EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102907/2018

Held in Glasgow on 28 February 2019

Employment Judge: Robert Gall

Mr S MacKenzie	**Claimant** **Represented by:** **Ms C Maxwell - Friend**
Ferguson Transport (Spean Bridge) Limited T/A Ferguson Transport And Shipping	**Respondent** **Represented by:** **Mr A Strain - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

1) the claim of breach of contract was presented out of time. It was not not reasonably practicable for it to have been presented within the time within which such a claim is to be presented in terms of Article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

2) the claim of discrimination brought in terms of the Equality Act 2010, the protected characteristic having said to be disability was also presented out of time. It is not considered just and equitable to extend time to enable the claim to proceed.

The claims are therefore at an end and are dismissed.

REASONS

E.T. Z4 (WR)

1. This case called for a Preliminary Hearing ("PH") at Glasgow on 28 February 2019. Ms Maxwell, the partner of the claimant, represented him. Mr Strain appeared on behalf of the respondents.

2. Productions were tendered for both parties. A reference to a document lodged on behalf of the claimant is preceded by the letter "C". A reference to a document lodged on behalf of the respondents is preceded by the letter "R". I heard evidence from the claimant and also from Ms Maxwell.

3. The claim brought was one of unfair dismissal and breach of contract. A Preliminary Hearing for case management purposes had been held on 1 February 2019 before Employment Judge Meiklejohn.

4. By Note dated 4 February 2019, Employment Judge Meiklejohn had permitted amendment of the claim so that an additional ground of claim was advanced. Employment Judge Meiklejohn determined that the claim as initially brought could now be relabelled as extending to a claim of discrimination with the protected characteristic being disability. The discriminatory acts were said to have been dismissal and a failure to make reasonable adjustments.

Clarification of the claim

5. Prior to hearing any evidence, I sought clarification of the claim.

6. At the PH on 1 February 2019 and indeed at an earlier PH on 22 October 2018, it had been raised with Ms Maxwell that Mr MacKenzie did not have two years' service. This was of significance as he claimed unfair dismissal. He alleged that his dismissal had been unfair. He did not link it to any of the grounds on which a dismissal might be said to be unfair and which did not require there to have been two years' service for such a claim to be made. In other words, Mr MacKenzie said that his dismissal was unfair. He did not link it to, for example, any whistleblowing on his part. The circumstances of Mr MacKenzie's dismissal would still be of relevance to the Tribunal. This was as he had been permitted, by amendment, to argue that his dismissal was an act of discrimination. Nevertheless, it seemed important to me to

establish whether he made a claim of unfair dismissal under the Employment Rights Act 1996 ("ERA"). If he did, I was keen to understand why it was that he said that such a claim was competent given that he did not have two years of service.

7. After discussion, Ms Maxwell confirmed on behalf of Mr MacKenzie and with his clear agreement, that he did not in fact make a claim of unfair dismissal in terms of ERA.

8. Employment Judge Meiklejohn had summarised what he understood to be the breach of contract claim brought by Mr MacKenzie. This is set out in paragraph 7 of his Note of 4 February 2019. Employment Judge Meiklejohn had said in that paragraph that it would be helpful if Mr MacKenzie could confirm prior to 28 February 2019 that what had been detailed there was a correct statement of the breach of contract claim made or, in the alternative, set out what that claim was. There had, however, been no response by Ms Maxwell or Mr MacKenzie.

9. At this PH, Ms Maxwell confirmed at this point, again with clear agreement from Mr MacKenzie, that the breach of contract claim had indeed been properly understood and set out by Employment Judge Meiklejohn in paragraph 7 of his Note.

10. It was also confirmed by Ms Maxwell, with Mr MacKenzie's agreement, that there was no breach of contract claim in terms of which notice pay was sought. It was accepted that notice pay had been paid by the respondents to Mr MacKenzie.

Other preliminary matters

11. Mr Strain said it was regrettable that the clarification given and noted above had only been given at this PH. He said that the respondents had highlighted that they would potentially seek expenses. He regarded it as appropriate that expenses were sought.

