time limits.

19. He was taken to his medical records and he acknowledged that from March 2017 to October 2017, he did not have significant health issues (pages 286-287 of the joint bundle).

20. On 26 January 2017, he submitted his appeal against the decision to terminate his engagement (pages 224-225).

21. On 10 February 2017, he emailed his Federation representative setting out the outcome of his research into reasonable adjustments (pages 475-475).

22. On 6 April 2017, he submitted his grounds of appeal against the decision to terminate his engagement. This document which is closely typed, covers 5 pages (pages 226-230).

23. On 4 June 2017, the Police Appeals Tribunal, an independent panel, under the auspices of the respondent, issued a preliminary determination stating that there were no compelling reasons why the appeal should succeed (pages 244-254).

24. He said in evidence that the preliminary ruling did not take into account all relevant facts of his case, but he acknowledged that, at the time, it was clear to him that he was unlikely to succeed at the final appeal.

25. On 19 June 2017, he challenged the preliminary determination of the Appeals Tribunal (pages 255-256).

26. On 29 March 2017, he inquired into legal representation through the Police Federation and was told that a solicitor would not be taking on his case in relation to his appeal against the decision to terminate engagement (page 477).

27. He was taken to his doctors' notes and told me that reference to getting a solicitor in the notes was to solicitor to help with his pension entitlements, which I accepted.

28. He did not know who had told him about contacting ACAS, but he contacted ACAS and completed the on-line form. He acknowledged that the form might have stated that before he could present a claim before an Employment Tribunal he had to contact ACAS and engage in conciliation. He told me that either through his initial discussion with ACAS or with the Police Federation, he became aware of the 3 months primary time limit, but I do bear in mind that he was already aware through his research of the time limits.

29. He was questioned on the notes he had written which had the telephone numbers of several organisations, such as Kingston and Richmond Law Centre; Disability Law Service; Civil Legal Advice and the Citizens Advice Bureau. In his notes, under Disability Law Service, he wrote

> *"12 April.*
> *4 May 2017.*
> *Galilee v Commissioner for the Metropolitan Police EAT.*
> *3 weeks 1 day.*
> *4 June – times up*." (pages 479-480)

30. He explained that when he contacted ACAS he was aware of his right to bring a claim to an Employment Tribunal and it was emphasised to him several times, that time was of the essence.

31. His partner had been diagnosed with breast cancer sometime in June 2017 and this added to his depression. Around June or July 2017, he said that he was functioning at 50%.

32. I was anxious to find out from him whether his medical conditions, namely the removal of the cancer in his bladder in October 2016; his depression; carpal tunnel syndrome; diverticulosis; sleep apnoea, and back pain, affected his ability to pursue his claims before an Employment Tribunal, either physically or mentally. All I could elicit from him was that he was not functioning at 100% but at 50% but at the same time was able to articulate his case before the stage 3 panel and present his appeal to the Police Appeals Tribunal. This he did with very little assistance from the Police Federation. Although he was aware of the time limit early on, his primary concern was to achieve a favourable outcome before the Police Appeals Tribunal.

33. I was satisfied that when the ACAS early conciliation certificate was issued on 4 May 2017, he made a note that the early conciliation extension expired on 4 June 2017 and had written *"times up on 4 June 2017"* (page 479).

34. I do not accept, as he asserted, that he had been told by the ACAS conciliator at or around 4 May 2017, that he had 3 months from that date within which to send his claim form. This is inconsistent with his note. It is also inconsistent with his evidence in cross-examination that he was aware of the time limit of 3 months.

Submissions

35. I have considered the oral submissions of the claimant who told me that he has a considerable amount of evidence to establish that he had been discriminated against because of his disabilities. In addition, he has medical evidence to support his contention that he is a disabled person and that the respondent had failed to make reasonable adjustments.

36. He submitted that between November to December 2016, his condition both mentally and physically, had improved and he was progressing at work. Following his termination, he was on anti-depressants. He invited me to accept his argument that the way he had been treated by the respondent was unacceptable and unlawful and that it is just and equitable to extend time.

