EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104205/2020 (V)

Heard via CVP (Cloud Video Platform) on 19 November 2020

Employment Judge J Young

Alistair Pettigrew	**Claimant**
University Of The West of Scotland	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that although the claim was presented outwith the time period provided for in sections 123(1)(a) and 140B of the Equality Act 2010 the Tribunal is satisfied that in all the circumstances of the case it is just and equitable to extend time. The claim will accordingly be continued to a full hearing on the merits on 6,7 and 8 April 2021.

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal on 6 August 2020. Of the claims raised against the respondent the sole remaining claim is that the claimant was directly discriminated against because of his age contrary to sections 5 and 13 of The Equality Act 2010.

2. The claim arises from the termination of his employment with effect from 15 November 2019 from his post as Senior Manager, Global Research, Excellence and Partnerships at the age of 58. The claimant wished to depart under the terms of the respondent's Voluntary Severance Scheme but was told that he was not eligible on account of his age. Instead he departed under the terms of the Voluntary Early Retirement Scheme which, on his estimate, was less lucrative.

3. The respondent confirms that it has in place a Voluntary Severance Scheme but that the claimant was not eligible on account of his age. The respondent confirmed in an email of 19 October 2020 to the Employment Tribunal that rejection of the claimant's application for voluntary severance amounted to less favourable treatment. However they maintain that their actions were a proportionate means of achieving a legitimate aim to ensure appropriate use of public funds and ensure fiscal responsibility given the potential level of strain costs to be paid (by) the respondent when an employee over age 50 leaves via voluntary severance.

4. It was also maintained by the respondent that his claim had been presented out of time in terms of section 123 of The Equality Act 2010 and this preliminary hearing was fixed to consider the issue of time bar. It was accepted by the claimant that the primary limitation period had passed and so the issue was whether it was just and equitable to extend time to hear the claim under section 123(1)(b) of The Equality Act 2010.

The Hearing

5. The Tribunal received a bundle of documents for the hearing paginated 1-189 and reference was made to those documents in the course of the hearing.

6. At the hearing I heard evidence from:-

   (1) The claimant who adopted as true and accurate his witness statement dated 12 November 2020 extending to 6 pages and answered questions in cross examination.

   (2) Dr Christopher O'Donnell, Senior Lecturer with the respondent and Branch Officer of the University and Colleges Union. He adopted as true and accurate his witness statement dated 12 November 2020 extending to 8 pages and also answered questions in cross examination.

   (3) David Wharrie, Case Worker for the University and Colleges Union with responsibility for case work at the respondent. He adopted as true and accurate his witness statement dated

12 November 2020 extending to 5 pages and also answered questions in cross examination.

(4) Mhairi Jenkins, Head of HR Operations at the respondent from 24 June 2019. She adopted as true and accurate her witness statement dated 12 November 2020 extending to 3 pages. She answered supplementary questions and questions in cross examination.

7. From the relevant evidence led, admissions made and documents produced I was able to make findings in fact on the issue.

Findings in fact

8. The claimant commenced employment with the respondent in May 2019 and from January 2018 was in the position of Senior Manager of Global Research, Excellence and Partnerships.

9. In June 2019 the respondent announced that they were carrying out a "rebalancing exercise" and the claimant was informed in late June 2019 that his role was at risk. A consultation meeting took place on 8 July 2019 at which time he was accompanied by his trade union representative Dr Christopher O'Donnell. Following that meeting he raised a query on voluntary severance terms namely that if he was to be made redundant would he receive the same terms as those offered under the Voluntary Severance/Voluntary Early Retirement Scheme (VS/VERS) operated by the respondent. (**48/49**)

10. A further meeting took place on 30 July 2019 and again the claimant raised the issue of whether if made redundant he would be offered terms under VS/VERS. He was advised at that time that the respondent would seek a quote on potential VS/VER figures and that the claimant would have until 13 August 2019 to submit an application (**50/51**).

11. Voluntary Severance (VS) and Voluntary Early Retirement Scheme (VERS) are two different schemes. VS operates to allow Professional Services Staff to leave the respondent on certain terms. It is subject to the terms of the Local

Government Pension Scheme. VERS is voluntary early retirement linked to immediate payment of pension with no actuarial reduction.

12. The claimant submitted an application for VS on 6 August 2019 (**52/53**). A further meeting took place with the claimant on 15 August 2019 and during that meeting he was informed that he was not eligible to apply for VS because he did not meet the relevant criteria.