12. I raised with Mr Strain my concern that there had been no prior warning given of any such application being made at this PH. Further, it might be that the issue of costs was a matter considered after the Judgment had been issued following this PH and in light of any decision made. I had a further concern. This was that to make any decision as to expenses, it was almost certainly the case that I would have regard to ability to pay on the part of Mr MacKenzie. Rule 84 of the Employment Tribunals (Constitution & Rules of Procedure) 2013 states that the Tribunal may have regard to ability to pay in deciding whether to make an expenses order and if so in what amount. Given that Mr MacKenzie had no prior notice of this application being made, he would have no vouching readily to hand and indeed might have to take time to prepare a statement of assets and liabilities, it seemed to me.

13. Mr Strain ultimately made no application at this PH for expenses.

14. It was also Mr Strain's position that Employment Judge Meiklejohn had ordered Mr MacKenzie to provide further and better particulars of his claim of disability discrimination. Mr Strain referred to the passage in paragraph 4 of Employment Judge Meiklejohn's Note. That passage reads:

"The alleged acts of discrimination were:

(i) The Respondent's dismissal of the Claimant and;

(ii) The Respondent's failure to make reasonable adjustments by offering the Claimant alternative employment. If the claim survives the next Preliminary Hearing (to consider whether the unfair dismissal and breach of contract are timebarred – this will now include the disability discrimination claims) the Claimant is to provide to the Respondent within 14 days of the Preliminary Hearing Further and Better Particulars of his disability discrimination claims. That Preliminary Hearing is listed for 28 February 2019."

15. It was Mr Strain's position that the claimant had by this passage been ordered to produce further and better particulars within 14 days of 1 February 2019.

16. When I read the paragraph, I raised with Mr Strain my own interpretation of that paragraph. It seemed to me that Employment Judge Meiklejohn was expressly detailing what would happen *"If the claim survives the next Preliminary Hearing."* In other words, he was not ordering at that point that further and better particulars be supplied. Rather, the use of the word *"If"* made it clear to me that the provision of further and better particulars was contingent upon the claim surviving the PH which came before me on 28 February 2019. In my view there had been no Order to produce further and better particulars, as Mr Strain argued.

17. I noted Mr Strain's position that an expenses application might be made, that the claim for breach of contract was misconceived and had no prospects of success and that there was no *prima facie* case of discrimination set out.

18. Mr Strain also submitted that the respondents had no knowledge of disability existing on the part of the claimant. They could not on that basis have discriminated on the grounds of disability.

19. It was Mr Strain's position that what he saw as the absence of substance in the claim made should be weighed by the Tribunal in determining whether it was just and equitable for time to be extended for presentation of the claim in order to enable the claim of discrimination to proceed.

20. The last point mentioned was one discussed to a limited extent with Mr Strain. I took the view however that it was appropriate to hear evidence and then to hear submissions which might or might not include the line of argument Mr Strain had highlighted as to the strength of the case brought, or lack of strength as he saw it.

Facts

21. The following were the relevant and essential facts as admitted or proved.

22. The claimant unfortunately had a seizure around 17 April 2017. He was absent from work in the period after that.

23. By letter of 16 May 2017, the respondents dismissed the claimant.

24. The claimant and his partner consulted a solicitor, Mr Kennedy, in Fort William. They met with him around 17 May 2017. Mr Kennedy then wrote to the respondents on 19 May 2017. A copy of that letter appears at R68.

25. That letter contains the following passages:-

"We consider that your decision to dismiss our client from your employment is discriminatory:-

…

It is unlawful to dismiss an employee because of an underlying disability unless certain procedures are implemented

…

In the circumstances, our client has been advised that he has the basis of a claim against you for unfair dismissal for a discriminatory reason. Claims for unfair dismissal on that basis are actionable irrespective of the length of service of the employee.

…

As indicated above, you do not appear to have fully investigated the possibility of our client returning to work within a reasonable period, nor have you taken any steps to meet and discuss matters with our client prior to your letter of 16 May 2017. These are matters which are likely to be taken into account by an Employment Tribunal in the event of our client making a claim for dismissal on a discriminatory basis."

26. Mr MacKenzie appealed against dismissal. The appeal hearing was scheduled and postponed on various occasions. It proceeded on 12 July 2017. It was finally determined on 19 September 2017, being refused. A further appeal was taken. The hearing on that appeal took place on 14 November 2017. This appeal was also unsuccessful.