37. Miss Meredith, counsel on behalf of the respondent, presented a detailed skeleton argument referring to the time limit in section 123(1) Equality Act 2010, and the relevant case law. She emphasised that the Tribunal must exercise its discretion in light of the authorities.

38. I do not propose to repeat her submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

39. Under section 123 Equality Act 2010, a complaint must be presented within three months,

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

40. Time limits are to be applied strictly. The Court of Appeal held that the exercise of the discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the Tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the Claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule and the matter remains one of fact.

41. In the case of Abertawebro Morgannwg University Health Board v Morgan EWCA/Civ/EAT/640, it was held by the Court of Appeal, that the Tribunal has a broad discretion to consider factors, such as the length of and reasons for the delay; whether the delay has prejudiced the respondent; and the prejudice to the claimant.

42. I have taken into account the case of Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR116, Court of Appeal in which it was held that waiting for

the outcome of internal procedures does not normally constitute a sufficient ground for allowing an application to be heard outside of the statutory time limit.

Conclusions

43. In relation to the delay, on 16 January 2017, the claimant was told that he would be dismissed with 28 days' notice. He complains that his dismissal was discriminatory. He notified ACAS on 12 April 2017, 3 days before the expiration of the primary time limit. Early conciliation ended on 4 May 2017, the early conciliation extension of time ended on 4 June 2017. The claim form was presented on 6 July 2017. There was 1 month's delay in presenting the claim form.

44. As previously stated, I was most anxious to ascertain from the claimant whether he was in any inhibited either mentally or physically in pursuing a claim before an Employment Tribunal, but I was not satisfied that he was. He was able to conduct his appeal and liaise with relevant individuals including advice agencies. He was able to research matters on the internet to do with disability and reasonable adjustments. He medication and medical treatment from March to August 2017, was described as unremarkable. I was satisfied that his concern was to achieve a successful outcome before the Police Appeals Tribunal though he was not present. There was no good or compelling reason for the delay having been informed the time limit was due to expire on 4 June 2017. He knew that on the Police Appeals Tribunals preliminary determination on 4 June that it was unlikely that he would be successful at the final hearing. This was confirmed in the outcome on 25 June 2017.

45. He knew about the statutory time limit and the extension of it through conciliation but deliberately decided notwithstanding the advice he had been given from the Police Federation and the information from ACAS that time was due to expire on the 4 June 2017, to wait for the outcome of his appeal.

46. The exercise of my discretion on just and equitable grounds is the exception rather than the rule.

47. In relation to the prejudice to the respondent, it is a publicly funded body and there is likely to be a further preliminary hearing to deal with other matters set down to be determined by Employment Judge Vowles, for example, the issue of disability. That is likely to require at least 1 day and with the current state of listing, this is likely to be some time either in the spring or in the summer of the new year. In addition, the claimant would like to pursue his application to amend by adding further discrimination claims. That would also require more time on the part of the respondent to prepare its case. By the time the case is finally listed it will be some time after the events the claimant is relying on, the most recent of which is likely to be over 2 years ago. This is likely to affect the respondent's witnesses' recollection of events.

48. I accept that in finding against the claimant that it, effectively, would be the end of the matter. I do take into account, that he brought this about himself by failing to accede to the advice and information given to him. He had to present his claim form by 4 June 2017 and decided not to do so.

49. Taking into account all of the above matters into account, the balance falls in favour of the respondent as it would be severely prejudiced were I to allow the claimant to proceed with his claims. Regrettably, I have come to the conclusion that it would not be just and equitable to extend time.

50. The claimant should have issued Employment Tribunal proceedings before the 4 June 2017 while at the same time continuing with his appeal before the Police Appeals Tribunal. If the outcome at the appeal stage was favourable to him, he could then have withdrawn his claim before the Tribunal. If unfavourable, at least his claim would have been presented in time.

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Employment Judge Bedeau
27.02.19
Sent to the parties on:
…12.03.19……
For the Tribunal:
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