13. The claimant was absent from work in the period 17 September until early October 2019 through ill health. In the discussions prior to his absence he had been accompanied by Dr Christopher O'Donnell. Representation was made in those meetings (a) there may be indirect discrimination at play for the claimant and so an Equality Impact Assessment should be carried out for his department and (b) that the claimant should be given access to Grade 8 posts by way of redeployment.

14. In late October certain conversations took place to consider whether the departure of the claimant could be settled amicably but that did not prove successful and the claimant was made redundant by letter of 14 November 2019 advising that his contractual notice period of 3 months would take effect from 15 November 2019. He was advised that he was not required to work his notice period; that his employment would end on 15 November 2019 and his "contractual notice will be paid to you in the form of post-employment notice pay". He was advised that he had a right to appeal that decision. (**54/55**)

15. The claimant did appeal and the appeal meeting was set for 19 December 2019. Before then the claimant and Dr O'Donnell met to discuss the process of appeal. That discussion covered the potential for an Employment Tribunal claim and the need to notify ACAS for early conciliation beforehand.

16. Notes were taken of the appeal meeting of 19 December 2019 (**62/66**). At that time he was again accompanied by Dr O'Donnell. The appeal meeting identified the grounds of the appeal which included the claim that "cases of discrimination" had occurred "one of which I was subject to on the basis of my age. It impacted on denial access to VS/VER at an early stage and

subsequently forcing me into compulsory redundancy by rendering the consultation process useless" (**62/63**). In the discussion the claimant confirmed that he was told that refusal of VS/VER was "UWS policy" and advised that "all local authorities have revoked the pension rules relating to age restrictions and redundancies and this was highlighted recently with the Fire Service". He was asked if this information on rules being revoked could be forwarded to the panel (**64**). That information was to be sent to the panel by 20 December 2019 and Dr O'Donnell advised that the claimant was "keen for the VS scheme and was told this was closed due to age characteristics".(**66**) The Chair of the appeal meeting indicated that he had been "looking at this lately and found different information regarding the rules relating to age and wasn't aware of the revoking that had been mentioned, and so this would need looked into".(**66**)

17. On 19 December 2019 Dr O'Donnell forwarded various items of information including information on rulings relating to local government pension schemes outlawing potential age discrimination (**67**).

18. The minutes of the redundancy appeal meeting were forwarded to Dr O'Donnell who confirmed by email of 14 January 2020 that he and the claimant were happy with the notes (**71**).

19. Mhairi Jenkins who was present in the appeal and supported the Chair in the consideration of matters did not consider that the claimant was reapplying for VS or that he was being reconsidered for VS at the appeal. She also advised that there was no appeal process against refusal of VS.

20. Around this time it was clear that the claimant was aware of the time limit for making an application to an Employment Tribunal. An email from his partner of 14 January 2020 to him and Dr O'Donnell asked whether it was worthwhile "putting a deadline" on the response to the appeal so "are not timed out for Tribunal" indicating that usually a claim required to be made within "3 months of your employment ending or the problem happening" (**72**).

21. On 15 January 2020 Dr O'Donnell entered the early conciliation process by notifying ACAS of the claim (**73**). ACAS acknowledged the claim advising of the reference number and that a conciliator would be in touch to discuss.

22. At this time enquiries were being made regarding the payment of pension to the claimant and Ms Jenkins advised that the respondent was holding off making arrangements for payment of pension pending the outcome of the appeal.

23. On 24 January 2020 Dr O'Donnell was contacted by an ACAS conciliator who confirmed that their actings could proceed in parallel with the internal appeal (**80**).

24. The respondent intimated their decision on the appeal by letter of 12 February 2020. (**97/101**) The appeal was unsuccessful. Within that letter it was stated that the appeal concerned "three core concerns that you asserted – which you believed indicated a flawed and discriminatory process, in contravention of UWS policy and ACAS Code of Practice …". One of those concerns was:-

> "That this led to discrimination on the basis of age and that you were not permitted severance (VS) on the basis of age" (**97**)

25. The letter went on to consider in some detail the "allegation of discriminatory treatment" and the VS/VERS procedures and criteria. The letter concludes that "your application for VS was not considered as you did not meet the published eligibility criteria for this Scheme …" and also the respondent could not give access to the VS element of the scheme as this was a "regulation set by the LGPS not UWS" (**99/100**)

26. Dr O'Donnell contacted David Wharrie on 12 February 2020 indicating that he had heard that the appeal had not been successful and indicating that he thought that the claimant was wishing to "work towards an ET" given that he had submitted an ACAS request for conciliation (**90**).