27. During the period between dismissal and successful presentation of the claim on 15 August 2018, 15 months after dismissal, the principle interaction with the solicitor acting on behalf of Mr MacKenzie was by Ms Maxwell. She and Mr MacKenzie met with Mr Kennedy. She was fully aware of what was happening in the claim. Mr MacKenzie was similarly fully aware. The illness by which he was affected however involved a form of depression, the precise details and level of which are not known to the Tribunal. Mr MacKenzie remained able however to appreciate what was happening with appeals against dismissal. As mentioned, he attended meetings with the solicitor, with Ms Maxwell also being present. He and Ms Maxwell gave instructions to Mr Kennedy as events unfolded.

28. The solicitor ceased acting for Mr MacKenzie around December 2017. He said to Mr MacKenzie and Ms Maxwell at that point that he was not covered under the Legal Aid scheme to cover costs of to continuing to act on their behalf.

29. In the period after December 2017, Ms Maxwell undertook no immediate action to advance the claim. From time to time, as detailed below, she consulted with the solicitor who provided a degree of assistance albeit not being formally instructed in the case.

30. Ms Maxwell has a daughter who is quite young. Her health was not particularly good around this time (2017/18). She was not hospitalised, however she was required to visit the doctor reasonably regularly and to attend hospital in Inverness for referral appointments. This was with a view to *"getting to the bottom"* of her health problems or seeking so to do. Ms Maxwell's daughter had persistent colds and has been diagnosed with asthma. She was also affected by a rash, the condition known as hives. She had an issue with her ears and required to have grommets inserted in her ears.

31. Mr MacKenzie's health has not been good since the seizure in April 2017. He has been affected by depression. He has had low moods and energy levels.

In addition to Ms Maxwell taking responsibility as the principal person dealing with the claim, she has also been the person responsible for the sole tasks of housework and shopping. She has more familiarity with computers and their use than does Mr MacKenzie. She is not however particularly familiar with using a computer. In addition, she is the primary carer for her daughter and has been the person attending medical appointments with her daughter. She has also cared for Mr MacKenzie as required.

Awareness of time limits

32. Ms Maxwell has no legal qualification. She was not, prior to this case, familiar with Employment Tribunal proceedings. Mr MacKenzie similarly had no knowledge of Employment Tribunals prior to this case.

33. Mr MacKenzie and Ms Maxwell were unaware at the time when Mr MacKenzie was dismissed that a claim had to be brought to an Employment Tribunal within 3 months.

34. When the solicitor, Mr Kennedy, said in December 2017 that he could no longer be a representative for or assist Mr MacKenzie, Ms Maxwell used the Google search engine to search for information on Employment Tribunals.

35. Her search resulted in her becoming aware in December 2017 that there was a time limit within which claims were required to be lodged and that this time limit was three months from dismissal. She also became aware at this point that a claimant required to make an application to ACAS for an ACAS Early Conciliation Certificate (ECC) before being able to present a claim to the Employment Tribunal.

36. Ms Maxwell completed a claim form on behalf of Mr MacKenzie and presented it to the Employment Tribunal. This claim form did not however include an appropriate ECC number. It was therefore returned to Mr MacKenzie on 22 February 2018. It had been submitted approximately two days prior to that.

37. Ms Maxwell notified ACAS of the intention of Mr MacKenzie to proceed with a claim, this occurring on 8 March 2018. The ACAS ECC was issued on 15 March 2018.

38. The claim form was submitted on 15 August 2018. The claim form submitted at this time was in the same terms as that which was submitted in February 2018. The only difference was that the claim form submitted in August 2018 included the relevant details of the ACAS ECC.

Period between 22 February 2018 and 15 August 2018

39. Between 22 February 2018 and 15 August 2018, Ms Maxwell continued, with the knowledge and consent of Mr MacKenzie, to be the *"driving force"* in any progression of any potential claim. She also remained the principal carer for her daughter. She continued to look after Mr MacKenzie. Mr MacKenzie continued to be affected by depression. Medication which he was taking for epilepsy was adjusted. His condition stabilised. Ms Maxwell's daughter continued to require to attend medical appointments with her doctor. She was not hospitalised in the period February to August 2018.

