EMPLOYMENT TRIBUNALS

Claimant:	**Mrs G Bates**	
`	**Miss C Blinkhorn**	
Respondent:	**Kuehne & Nagel**	
Heard at:	**Birmingham**	**On: 29 January 2020**
Before:	**Employment Judge Flood**	
Appearances:		
For the claimants:	**In person**	
For the respondent:	**Mr Islam-Choudhury (Counsel)**	

PRELIMINARY HEARING JUDGMENT

The claimant's complaints of age discrimination were presented after the expiry of the statutory time limit. However, it is just and equitable to extend time to the date of presentation. The Tribunal has jurisdiction to consider the complaints, which will proceed to hearing on 2-6 & 20 November 2020.

REASONS

1. By claim forms submitted on 27 June 2019, the claimants brought complaints of age discrimination (direct and indirect) contrary to section 13 and/or 19 of the Equality Act 2010 ("EQA"); and a claim for a redundancy payment under section 139 of the Employment Rights Act 1996.
2. The case was listed for a preliminary hearing and came before me **"consider whether time should be extended to permit the claims brought by the claimants identified above on a just and equitable basis under section 123 (1) (b)EQA"**.

The Issues

3. In determining whether the claimant's complaints for were presented within the time limits set out in **sections 123(1)(a) & (b) of the EQA** involved considering *whether time should be extended on a "just and equitable" basis.* **The relevant law**
4. **Section 123 of the EQA**, which specifies time limits for bringing employment discrimination claims, provides so far as relevant that:

"(*1) … proceedings on a complaint … may not be brought after the end of—*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

5. **Section 33(3) of the Limitation Act 1980** (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (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 co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

6. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (**Southwark London Borough v Afolabi [2003] IRLR 220**).

7. The Court of Appeal in **Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA** made it clear that there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

8. In the case of **Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640** the Court of Appeal stated that the "*such other period as the employment tribunal thinks just and equitable*" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "*factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent"*. There is no requirement that the tribunal had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour.

The relevant facts

9. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 24 February 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

10. There is no dispute that the employment of Mrs Bates terminated on 31 January 2019 and of Miss Blinkhorn on 31 December 2018. Early conciliation would need to have been commenced by 30 April 2019 and 30 March 2019 respectively. Early conciliation was commenced for both claimants on 23 May 2019 and both claims presented on 27 June 2019, so on its face both claims were presented out of time.

11. The claimants gave evidence today on the course of events leading up to the decision to issue proceedings. They gave evidence individually but there are some

facts which are common to both claimants. Both claimants were employed by the Ministry of Defence and on 1 August 2015, their employment transferred to the respondent by application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) ("TUPE"). Both claimants were employed as warehouse operatives at the respondent's Donnington site in Telford.

12. In or around July 2018 as part of a larger operational change programme, the respondent started individual consultation with employees working at the Donnington site. Both claimants were informed of potential redundancy around August 2018. Mrs Bates was notified on 15 August 2018 (letter shown at page 54) of the termination of her employment on 31 January 2019. Miss Blinkhorn was notified of the termination of her employment on 18 October 2018 (letter shown at page 53). Both claimants had originally been due to left employment on 31 March 2019 (along with other affected employees) but had their end dates brought forward. Mrs Bates decided to ask to leave early as there was to be a change to pension with effect from 1 February 2019 and she did not think it was worth moving schemes for one month so asked if she could be released before this. Miss Blinkhorn had been very ill at the beginning of 2018 and returned to work probably sooner than she should have in September 2018 because the redundancy process was going on and she felt she needed to be at work. When her redundancy was confirmed she asked if she could leave at the end of 2018 so she could take time to properly recover.

13. Mrs Bates explained that she thought she had been treated unfairly in relation to her redundancy payment from 15 August 2018 onwards. She said that she was told by her employer that that was just the way it was and that there was nothing she could do about it. She spoke to her union representative at the time (she was a member of the Unite union) and recalls be told that they would not be able to do anything to assist as they were involved in the consultation process around the redundancy and its terms. She felt aggrieved at the time but did not feel confident enough to pursue the matter on her own. She did not seek any legal advice. Her employment terminated on 31 January 2019. She did not look for work immediately as she was taking care of her husband who has a heart condition (as does she). She briefly claimed jobseekers' allowance. After her employment terminated, she met up with colleagues and discussed what had happened. From April 2019 onwards when the other employees affected had left the respondent, the discussions about how to pursue matters as a group started in earnest.