27. The Early Conciliation Certificate from ACAS was issued to Dr O'Donnell on 15 February 2020 and in usual terms Dr O'Donnell was notified that "ACAS

cannot advise you about when a Tribunal claim should be submitted. It is your responsibility to ensure that any Tribunal claim is submitted on time." (**102/103**)

28. By email of 16 February 2020 Dr O'Donnell sought to forward a copy of that Certificate to the claimant. The claimant stated that he had never received that email with the Certificate and I accepted that position on the basis that:-

    (a) as matters developed it seemed clear that the claimant was not aware of the Certificate being issued. I accepted that his evidence on this was genuine. Reference is made to this factor in the sequence of events to follow (paras 38 and 40).

    (b) I accepted his evidence that he had searched his "spam folder" and "inbox" thoroughly but found no trace of the email.

    (c) The email address used on this occasion differed slightly from his normal email address being that the normal email used between Dr O'Donnell and the claimant was "Alistair Pettigrew [AlistairPettigrew1165@gmail.com]" whereas the email used on this occasion was "AlistairP[AlistairPettigrew1165@gmail.com"]. While I am not sufficiently au fait with electronic messaging to know if that slight difference could have resulted in non-delivery of the email with the Certificate, equally it could not be ruled out.

29. On 25 February 2020 the claimant's partner emailed Dr O'Donnell asking that the respondent be given a "nudge" on pension payment and also stated "assume getting nowhere with ACAS". Dr O'Donnell replied indicating that he would contact the respondent and that "ACAS have had a meeting/call today. They will get me up to speed tomorrow" (**104**).

30. On 3 March 2020 Mr Wharrie had emailed Dr O'Donnell asking for an update on the case but received no response (**108**).

31. On 6 March Dr O'Donnell and Ms Jenkins met to discuss matters and as a result of that conversation Dr O'Donnell gained the impression that the respondent might be prepared to consider a settlement of the claimant's claim

without the necessity of Tribunal proceedings. On 4 March 2020 the claimant had emailed Dr O'Donnell asking whether he had "heard anything from HR about me getting access to pension" and that he was "getting concerned about undue delays". He asked "any news about the ACAS situation" (**114**). On 6 March 2020 Dr O'Donnell responded stating the following:-

> "I've been trying to chase all of this up today to a decision. ACAS have said that they have had no substantive response to the request, they have issued the Certificate as they wanted to give you the option of ET after a month of trying to reach a COT3. UWS have avoided them and there is no COT3 in the pipeline, I've gone back to UWS as asked for a final decision on COT3. I think we should give them to Wednesday to respond and then you can consider the ET" (**114**).

32. The claimant was unsure what a "COT3" meant and that was explained by Dr O'Donnell "let's give UWS until Wednesday next week to respond as you suggest. What happens next if they don't?" (**114**)

33. At this point the claimant did not follow up on the reference to a "Certificate" being the EC Certificate. He explained that at the time the "word did not register with me".

34. On 12 March 2020 the claimant emailed Dr O'Donnell stating "assume no action from UWS. By what date do we need to lodge case at ET?" to which he received a reply on 13 March 2020:-

> "I'm on leave but checked in just there and there is no UWS response. The ET can't be lodged any earlier than a month after the issue of the ACAS Cert. in terms of maximum time to submit it the government guidance is vague. ACAS seem to like it done around 6m to a year. ACAS said they would send a final request for an early settlement this week if they had not heard from them. So I'll check in with Tricia when I get back on Monday".(**116**)

The reference to "Tricia" was a reference to the ACAS conciliator engaged in this matter. Dr O'Donnell acknowledged that the information provided to the claimant was "a hasty answer" which was "unclear and incorrect".

35. At this time there was confusion between the claimant and Dr O'Donnell as to their respective responsibilities. The position of Dr O'Donnell was that he considered the claimant who had been alert to timescale would be progressing a claim to the ET. The position of the claimant was that the ET application would be progressed by Dr O'Donnell as his advisor. In retrospect he considered that he should have been more proactive in identifying responsibility and being clear on timeline.

36. Dr O'Donnell unfortunately was taken unwell with Covid 19 and on sick leave until approximately 25 March and the respondent locked down on 22 March 2020.