40. Ms Maxwell had some interaction with the Employment Appeal Tribunal in relation to rejection of the claim form submitted on behalf of Mr MacKenzie in February 2018. She spoke with Mr Kennedy, the solicitor, regarding that. He sent her an email and letter on 3 May 2018. She sent those on to the Employment Tribunal. They were received by the Employment Tribunal on 18 June 2018. The Employment Tribunal returned the papers as it appeared that they related to an appeal. It is not known from the evidence whether and to what an extent such an appeal was progressed.

41. There was also interaction between Ms Maxwell and Mr Kennedy on 8 June 2017. A letter from Mr Kennedy at that time did not deal with the substance of the claim, or provide any advice upon it. It reflects the contact with Ms Maxwell. It appeared at C33.

42. Mr MacKenzie has been taking medication for depression since approximately 2009. A side effect of the medication is forgetfulness.

The issue

43. The issue for the Tribunal was whether time was to be extended to permit the two elements of claim advanced to proceed, although presented out of time.

44. The tests to be applied were different in relation to each element of claim.

45. For the breach of contract claim to be permitted to proceed, the Tribunal required to be satisfied that it was not reasonably practicable for that claim to have been presented within 3 months of when the breach of contract occurred. This is in terms of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, specifically Article 7 thereof.

46. If the claim of discrimination was to be permitted to proceed with time being extended for that to occur, the Tribunal required to be persuaded that it was just and equitable that this occur. This is in terms of Section 123 of the Equality Act 2010.

Not reasonably Practicable

47. It is the wording of the statute which must be considered in assessing the issue of whether time is to be extended to permit a claim to proceed although presented out of time. *"Not reasonably practicable"* has, helpfully, been equated with determining whether it was *"reasonably feasible"* for the claim to be presented. That is detailed by the Court of Appeal in ***Palmer & another v Southend-on-Sea Borough Council 1984 ICR372 ("Palmer").***

48. Ignorance of the existence of time limits is potentially a reason for extension of time. If that is to be so however, the ignorance or unawareness of the time limit must itself be reasonable.

49. It is relevant to consider whether a claimant had legal representation. If a claimant does have legal representation and the time limit is missed, then the

case of ***Dedman v British Building & Engineering Appliances Limited 1974 ICR53 (("Dedman")*** makes it clear that the Tribunal door is closed against such a claimant with there being a potential remedy against the solicitor.

50. The circumstances which pertained relative to a claimant in the period within which the claim ought to have been presented are of relevance. Broadly put, the greater the extent of any ill health affecting a claimant in that time, the more likely it is that it is held to have been not reasonably practicable for the claim to be lodged in time.

51. It has been held in ***Bodha v Hampshire Area Health Authority 1982 ICR2000*** that a "live" internal appeal does not of itself mean that it was not reasonably practicable to present a claim within the time limit. That decision was approved by the Court of Appeal in ***Palmer***. The onus is on a claimant to persuade the Tribunal that it was not reasonably practicable to present the claim in time.

52. If a Tribunal is persuaded that it was not reasonably practicable for the claim to be presented within the time permitted for that to occur, the Tribunal must then go on to determine whether the claim was presented *"within such further period as the Tribunal considers reasonable".* The Tribunal must therefore look at the time between expiry of the time limit for presentation of the claim in time and the date at which the claim was ultimately successfully presented.

53. There is no set time which constitutes a reasonable time for presentation of the claim. The extent of the delay is of significance. A claimant would be expected to act relatively swiftly to keep any delay in presentation of a claim to the minimum.

Just and Equitable

54. A wider range of considerations may be taken into account by a Tribunal in deciding whether time should be extended for presentation of a claim of

discrimination. The test is whether that is just and equitable. There is less weight attached to the fact that a claimant had an advisor acting for him or her. It remains however a relevant fact.

55. The case of ***British Coal Corporation v Keeble 1997 IRLR 336 ("Keeble")*** sets out factors which a Tribunal should relevantly consider. From the areas mentioned in that case, those with particular relevance to this case are:

(i) the length of and reasons for any delay.

(ii) the promptness of acting for a claimant once facts giving a rise to the cause of action are known.

56. Ignorance of rights is also of relevance. In general terms, that is properly weighed by a Tribunal only where the ignorance is viewed as being reasonable. The case of ***Perth & Kinross Council v Townsley EAT0010/10*** is an example of this point being considered and the view being taken that although a claimant was ignorant of rights, that was not reasonable in the circumstances which applied. As mentioned, the fact that incorrect advice was given by an advisor does not carry the same weight in consideration of the just and equitable principle as it does a situation where the test to be applied is that of whether it was not reasonably practicable for the claim to be brought in time.

