THE EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Robson**
Respondent:	**NCG Corporation**
Heard at:	Newcastle Hearing Centre
On:	Monday 14th September 2020
Before:	Employment Judge Jeram (sitting alone)

Representation

Claimant:	In person
Respondent:	Mr J English (Solicitor)

Covid-19 statement
This hearing was held via CVP which was not objected to by the parties. A face to face hearing was not held because of the Covid-19 pandemic and all issues could be determined at a remote hearing.

JUDGMENT having been sent to the parties on 22 September 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. This matter was set down to consider whether the claimant had brought his unfair dismissal claim and disability discrimination claims in time not whether the relevant time limits should be extended.

2. At a preliminary hearing held on 11 December 2019, before Employment Judge Sweeney, the Claimant confirmed that his claims unfair dismissal and discrimination because of something arising in consequence of his disability, where the unfavourable treatment is said to be the dismissal. The Claimant was directed to provide further thought to whether and how he pursued his claims of failure to make reasonable adjustments and age discrimination. The hearing today was set down to consider the time limit issues.

3. At the outset of the hearing I discussed with the Claimant how he put his age and reasonable adjustments claims. The Claimant confirmed that his age discrimination was not pursued and agreed to its dismissal upon withdrawal. He also confirmed that his reasonable adjustments complaint was based on the dismissal itself; it was contended the Respondent should have not dismissed him because he was capable of doing the non-active parts of his role i.e. setting up lessons and creating lesson plans, marking work and creating PowerPoint presentations i.e. the work the Claimant describes as being 'behind the scenes' as well as potentially delivering theory work. The Claimant confirmed that he also sought to pursue a claim of direct disability discrimination claim where the less favourable treatment was, again, the dismissal itself.

4. As to his disability, the Claimant relies upon depression, anxiety and severe mental health issues and he also relies on deep vein thrombosis ('DVT'). The Respondent accepts that the Claimant was disabled at the relevant time by reason of his DVT, but not in respect of his claimed mental impairment.

5. At the hearing, I had regard to:
   a. The Claimant's oral evidence;
   b. The Claimant's written explanation for the lateness of the presentation of his claim set out in a document sent to the tribunal on 18th March 15:50;
   c. A bundle prepared for the hearing consisting of 189 pages;
   d. The parties' oral submissions and the written submissions of the Respondent.

Background Facts

6. The Claimant was employed as an A-level Drama and Theatre Studies lecturer. He was employed from September 2007 until his dismissal on 18 January 2019 on ill health capability grounds.

7. In November 2017, the Claimant was subject to informal capability (performance) action plan. In February 2018, the Claimant was given a written warning and placed on a formal improvement plan. Between 5 March 2018 until 4 June 2018, the Claimant remained off work citing work related stress, anxiety and

depression. On 18 June 2018, the Claimant was admitted to hospital with deep vein thrombosis ('DVT') as a result of which he remained off work until his dismissal on ill health capability grounds.

8. On 26 October 2018, Occupational Health advised that the Claimant was unfit to work due to the serious nature of his DVT, that his opiate medication ruled out desk work that it was difficult to predict his return to work and that any type of work would be 'many months down the line'.

9. In November 2018, the Claimant reduced his dosage of morphine. By January 2019, the Claimant was no longer taking morphine, although he continued to take other medication such as codeine and duloxetine.

10. The Claimant was represented by his trade union at all stages during his capability proceedings. On 2 January 2019 the claimant was invited to a formal absence management meeting that took place on 10 January 2019. He was accompanied by a trade union representative. In a letter dated 14 January 2019, the Claimant was dismissed on grounds of ill health capability, effective on 18 January 2019.

11. On 31 January 2019, the Claimant submitted an appeal against his dismissal, prepared on his behalf by his trade union representative.

12. On 21 March 2019, the Claimant's General Practitioner noted in his medical records that his low mood was 'quite likely depression related'. He was advised to self-refer to Talking Therapies.

13. The Claimant's appeal against dismissal was heard on 29 March 2019, when again, the Claimant was accompanied by his trade union representative, Joyce McAndrew. After the hearing, the Claimant had a brief discussion with Joyce McAndrew about his appeal, which the Claimant described as 'hurried'. In a letter dated 10 April 2019 and received by the Claimant the following day, the Claimant's appeal against dismissal was rejected.

14. On a date that the Claimant could not recall, he had a conversation with Joyce McAndrew about the possibility of his union providing him with legal advice and assistance. The Claimant was either declined assistance or, at least, was given no basis for believing that the union would extend legal assistance to him.