37. On 1st April the claimant emailed Dr O'Donnell (116) stating:-

> "Have you heard anything new? Is everything on hold due to pandemic? I've heard nothing from UWS or the Pension Fund. I don't want to miss any ET deadlines. Hope you are well"

to which Dr O'Donnell responded on 3 April 2020 stating:-

> "I haven't had any form of reply from UWS and neither did the ACAS case worker. I have asked about ET and their working practices right now. I'll be in touch".(**116**)

38. The claimant sought further information from Dr O'Donnell on 26 June 2020 as he became concerned about "lack of progress" and asked "has there been any update from ACAS?". The exchanges at that time indicated that the ACAS case worker was to email the respondent to ask if they wished "one last chance to input" and that the "ACAS advisors are saying you can move to ET once we have an answer or no answer by Wednesday 7th (July)". On 9 July the claimant indicated that as he assumed there had been no response from the respondent he wished to proceed to ET and asked "What are the next steps?". Dr O'Donnell responded on 13 July 2020 indicating that you can "submit the ET online, we have not solid idea of the backlog as of yet due to the partial closing of the offices" and sent the claimant a link to the ET service website (**117/118**). The claimant considered at this stage that Dr O'Donnell would be gathering relevant information on his case and that he would receive guidance on how to

submit an application to the Employment Tribunal. However he did research the matter and that information "flagged" to him that he still had no EC Certificate. He knew that Dr O'Donnell was on holiday and emailed ACAS on 21 July 2020 with the reference number of the case stating:-

> "Dear ACAS, can you please give me and my representative Chris O'Donnell an update on this case. Many thanks".(**128**)

39. On receipt of this email the ACAS conciliator emailed Dr O'Donnell asking that he get in touch to discuss as the "early conciliation period ended some time ago and I'm not aware that you/the claimant have lodged a claim at the Tribunal …". In response Dr O'Donnell indicated that he didn't believe the claimant had submitted an ET "though he has been unclear".(**127**) Also on 21 July 2020 the ACAS conciliator emailed the claimant to say that she had "tried to contact your representative to discuss but I understand he is on leave until 3 August". She indicated that the Early Conciliation Certificate had been issued quite some time ago and that there had been no communication with the parties since early March. She was not aware that any claim had been lodged with the Employment Tribunal and that the claimant "may wish to follow matters up with your representative when he returns from leave…." (**166**)

40. Dr O'Donnell contacted David Wharrie to seek his advice on 21 July 2020 (**126**). The following day Dr O'Donnell spoke with the ACAS conciliator who advised that the claimant should submit an ET as soon as possible. Dr O'Donnell then exchanged emails with Mr Wharrie to give him the background to the matter and advised that he had forwarded the EC Certificate to the claimant. Mr Wharrie spoke with the claimant on 22nd July and at that time the claimant advised he had not been sent the EC Certificate. On the same day Mr Wharrie sent to the claimant the email which had been sent by Dr O'Donnell seeking to forward the EC Certificate and advised him "very strongly" that if he wished to proceed to an Employment Tribunal then he should make an application immediately as he was likely to be out of time (**144**).

41. The claimant responded to that email on 22 July 2020 stating he had never seen the EC Certificate and detailed the background to the matter. He stated

in that e mail that he did not know why he had not received the EC Certificate "unless an email glitch" and that he always forwarded correspondence to his partner " but there is nothing in her inbox or my sent box whereas all other emails are there" (**147**). He indicated that his belief was that "UCU would prepare the ET paperwork so I have not consulted with anyone/prepared anything formal to submit as I assume this would be done when we finally got a date to proceed. Will your legal team now prepare an appeal on time limits based on the wrong advice from ACAS and a full ET case based on the positive legal merits of my case" (**147**). A further conversation ensued between the claimant and David Wharrie who advised in an email of 24 July 2020 that he should contact Dr O'Donnell to discuss and "use the outcome of that discussion to inform next steps, if any" and that he should make an application to the Employment Tribunal without delay. The claimant responded with an email of 27 July enclosing copies of earlier emails to provide reasons for the delay in making an immediate submission. He did not consider that he had all relevant information to make that claim immediately. He stated he had sent a Subject Access Request to the respondent and ACAS as he was concerned that the ACAS advisor had indicated she had no record of contact with Dr O'Donnell after 6 March 2020 as Dr O'Donnell had been very clear in emails that was not the case. At that stage he indicated that he was in touch with an alternative representative as to how to proceed and that representative wanted further information. He considered that the case had to be put together and he could not lodge the application as immediately as had been advised (**154**).

42. David Wharrie again reiterated by email of 28 July 2020 (**155**) that a claim should be made to the Employment Tribunal without further delay.

43. The claimant made an application to the Employment Tribunal on 6 August 2020. The claimant was still not sure of the communication between Dr O'Donnell and ACAS. He had previously been advised that he thought he had a month from 7 July to lodge the claim. He did not think that the delay between 22 July (when he received the EC Certificate) to 6 August 2020 to be significant as he was confused about the communication and needed to

understand what had happened. It took him time to realise that he had been misadvised.