57. The case of ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ECWA Civ 640 ("Morgan")*** is authority for the proposition that a Tribunal need not be satisfied that there was any good reason for delay before it concludes that it is just and equitable to extend time.

58. The case of ***Robertson v Bexley Community Centre 2003 IRLR 434 ("Robertson")*** confirms that granting an extension of time for presentation of claim as that is considered just and equitable will be the exception rather than the norm.

59. A Tribunal should always consider prejudice which results to one party if the claim is permitted to proceed or to the other party if it is not permitted to proceed.

Submissions

Submissions for the Respondents

60. Mr Strain presented written submissions. He spoke to those.

61. He urged that I have regard to the fact that the claimant had a legal representative between May 2017 and December 2017. The claimant interacted with his legal representative. Ms Maxwell likewise was involved in any meetings or correspondence.

62. The claimant had therefore been able to provide instructions and to receive information from his solicitor. In addition, Mr Strain said it was not credible that there had been no information given to the claimant or Ms Maxwell as to there being time limits affecting claims to Employment Tribunal. There had been reference in the letter from the solicitor of 19 May to discrimination, to unfair dismissal and to an Employment Tribunal. The Tribunal should conclude that the claimant and Ms Maxwell were made aware of time limits. If the solicitor had not given advice as to time limits and the claim was not permitted to proceed, there would still potentially be a remedy against the solicitor.

63. Although both Mr MacKenzie and Ms Maxwell had referred to other pressures as being a reason for the claims not being presented, during the period in question they had attended meetings with their lawyer and had corresponded with him. It had been reasonably feasible or reasonably practicable, Mr Strain submitted, for the claim to have been lodged in time. There was nothing to prevent the claim being lodged.

64. It had taken until around 20 February 2018 for the claim to be presented. That had been rejected. Both the claimant and Ms Maxwell were aware of that rejection.

65. An ACAS ECC had then been sought on 8 March 2018 and issued on 15 March 2018. At the very latest, the claim ought to have been presented soon after that time. It was not however presented until 15 August.

66. It also was of relevance that there had been contact with Mr Kennedy, the solicitor, in May and June 2018. This again demonstrated that there was the capacity and ability to take advice at that point. In addition, it appeared that there may have been some interaction with the Employment Appeal Tribunal by this time.

67. The Tribunal should therefore not extend time in the breach of contract claim as it was perfectly practicable and feasible to present the claim within the relevant time. There had been substantial delay. That delay had prejudiced the respondents.

68. Turning to the discrimination claim, Mr Strain noted that the Tribunal could extend time if it found that to be just and equitable.

69. He urged the Tribunal to have regard to the factors mentioned in ***Keeble.*** There had been a lengthy delay. The claim ought to have been presented by the end of August 2017 at the very latest. It was not however presented until a year after that time.

70. The Tribunal required it to keep in mind that the claimant had the benefit of legal advice and representation between May and December 2017. He had further advice in May and June 2018.

71. The explanation given for not lodging the claim was, Mr Strain said, completely unacceptable. There had been nothing put forward which was an acceptable reason. It could not be right that the claimant and Ms Maxwell

were able to obtain legal advice when they did, but yet had not been able to present a claim.

72. At the moment, what the respondents knew was that the claim was on the basis of Mr MacKenzie having had a seizure, being off work and being unfit. He had been dismissed. This was said to be an act of discrimination. It was unclear as to why that was alleged as being a discriminatory act. Similarly the failure to make reasonable adjustments was not a claim clearly set out.

73. Mr Strain also highlighted the respondent's position that they did not know of disability. He said that the evidence from Ms Maxwell was that the claimant was diagnosed with epilepsy in December 2017 or January 2018. He would not therefore have known that he was disabled at the relevant time. In that circumstance, it could not be the case that the employer knew or ought to have known. There was no stateable discrimination case. The Tribunal should take that into account in assessing whether it was just and equitable for the claim to proceed. The respondents would have to backtrack now some two years to obtain information about what happened at the time.