15. I accept Mr English's submission that, on the balance of probability, the Claimant had begun, in early 2019, to contact the local Citizen's Advice Bureau for advice and assistance, since that would coincide with the time when the Claimant would have been aware that his chances of retaining his job were diminishing and that he would need to do something about it.

16. The Claimant had 'some contact' with Joyce McAndew prior to 11 April 2019, being the date that early conciliation was commenced.

17. Either the Claimant, or Joyce McAndrew, on the Claimant's behalf and with his agreement, contacted ACAS to commence early conciliation on 11 April 2019. In his evidence, the Claimant stated that he learned of his right to pursue a claim against the Respondent from 'a friend'. I find that by no later than 11 April 2019, Joyce McAndrew had told the Claimant of his ability to pursue a claim against the Respondent in the Employment Tribunal; the process of early conciliation would be largely meaningless unless explained as a necessary precondition of presenting a claim.

18. The Claimant's priority was, with the assistance of his trade union, to see if he could secure a financial settlement with the Respondent. The Claimant remained in contact with Joyce McAndrew throughout the early conciliation period.

19. On 10 April 2019 the Claimant's doctor prescribed 10mg of citalopram a day; in September 2019, the dose increased to 40mg.

20. In April 2019, the Claimant had an appointment which he attended, with Gateshead Citizens' Advice Bureau at its office in Shiremoor, which was the office that provided advice about the Claimant's legal rights.

21. Around the time of the early conciliation process, the Claimant researched alternative means of representation. He did so by conducting internet searches and by telephoning solicitors to investigate whether they would be prepared to represent him on a 'no win, no fee' basis. He met with no success.

22. The early conciliation period ended on 9 May 2019, at which point the Claimant had a further telephone discussion with Joyce McAndrew. The plan to agree a financial settlement with the Respondent had not proved successful.

23. The Claimant ensured that he received a copy of the ACAS EC certificate, and ensured that he kept a hard copy of it, because he knew it was an important document. The Claimant knew it was an important document because, I find, he knew that he could not commence Employment Tribunal proceedings without it.

24. The Claimant had a named ACAS conciliator.

25. The Claimant knew, from 'an email' he received, that he had a deadline within which to pursue a claim against his employer. In evidence, he recalled that the email stated he had 'a few months' in which to pursue a claim against the Respondent.

26. In June 2019 the Claimant again attended his GP about his low mood, citing that his application for Personal Independence Payments ('PIP') had been rejected and that he had lost his appeal against dismissal; he complained of fatigue and tiredness. Similar entries appear in the GP records on 2 and 16 September 2019.

27. By 23 August 2019, the Claimant had submitted an appeal against the decision to reject his application for PIP. The Claimant had some assistance with this.

28. A week or so before he presented his claim, the Claimant realised either that nobody had been in touch with him for a while, or that he had not taken any steps to further his claim, but that he was outside the deadline for submitting his claim. He contacted ACAS and subsequently presented his claim on 2 October 2019.

The Law

29. Section 111(2)(a) and (b) of the Employment Rights Act 1996 provides that an Employment Tribunal shall <u>not</u> consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

30. Section 207B of the Act provides for an extension of those time limits to facilitate early conciliation before the institution of proceedings:

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(2) In this section –

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

31. When considering the test of whether it is reasonably practicable to submit a claim within time, 'reasonably practicable' does not mean 'reasonable' (which would be too favourable to employees), and does not mean 'physically possible' (which would be too favourable to employers) but means something like 'reasonably feasible' Palmer v Saunders and Southend-on-Sea Borough Council [1984] IRLR 119.

32. The burden of proof is on the Claimant to show that it was not reasonably practicable for her to have submitted the claim within the applicable limitation period: Porter v Bandridge Ltd [1978] IRLR 271.

33. A claimant who knows of his or her rights to bring a complaint of unfair dismissal is under an obligation to seek information and advice about how to enforce that right: Wall's Meat Co. Ltd v Khan [1979] ICR 52.

34. Section 123 of the Equality Act, which specifies time limits for bringing employment 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.

35. There is a mirror provision to that of s.207A ERA 1996 at s.140B EqA 2010.

36. The 'just and equitable' test at s.123(1) Equality Act 2010 is a broader test than the 'reasonably practicable' test in section 111 Employment Rights Act 1996:

37. The burden is on the claimant to persuade a tribunal that it is just and equitable to extend time: Robertson v Bexley Community Centre [2003] IRLR 434.