44. The view of Mr Wharrie was that there had been a misunderstanding between the claimant and Dr O'Donnell and that mistakes had been made in that confusion. The evidence of Dr O'Donnell was to the effect that he appeared to have erroneously thought that the claimant was looking after the Tribunal claim and that his role was to explore the possibility of settlement. He advised that reflecting on the advice he gave in late March/early July 2020 he could see that errors had been made.

Submissions

45. I was grateful for full submissions on behalf of the parties.

For the Claimant

46. It was agreed that there was a request made for VS on 6 August 2019. There was no formal response received but denial of that request could be taken from the decision to dismiss on 14 November 2019 by way of compulsory redundancy.

47. That decision was appealed and it was of no consequence that there was no formal application for VS within that appeal as in substance the issue was discussed and considered in detail. The appeal outcome letter contained lengthy rebuttal of the complaint on VS.

48. It was clear the Chair of the Appeal Panel reconsidered eligibility. If it had been thought that the decision to refuse VS was wrong then that could have been corrected.

49. It was submitted that a policy of the respondent applied over a period of time and the actions were "bookended" by (1) the application for VS on 6 August 2019 and (2) the concluded appeal outcome of 12 February 2020. In that period the policy applied and the claimant was considered ineligible for benefit.

50. It was submitted that the case of ***Cast v Croydon College*** (1998) ICR 500 was on all fours with the position. That case concerned a policy on part-time working and it decided that if the matter was reconsidered then there was a fresh act of alleged discrimination for time bar purposes even if there was no material change of circumstances in the decision made. It was submitted that this case concerned a continuing act which concluded 12 February 2020. Reliance was also placed on ***Aziz v FDA*** [2010] EWCA Civ 304.

51. Thus time bar operated from 12 February 2020 and the claim should have been lodged by 11 May 2020. The claim was late by approximately 2 months 3 weeks. Even if time bar operated from date of compulsory redundancy (14 November 2019) that rendered the claim late by approximately 5 months and in neither case could it be said delay was extraordinary.

52. There was a broad discretion to extend time and it was submitted that the overarching consideration was the balance of prejudice. The factors in play were as outlined in ***British Coal Corporation v Keeble*** [1997] IRLR 336 but in ***Abertawe Bro Morganneeg University Local Health Board v Morgan*** [2018] IRLR 1050 it was clear that (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the respondent were always relevant.

53. Insofar as the reasons for delay were concerned there had been a full and frank explanation. The email chain between 13 March and mid July 2020 demonstrated that the claimant was relying on advice which was incorrect. On the 2nd of July 2020 Dr O'Donnell said that the claim could still not be brought and that they could move to an Employment Tribunal once an answer had been given on the 7th of July 2020 from the respondent on the claim.

54. On 13 July Dr O'Donnell had not indicated that the claim should be brought. He did not suggest any urgency in the matter or any more work at that time was necessary. In that context there was no surprise no claim had been lodged.

55. Also it was submitted that the claimant had not received the copy of the Early Conciliation Certificate when it had been sent to Dr O'Donnell. The claimant only received this on 22 July 2020 from Mr Wharrie who then advised that the

claim should be raised immediately. While it might be possible for a lawyer to turn matters round within hours the claimant needed time to present his case. He was naturally concerned with why his claim was late. He considered it important to say why it was late in the application which was being made. The claim was made by 6 August 2020 which was a reasonable time period from when he was strongly advised to present his claim.

56. In this case it was submitted that the balance of prejudice was firmly with the claimant. The case involved the application of a policy and the criteria for eligibility and did not depend on eye witness evidence. The determination would be made under reference to documents. It could not be said that evidence had been affected by delay and so there was no prejudice. The respondent had examined the position fairly recently.

57. On the face of the claim there were reasonable prospects of success. The respondent would require to show that their policy was objectively justified.

58. The claimant had relied on the Union officials to guide him through the process and in the course of that incorrect advice had been given which caused delay. In considering "just and equitable" principles the fault of the advisor was not to be visited on the claimant (***Benjamin-Cole v Great Ormond Street Hospital*** [UKEAT/0356/09].

For the Respondent

59. It was submitted that time should not be extended under the just and equitable considerations.

60. The application for VS had been submitted on 13 August 2019 (albeit dated 6 August 2019) and the claimant had been advised at a meeting on 15 August 2019 that he was not eligible for the VS. The respondent's position was that the claimant would be aware of formal refusal of the application when he was made compulsorily redundant on 15 November 2019.