74. In short, said Mr Strain, there had been no reasonable explanation given to enable the Tribunal to be persuaded that the extension of time was just and equitable.

Submissions for the Claimant

75. Ms Maxwell underlined that Mr MacKenzie had been ill. Her young child had health issues. She had a lot to do in caring for each of them and also in running the house. She had to do everything herself. She had obtained legal advice. The appeal against dismissal had taken up a lot of time. It had taken time to be concluded. Mr MacKenzie had been badly affected by stress. Time should be extended.

Discussion and Decision

76. I had some sympathy with Mr MacKenzie and Ms Maxwell. They both presented as straightforward honest witnesses. I was, nevertheless, faced

with what seemed to me to be a very difficult set of facts on which it could be said that it was not reasonably practicable for the claim of breach of contract to be advanced within time. Similarly, it seemed to me difficult to argue that the breach of contract claim was presented within a reasonable time of the claimant becoming aware of his right to make a claim. It also seemed to me, applying the broader test of whether it was just and equitable for the claim of discrimination to be permitted to proceed by time being extended, that it was difficult for that test to be satisfied.

Breach of contract – not reasonably practicable

77. Applying ***Dedman****,* it is clear that when a solicitor has been instructed, it is very difficult for a claimant in circumstances where the deadline is missed, then to argue successfully that it was not reasonably practicable for the claim to be lodged in time.

78. Mr Kennedy was clearly involved in various meetings with Mr MacKenzie and Ms Maxwell during the period of May to December 2017. He wrote to them on various occasions. He wrote to the respondents on various occasions. Specifically, in May 2017 at time of instruction, he referred to possibility of an Employment Tribunal claim.

79. I find it curious that, from Mr MacKenzie and in particular Ms Maxwell's evidence, no time limit for presentation of claims to an Employment Tribunal had been mentioned by Mr Kennedy. There was certainly no correspondence produced by way of, for example, a letter of engagement, confirming the matter about which Mr Kennedy had been consulted and any initial advice by him upon that. Such a letter might have mentioned the period within which a claim required to be brought. Alternatively, it might have omitted any such mention. I accepted the evidence from Mr MacKenzie and Ms Maxwell that they were unaware until December 2017 of the time limit for presentation of claims to an Employment Tribunal.

80. I appreciated that Mr MacKenzie's health had not been of the best in the period after May 2017. No doubt it was a very difficult time for him having

had a seizure for the first time. Losing his job would clearly have added to his troubles. He had been affected by low mood and low energy levels. He was however able to participate in meetings with Mr Kennedy. He had full support from Ms Maxwell who attended those meetings. It was not said that he was unable to provide instructions. Both Mr MacKenzie and Ms Maxwell said in evidence that one was aware of what the other was doing in the claim. In effect they acted jointly.

81. It seemed to me, however, that with a solicitor being instructed, when the time for presentation of the claim came and went, it would be very difficult for the claimant to argue successfully that it had not been reasonably practicable for him to lodge a claim on time. I did not see any factors as enabling such an argument to be successful.

82. That is enough to determine that the breach of contract claim cannot proceed.

83. I accepted the evidence that Mr MacKenzie and Ms Maxwell were unaware of the existence of any time limit until December 2017. Nevertheless, by then the period within which a claim required to be lodged had expired for some time.

84. Had I been persuaded that it was not reasonably practicable for the claim to be lodged within three months, I would nevertheless have not permitted the claim to proceed. This would have been on the basis that the claim was not presented within a reasonable time thereafter.

85. I appreciated that there had been an attempt to lodge a valid claim in February 2018. Had that attempt been successful, and had there not been a solicitor instructed, the outcome might have been different.

86. There was however a solicitor instructed. This attempt to present a claim (by Ms Maxwell rather than by the solicitor) was then unsuccessful. It then took until 15 August 2018 for a claim successfully to be presented. The ACAS ECC had been issued on 15 March.

87. Again, I appreciated the pressures on Ms Maxwell given her daughter's illness and the illness of Mr MacKenzie. There had been interaction with Mr Kennedy, the solicitor, during the time however. I do not wish in any way to belittle the illness which affected Ms Maxwell's daughter. I am sure it was worrying and that attending appointments was time consuming. Similarly, Mr MacKenzie's illness appeared on the evidence to have been debilitating. Nevertheless, there was contact during this time with both the Employment Appeal Tribunal and with Mr Kennedy. By this point, it was known that the claim was already out of time. That of itself would, or should, have been *"a driver"* towards early submission of a valid claim. That did not occur.