38. A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was: Abertawe Bro Morgannwa University Local Health Board v Morgan UKEAT/0305/13

39. In the case of British Coal Corporation v Keeble [1997] IRLR 336 EAT it was suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980. Those factors are consideration of the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case, 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. whether the party sued had cooperated 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 to obtain appropriate advice once he or she knew of the possibility of taking action.

40. The Court of Appeal considered the exercise of this discretion in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 per Leggatt LJ:

    First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. . . That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

41. In Miller v Ministry of Justice UKEAT/0003/15 Laing J provided guidance on the question of prejudice, distinguishing on the one hand the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and on the other, the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. If there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts.

Discussion and Conclusions

42. A particular feature of the Claimant's evidence was the lack of clarity in respect of almost every aspect of his evidence, from when and how he became aware of right to bring a claim in the Employment Tribunal, when and how he became aware of the existence of time limits for doing so, even which year he began to seek assistance from sources other than his trade union. Although I bear in mind the adverse impact that being dismissed will have had on the Claimant's mental wellbeing, the quality of his evidence was not discernibly better in respect of the period immediately before his dismissal until the dismissal of his appeal i.e. the period of time during which the Claimant was allegedly fit to return to the non-physical aspects of his employment. The findings of fact made above are those I was able to make on the balance of probability based on such oral and written evidence that the Claimant was able to give, together with the bundle I was provided with.

Primary Time Limits

43. The Claimant was dismissed on 18 January 2019. The primary limitation period, if not extended by the early conciliation provisions would be 17 March 2019. However, the ACAS early conciliation procedure was commenced on 11 April 2019 and ended on 9 May 2019.

44. By applying s. 207B(4) ERA 1996 and 140B EqA 2010, the time by which the claim of unfair dismissal and the claims of discrimination should have been presented was 9 June 2019.

45. The Claimant's claim was in fact presented on 2 October 2019; it was presented almost 4 calendar months (or 16 weeks and 3 days) out of time.

'Reasonable Practicability' Extension

46. In summary, the Claimant contended that it was not reasonably feasible to have presented his claim by 9 June 2019 because: his mental state; the lack of assistance from his trade union, from Citizen's Advice and from solicitors.

47. The Claimant's principal explanation was that his morphine prescription had affected his cognition skills.

48. The medical records reveal that the Claimant's dose of morphine was being reduced in November 2019 and that he had ceased altogether taking morphine in January 2019. There is no evidential basis to support the Claimant's contention

that that medication had had lasting effects upon the Claimant almost 6 months later.

49. I have little doubt that the Claimant's dismissal had a negative impact on his mental wellbeing, and his medical records show that he was complaining to his General Practitioner of low mood in March 2019 and had commenced taking Citalopram in April 2019. It does not follow, however, that his low mood, in the alternative to the Claimant's primary explanation, rendered it not reasonably practicable to present his claim by 9 June 2019, not least because he was still taking Citalopram (albeit at a higher dose) when he submitted his claim in October 2019.

50. Although the Claimant described his condition as being depressed, I note that throughout the period March 2019 until October 2019, the Claimant's doctor had not, in fact, diagnosed depression. I reject his explanation that he was not in a 'fit state' to submit his claim any sooner than he did.

51. The Claimant had not secured assistance to complete his claim form, but on his own evidence, he received considerable assistance from his trade union until the end of the early conciliation procedure. Arguably, the most difficult hurdle was that of the obtaining of the EC certificate, which either the Claimant had managed to acquire himself, or Joyce McAndrew had acquired for him. Furthermore, he had a named conciliator at ACAS, who he could contact for further assistance, and who he ultimately did contact before submitting his claim on 2 October 2019. The claim form is designed to be accessible to unrepresented parties. The claim form that the Claimant did complete and submit on 2 October 2019 was neither lengthy nor detailed, and it did not need to be; the Claimant was complaining about a single act, i.e. his dismissal. The Claimant is an intelligent man. I reject the Claimant's contention that either the form, or the case he needed to articulate, was such that it required him to be assisted.