61. To take account of early conciliation the claim should have been lodged by 16 March 2020 but it was not lodged until 6 August 2020, some 5 months later.

62. It was disputed that the claimant made application for VS at the Appeal Hearing and disputed that time bar would operate from the letter of intimation of refusal of that appeal, namely 12 February 2020. The appeal concerned a review of the fairness of dismissal. Ms Jenkins had indicated that there was no belief that the claimant was reapplying for VS. He had not asked for that to be considered in the statement of case.

63. His ET1 claim had not indicated that he had applied for VS at appeal. It was not possible to undo time bar by asking to be done what already had been done. The appeal was simply affirmation of the previous position. There was no right of appeal contained within the Voluntary Severance Scheme according to the evidence of Miss Jenkins. The appeal was a review of redundancy. Even so the claim should have been lodged by 14 May 2020 taking into account early conciliation and had not been lodged until 6 August 2020 some 3 months later.

64. On the issue of whether it would be just and equitable to extend time reference was made to ***Bexley Community Centre v Robertson*** [2003] EWCA Civ 576 which emphasised that it was up to a claimant to convince a Tribunal that it was just and equitable to extend time which was the exception rather than the rule.

65. Looking to the factors which require to be considered by a Tribunal under ***Keeble*** it was not satisfactory that the claim should be lodged so late given that the benefit of advice from Dr O'Donnell who was trained and skilled in these matters and who was aware of time limits. It was not an excuse for the claimant. He had access to advice from a full time official and from his own resources. There were certainly no internal process or conciliation being considered which could form any reason for delay. Also the claimant had applied for early conciliation before the appeal outcome and so it was not as if he was awaiting that decision.

66. He knew when he had been turned down for VS in August 2019. He knew that the decision was conclusive when he was made compulsorily redundant. He was aware at that time of the action which could be taken.

67. Also on 13 July 2020 when he was told that no ET application had been made and was sent appropriate web link (which he shared with his partner) no application was made and no approach to ACAS regarding the Certificate until 21 July 2020.

68. It was not accepted that the claimant had not received the Certificate by the email from Dr O'Donnell on 16 February 2020.

69. Even when Mr Wharrie emailed the claimant to say that he should make immediate application to the Employment Tribunal he did not do so. By that stage he had the appropriate web link and the Certificate. However there was no claim but continued response about the Union's position and belief that the Union should be making this claim. Essentially even although he knew he should be making the claim urgently he continued to press the Union to fix matters and engage in lengthy emails rather than getting on with his application.

70. It took the claimant 16 days to make the claim and that was an unreasonable delay. He seemed to have time to lodge a Subject Access Request with the Union and ACAS but not to lodge his claim.

71. In this case the rebalance exercise had taken place in early 2019 and considerable time had passed. The respondent now needed to defend by going back into that process and there was prejudice in that respect. There was a need to ensure timeous action and for adherence to the time limits so that there was an ability to have matters resolved promptly and fairly. There was no justifiable excuse in this case for non-lodging of the claim.

Conclusions

Statutory Provision

72. The time limits for claims under the Equality Act 2010 are set out in section 123 which states:

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 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.

(2) … …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Date of the act to which the complaint relates

73. The dispute between the parties was whether the starting point for consideration of the just and equitable extension was whether the claim to the ET should have been lodged within 3 months (and any extension provided for by early conciliation) of 15 November 2019 being the date the claimant was made compulsorily redundant; or 3 months (and any extension provided for by early conciliation) of 12 February 2020 the date the appeal was refused. I preferred the submission of the claimant on this matter namely that either there was a continuing act or two separate acts which could found the claim for discrimination. The relevant time period could then commence with the date of refusal of the appeal.

74. In ***Barclays Bank Plc v Kapur and Another*** [1991] ICR 2008 the House of Lords drew a distinction between a continuing act and an act with continuing consequences. It was held there that where an employer operated a discriminatory regime, rule, practice or principle then such practice will amount to an act extending over a period. Where however there is no such regime, rule, practice or principle in operation an act which affects an employee will not be treated as continuing even though that act has ramifications which extend over a period of time.