14. Miss Blinkhorn said that at the time she was issued with her redundancy letter in October 2018 she felt that she had been discriminated against. She explained that at that time she did not want to "rock the boat" with the respondent. She said that she felt that the respondent could make life difficult for her in terms of making her do shift work or work at another building. She reached the conclusion that it was better to wait for her other colleagues to try and pursue matters as a group. She said that if she had thought she had a case she would not have known where to go or what to do to take matters further.

15. The claimants started to organise with other colleagues with a view to taking things forward in April 2019. They met at various occasions at different people's homes. Mrs Bates explained it took some time for the group to work out how they could pursue matters. It was Mr Brewer that found out that potential claimants had to get in touch with ACAS as he was told of this by Mr Nixon one of the other affected employees. Mr Nixon was in a different trade union to the other employees and had

obtained legal advice. All the claimants submitted their ACAS conciliation form online on the same day, 23 May 2019. Miss Blinkhorn explained that a friend of hers had to do this for her as she was unable to use computers effectively. Mrs Bates completed her own form. Following the submission of the forms and contact from ACAS, Miss Bates discussed the matter with family members who had some experience in employment law, and they advised her that it was worth pursuing. She was not told at this time that there were time limits. The claimants drafted their claims as a group and both Miss Blinkhorn and Mrs Bates played an active role in putting the claim together and stating what should be said and they all agreed on a form of words. The Et1 forms for the affected group were completed by one person on behalf of all 7 claimants, once they had provided him with the necessary information. This was done on 27 June 2019.

16. Neither claimant was aware of any time limits for bringing proceedings from August 2018 when they first considered the decision to be unfair or after their employment terminated in December 2018 and January 2019 respectively. I accepted their evidence that they were not aware of any time limits at the time they contacted ACAS or submitted their claims to the Tribunal. The fact that there was an issue with claims being out of time was highlighted in the grounds of resistance submitted by the respondent on 28 August 2019. This was sent to the claimants on 12 October 2019. Both claimants admitted that they understood now what was set out in the response as suggesting their claims were out of time but did not appreciate the significance at the time. They both became aware that there was a problem with time limits after the preliminary hearing before Employment Judge Jones on 27 November 2019.

17. Neither claimant took any independent legal advice before issuing proceedings. The claimants have since joined the GMB Union but were still waiting for an appointment to get some advice. Both claimants had been to the Citizens Advice Bureau in preparation for today's hearing and had some assistance in putting together their witness statements.

Submissions

18. The claimants submit that they did not know that time limits applied to the claims they wanted to bring until the last preliminary hearing in November. They say that had they known that there was a time limit which may mean their claims were out of time, they would not have waited to submit their claims with the rest of the group but would have tried to do something themselves. They both feel it would be unfair for them to be prevented from pursuing their claims now, after they had come this far and to be treated differently from their colleagues who were in a similar position. They ask me to exercise my discretion to allow the claims to proceed.

19. Mr Islam-Choudhury for respondent submitted that whilst it was possible to feel sympathy for the claimants personally, the issue to consider was whether in is in the interests of justice and equity for the claims to proceed. He submits I am required to consider the reason for the delay in presenting the claims in time. He reminded me that the claims had to be treated individually and that any difference in treatment to the other claimants in this case (who had presented in time) was not a relevant factor. He submitted that both claimants were alive to the fact that they had been aggrieved in August and September 2019 and both could have taken individual legal advice on possible claims. He reminds me that time limits are to be treated strictly and ignorance of the law does not provide a defence, where claimants have will fully

closed their eyes to obvious sources of information as to how they could pursue their rights. He says this did not appear to be a case where legal advice was unaffordable as both claimants were working and earning until the end of December and January respectively and received a payment on termination of employment. He suggests that resources could have been pooled to seek advice at a much earlier stage. He submits that the claimants were passive participants in a group process and had not proactively taken steps to find out whether their claim was in time.