52. Although I did not understand the Claimant to positively contend that he was ignorant of the time limit by which he was required to present his claim, insofar as he suggests that the email he received containing information about the time limit was received at some later point in time, but before he realised he was 'outside the deadline', any prior ignorance was not reasonable. First, the Claimant was aware of his ability to bring proceedings by at the latest 11 April 2019. Once a Claimant is aware of his rights, ignorance of the time limit is rarely acceptable as a reason for the delay. He must prove that he behaved reasonably in not making enquiries as to how and within what period that he should have brought his claim. On the facts as I have found them to be, the Claimant had, in early 2019 and certainly before 9 June 2019, conducted internet searches and had contacted the Citizen's Advice Bureau, as well as various solicitors, to enquire about the basis upon which they might represent him. The time limits by which

to bring a claim in the Employment Tribunal are widely accessible online. Furthermore, the Claimant's 'plan A' was to reach a settlement with the Respondent had failed by the end of the early conciliation period; it was therefore incumbent upon him to make enquiries of the time by which he was required to present a claim in the Employment Tribunal, if he wished to pursue a 'plan B'. Thus, even if the Claimant was, in fact, ignorant of the time limit before 9 June 2019, I am not satisfied that that ignorance was reasonable.

53. In summary, the Claimant did not satisfy me that it was not reasonably practicable to present his claim by midnight on 9 June 2020.

54. Further and in the alternative, if it was not reasonably practicable to present a claim within the applicable time limit, I am not satisfied that it was brought within such further period as was reasonable. Whilst the Claimant's mental wellbeing was clearly impacted by his dismissal, he was able to, albeit with assistance, submit an appeal against the decision to reject his claim for PIP by 23 August 2019. The Claimant has not satisfied me that the further period of 5 weeks that he took to present his claim on 2 October 2019 was reasonable.

55. Accordingly, the Tribunal has no jurisdiction to entertain the Claimant's unfair dismissal claim.

<u>'Just and equitable' Extension</u>

56. The delay in the present case, of almost 4 calendar months when compared to a primary time limit of 3 calendar months is both significant and substantial.

57. I have already rejected, for the reasons set out above, that the morphine medication and the lack of assistance in completing his claim form were adequate reasons for the delay.

58. I have already set out my reasons for rejecting the Claimant's explanation that his mental health was such that it caused him to delay presenting his claim by almost 4 months. I have considerable sympathy for the Claimant in that he has endured two adverse life events in succession, being his DVT and loss of employment and those matters have had an impact on his mental wellbeing. But it does not follow, and I do not accept, that the Claimant was therefore unable to present his claim in time, having received a significant amount of support and assistance from his trade union, been able to conduct his own independent research into his predicament, at a time when, if his claim were to proceed, he would be seeking to persuade the Tribunal that he was sufficient fit and able to carry out the administrative aspects of his lecturing role.

59. On any view, 4 months is a considerable period of time, particularly when, on the findings I have made, the Claimant either knew (or ought reasonably to have known) when the time limit expired. The claim he did submit was modest in content (appropriately so, given the substance of the complaint). Neither the Claimant's medical records, the fact that he was able to prepare and submit (albeit with assistance) an appeal against the rejection of his PIP application one month earlier, or his oral evidence more generally, support the Claimant's explanation that he was not in a fit state to submit his claim sooner than he did.

60. If I were to not exercise my discretion in his favour, the Claimant would be unable to pursue his claims of disability discrimination; if I were to permit the claims to proceed, the Respondent would face the obvious prejudice of having to meet claims that would otherwise be statute barred.

61. Mr English properly and fairly accepts that a delay of almost 4 months would have little to no effect on the preservation of relevant documentary evidence in relation to claims about the Claimant's dismissal. Whilst he may have a point, a modest one, as to the impact of the delay on the quality of the Respondent's oral evidence, it seems to me that another, more significant, issue, having observed the Claimant give evidence, is the apparent impact of the delay on the cogency of his own evidence.

62. The burden is upon the Claimant to persuade me that it is just and equitable to extend time to consider his complaints. That is a broad assessment. The two most relevant factors are likely to be the Claimant's explanation for the delay and prejudice to the parties.

63. The Claimant has not provided an explanation, that I accept, as to why he did not submit his claim in time, or why it could not be presented sooner. I remind myself that there is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay, only that any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard.

64. I am mindful of the fact that the forensic prejudice to the Respondent is limited. The most significant prejudice, to the Respondent, if I were to allow the claims to proceed is being deprived of a limitation defence. That is a relevant factor, which I attach weight to, in circumstances where the Claimant has failed to provide an explanation as to why he presented his claim when he did.

65. There is a public interest in ensuring that claims are presented within the time limits set by Parliament.

66. In all the circumstances, the Claimant has not persuaded me that it is just and equitable to extend time in his favour so as to permit his complaints of disability discrimination to proceed.

AUTHORISED BY EMPLOYMENT JUDGE JERAM

REASONS SIGNED BY EMPLOYMENT JUDGE ON 20 NOVEMBER 2020