75. Thus in ***Sougrin v Haringey Health Authority*** [1992] ICR 650 the Court of Appeal held that a decision not to regrade an employee was a "one off" decision or act even though it resulted in the continuing consequence of lower pay for the employee who was not regraded. There was no suggestion in that case that the employer operated a policy whereby black nurses would not be employed on a certain grade. That can be contrasted with ***Owusu v London Fire and Civil Defence Authority*** [1995] IRLR 574 where an employee complained he was discriminated against by his employer's refusal to award him promotion. There the EAT agreed that a specific failure to promote or shortlist was a single act – despite its continuing consequences – but drew a distinction with the situation where the act (a failure to promote) took the form of "some policy rule or practice in accordance with which decisions are taken from time to time". It is not necessary for there to be a policy or practice in place before it can be determined that there is a continuing act of discrimination but that is a significant factor. In ***Aziz v FDA*** [2010] EWCA Civ the Court approved an approach that the test to be applied at the pre hearing review was to consider whether the claimant had established a prima facie case or as it was put "the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.

76. It is clear that the claimant's complaint arose out of the policy being operated by the respondent on VS. That policy continued and still continues. I did not agree that on the facts of the case the claim made by the claimant that he was discriminated on the grounds of age in relation to the VS policy was not considered within the appeal process. The appeal notes (**62/66**) indicate that

the claimant made the case that there was discrimination within the process of rebalance "one of which I was subject to on the basis of my age" namely that he was denied access to VS. The point is affirmed when at conclusion of the appeal Mr Donnelly indicates that the claimant was told he could not benefit from the scheme due to age and the Chair of the appeal stated that this would "need looked into". The appeal outcome letter duly did consider the issue by first of all indicating (**97**) that one of the grounds of appeal was that there was discrimination on the basis of age in that the claimant was not "permitted severance (VS) on the basis of age"; and that matter is then dealt with at some length (**98/100**) with a view taken that entitlement to VS was not available to the claimant.

77. I take that to be a reconsideration of the issue of whether or not the claimant was discriminated against on the grounds of age in respect of denial of access to the VS scheme. As was indicated in ***Cast v Croydon College*** [1998] ICR 500 the Court of Appeal held that a decision in response to the repetition of an earlier request may constitute an act of discrimination whether or not it was made on the same facts as before "if it resulted from a further consideration of the matter and was not merely a reference back to an earlier decision". In this case I find that the respondent did reconsider and looked again at the issue of whether there was discrimination on the grounds of age by denial of access to the VS scheme. Thus the most recent act complained of would be refusal of the appeal intimated by letter of 12 February 2020.

78. Separately in this case it would appear that the claimant could rely on repeated discriminatory acts. Again in ***Cast*** the Court of Appeal was prepared to hold as an alternative to its finding of a "continuous act" that time had started to run on the last occasion that the employer had refused the employee's request for a part time working or job sharing arrangement. The Court found that there was an error in concluding that time ran from the date of the first refusal instead of from the date of each reconsideration and refusal.

79. Again I consider that there was reconsideration of the matter by the Appeal Panel and that there was a separate act with the appeal being refused.

80. Of course whether the time should have run from 15 November 2019 or 12 February 2020 does not mean the application to the Employment Tribunal was presented in time. It is simply that the period of delay is shortened which is an issue when coming to consider the Tribunal's discretion to allow a just and equitable extension. As indicated in this case I find that time could have run from 15 November 2019 as well as 12 February 2020 but that the length of the delay should be considered on an ability to lodge the claim 3 months (with any extension for early conciliation) from 12 February 2020.

Just and Equitable Extension

81. As was submitted under reference to ***Robertson v Bexley Community Centre*** while an Employment Tribunal has a wide discretion in determining whether or not it is just and equitable to extend time such limits are exercised strictly and there is no presumption that discretion should be exercised. A Tribunal should hear evidence to convince it that it is just and equitable to extend time which is the exception rather than the rule. At the same time the Court of Appeal in ***Chief Constable of Lincolnshire Police v Caston*** [2010] IRLR 327 advised that there was no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain circumstances policy might lead to a consistently sparing use of the power but that should not be the case in relation to the power to extend time for bringing ET proceedings "and Auld LJ is not to be read as having said in Robertson that it either had or should". The case law certainly would indicate that it would always be relevant to consider (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the respondent.

Reason for the delay

82. In essence the claimant's position was that he was wrongly advised as to the presentation of the claim. It is clear from the case law that an Employment Tribunal's discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases. Therefore whereas incorrect advice by a skilled advisor was unlikely to save a late Tribunal claim in an unfair dismissal case the same is not necessarily true when the claim is one of discrimination (***Hawkins v Ball and another*** [1996] IRLR 258; ***Chohan v***

Derby Law Centre [2004] IRLR 685). It has been held that incorrect advice received by a trade union official before and after the claimant submitted out of time discrimination claims should not be ascribed to the claimant and an extension of time should be granted (***Wright v Wolverhampton City Council*** EAT0117/08).