20. When asked on the issue on balance of prejudice, Mr Islam Choudhury said this was neutral and acknowledged that the respondents would not be prejudiced significantly as they did have to deal with and call evidence on the remaining claims brought in time on the same issues. However, he contends that this is just one relevant factor and was one of many to consider primarily, he says, being the reason for the delay.

Conclusions

21. It is clear from the case law that it is not a question of the Tribunal being able to exercise jurisdiction to extend time just because it would be kind to do so. There must be something which convinces me that it is just and equitable to do so. I have considered the relevant factors as indicated by the case law above.

22. Firstly, the length of the delay in bringing the claims being was not insubstantial but neither is it excessive. It is just over 3 weeks in the case of Mrs Bates and 7 weeks for Mrs Blinkhorn. The issue of any lack of cooperation by the respondent or delay whilst internal procedures were exhausted does not apply in this case.

23. The main issue that the claimants were questioned on was the reason for the delay in issuing proceedings; the promptness of action once they knew of the facts giving rise to the cause of action; and the steps taken to obtain appropriate professional advice once they knew of the possibility of taking action.

24. I have concluded that the reason the claims were not issued sooner was that the claimant's were unaware of the statutory time limits and did not have the ability or confidence to pursue the claims individually and felt they would have more success applying as a group. The claimants were part of the same redundancy programme as the other six claimants in these proceedings and indeed both were originally due to have their employment terminated on 31 March 2019 as the other six claimants did. I can understand why it seemed logical for them to take the view that the claims were best brought as a group rather than individually.

25. It is clear to me that neither claimant had any knowledge of time limits that might apply to their claims at the time they were considering bringing their claims, preparing to bring claims by contacting ACAS or indeed submitting claims. I have considered the point raised by Mr Islam-Choudhury that the claimants wilfully closed their eyes to obvious sources of information but do not accept this is the case. After each claimant's employment terminated both individuals were dealing with other matters in their lives (Mrs Bates dealing with her own poor health and an unwell husband and Miss Blinkhorn recovering from serious ill health the previous year which she had not full recuperated from). Neither claimant felt they had the knowledge or ability to pursue matters on what are complex claims on their own. However once they were part of a group of employees who seemed to be in exactly the same situation as them, they participated to try and take their complaints forward as best they could.

26. It is correct that neither claimant obtained legal advice, and could have done so. However, I also note that each claimant tried to elicit the support of their trade union (which was the obvious source of advice for them) but this assistance was

    not forthcoming. It was only when the claimants started to discuss matters as a group that they started to see a route to pursue matters. It is correct that both claimants had a sense of grievance from August 2018. However, their employment in fact only terminated on 31 December 2018 and 31 January 2019 respectively and it is only at this point that redundancy takes effect and the payments are made. Both claimants had other things going on in their lives at this time involving their health and the health of people close to them. It is only as part of the group and having received input from other members of the group who perhaps did have more knowledge (e.g. Mr Brewer who had spoken to Mr Nixon who had legal advice from h is union) that practical steps were able to be taken. The group acted promptly once the process started.

27. **Abertawe Bro Morgannwg University v Morgan** makes it clear that there is no requirement that I must be satisfied that there was a good reason for the delay before I can conclude that it is just and equitable to extend time in the claimant's favour. That is just one factor that needs to be applied in considering exercising discretion. I have considered that the claimant's lack of knowledge of the time limits was genuine and that there was no wilful decision not to seek advice. The decision to proceed as a group was a logical and understandable one for these two claimants to have taken

28. A key factor in my consideration is also whether the delay in the claimant's issuing their claims has prejudiced the respondent. It is acknowledged by the respondent that any prejudice is minimal. There are six other valid claims all apparently standing or falling on the same issue as the claim brought by these two claimants. The same evidence will be required to deal with all cases. The only prejudice relates to the ability of the respondent to rely on the defence of limitation in two out of eight very similar cases, rather than any prejudice caused because of the delay (e.g. deterioration in the quality of the evidence). Against that, the claimants would lose the ability to bring their claims entirely. This prejudice to the two claimants is significant. The prejudice against them outweighs that to the respondent.

29. Taking all the above relevant factors into account, it is just and equitable to extend time for the discrimination complaints to be presented.

Employment Judge Flood

30 January 2020