88. I therefore concluded that the claim had not been presented within a reasonable time of awareness on the part of Mr MacKenzie as to the ability to bring a claim. On that basis, had I concluded that it was not reasonably practicable to present the claim within three months, I would not have been persuaded to extend time to permit this element of claim to proceed.

Discrimination - Just and equitable extension of time

89. The test to be applied in looking at whether it is just and equitable for time to be extended to permit a claim to proceed is broader than that of whether it was not reasonably practicable to present the claim in time. The Tribunal does not, for example, require to be convinced that there was a good reason for late presentation of the claim. It must have regard however to all the facts and circumstances.

90. There is clearly prejudice to the claimant if the claim is not permitted to proceed. His claim is at an end. I accepted that there is a degree of prejudice to the respondents if the claim is permitted to proceed. They then face a claim which otherwise they would not. They require to obtain any evidence and to formulate their defence, attending a hearing to dispute the claim.

91. In my view the question of prejudice favoured the claimant, albeit I recognise that there was some prejudice to the respondents if the claim was permitted to proceed.

92. What, in my view, *"tipped the balance"* against extending time on the basis that it was not just and equitable so to do were the following factors:-

(i) The time taken from date of dismissal to presentation of a valid claim. That was some 15 months.

(ii) The awareness on the part of Ms Maxwell and the claimant that the right to make a claim of discrimination potentially existed. This was confirmed by Mr Kennedy in his letter to the respondents written within 2 days of dismissal.

(iii) The circumstances which pertained during the period between date of dismissal and presentation of the claim. Those involved the health of Mr MacKenzie and that of Ms Maxwell's daughter. The health of both of those people was not good, however was not grave or severe. It was possible for both Mr MacKenzie and Ms Maxwell to take steps during this time in relation to the potential claim. I appreciate that Ms Maxwell had several pressures on her time and energy and that this was a very difficult period for her in particular. Nevertheless, instruction of and interaction with a solicitor occurred over a number of months. Mr MacKenzie was as involved in that process as Ms Maxwell. Ms Maxwell investigated the possibility of a claim in December 2017. At this point she became aware of the time limit of three months for presentation of a claim. She completed and presented a claim form in February 2018. She obtained the ACAS ECC in March 2018. There was no particular evidence about what had occurred between March and August 2018 leading to particular difficulties in presentation of a claim. The claim presented in August was no different to that presented in February, except that it had attached to it the ECC Certificate. That apart it was the same. Mr MacKenzie was aware of

all these developments as they took place, albeit he was not the "*leading player*".

93. Whilst there is not much detail as to the claim of discrimination, I did not weigh the potential merits of the claim in reaching the conclusion which I have. There is a public interest in claims of discrimination proceeding. Specification of a claim by way of further and better particulars can be ordered as a claim progresses. It is difficult to form a view on the merits of any such claim without evidence being heard. There is nothing immediately obvious from the statement of claim (which I recognise is somewhat lacking in detail at the moment) which would lead me to take the view that it almost inevitably must fail. A PH on disabled status at the relevant time might be required. It is not possible, on the information before me at this PH, to predict with any degree of certainty the outcome of such a PH.

94. On balance, I came to the view that it was not just and equitable to permit the claim of discrimination to proceed by extending the time for presentation of that claim. Time limits are present for a reason. The case of ***Robertson*** makes it plain that extending time is the exception rather than the norm. Finality of litigation is also a factor to weigh in the balance. A party has an interest in knowing at the end of the time permitted for presentation of a claim that, if no claim has been intimated (and subject of course to possible extension of time) , no such claim is to be advanced.

95. The factors set out above, particularly the length of delay in bringing of a claim and the explanation given for that delay with matters said to have caused the delay, led me to the conclusion that it was not just and equitable to extend time.

96. The claim of discrimination is therefore at an end.

Summary

97. As both elements of claim have been presented out of time and time has not been extended to permit them to proceed, the claims are at an end.

Employment Judge **Robert Gall**

Date of Judgment **15 March 2019**

Entered in register and copied to parties **18 March 2019**