83. In this case the claimant had sought advice from the UCU. The evidence from Mr Wharrie was to the effect that he was aware of the time limits applicable to Employment Tribunal proceedings and that had been communicated to the Branch officials including Dr O'Donnell.

84. The claimant had engaged Dr O'Donnell in the representation he made to the respondent. The claimant was accompanied by Dr O'Donnell in the redundancy consultation process and then at appeal. It was certainly the case that the claimant was aware of time limits in presenting a claim to the Employment Tribunal at an early stage. However he believed that as he had engaged the Union in this whole matter and Dr O'Donnell had represented him he would continue to progress matters to the Employment Tribunal. That did not seem an unreasonable assumption on his part. Dr O'Donnell had submitted the early conciliation notification to ACAS on 21 January 2020 and in the email from ACAS of 24 January 2020 it was stated that the ACAS negotiator had "emailed the claimant explaining that I will be dealing directly with you (i.e. Dr O'Donnell) as their nominated representative" (**85**). In light of that intimation it would be reasonable for the claimant to consider that he could rely on the representative to progress his application.

85. The Early Conciliation Certificate was issued to Dr O'Donnell on 15 February 2020 and he was advised at that point that it was "your responsibility to ensure that any Tribunal claim is submitted on time". Dr O'Donnell was also advised by ACAS that he should email "if you need an individual Certificate for a claimant" (**J102**). Dr O'Donnell indicated that he had forwarded the Certificate to the claimant at that time but I accepted the evidence that the claimant had not received the Certificate. Accordingly he was not aware that he was in a position to present a Tribunal claim at this point.

86. Dr O'Donnell was asked on 3 March 2020 by David Wharrie whether there was any activity in this case and at that point he emailed ACAS apparently under the misapprehension that there were some continuing negotiations with the University. On a reminder from the claimant as to "news about the ACAS situation" on 4 March 2020 Dr O'Donnell gave a response which would not alert the claimant either that he had to make an application to the ET himself or that time was an issue as Dr O'Donnell considered that the University should be given some more time to respond to ACAS "and then you can consider the ET". Thereafter on 13 March 2020 there was further email exchange between the claimant and Dr O'Donnell who was asked specifically about "ET deadlines" and advised that "the ET can't be lodged any earlier than a month after the issue of the ACAS Cert. in terms of a maximum time to submit that the governance guidance is vague, ACAS seem to like it done around 6m to a year" (**116**). It is not clear where this advice came from but it would clearly mislead the claimant into thinking that he had had a good deal of time to intimate his claim to the ET. Indeed there was further discussion in June/July 2020 when Dr O'Donnell was indicating that the "ACAS advisors are saying you can move to ET once we have an answer or no answer by Wednesday 7th (July)".

87. Clearly within the time limit for which the claim should be presented (on a finding that time ran from 12 February 2020) the claimant was incorrectly advised on the issue of when a claim should be lodged. He may have been lackadaisical or insufficiently proactive in questioning the accuracy of this advice given that he was aware of the 3 month time limit. Nonetheless it was incorrect advice by a skilled advisor and the authorities are at one in indicating this is a relevant factor. I consider that the claimant was entitled to rely on that advice.

88. If time commenced to run from date of intimation of redundancy on 15 November 2019 then time would expire (with the extension provided by early conciliation) by 16 March 2020. On 13 March 2020 the claimant had been advised in the email of that date that there may be "6m to a year" for an ET

claim to be lodged and so there was no haste. So even if time started to run from 15 November 2019 I would still find that the claimant was being given incorrect advice from a skilled advisor.

89. Essentially I accept that the claimant was in the hands of a skilled advisor from November 2019 onwards. That advisor had lodged on his behalf notification of early conciliation with ACAS. ACAS were not communicating with the claimant but with that advisor. The claimant was entitled to rely on the advisor in progressing his claim timeously before the Employment Tribunal.

90. I consider, therefore, that the reason for delay was down to fault from the skilled advisor in this case.

Length of delay

91. So far as length of delay is concerned in either case the delay between timeous lodging and actual lodging was not unduly lengthy if the claim should have been lodged either in March or May 2020.

Cogency of Evidence

92. I do not consider that the cogency of evidence would be affected by the delay either from March 2020 or May 2020. This claim relates to a scheme operated by the respondent. The respondent's position is that using age as a criteria for eligibility is a proportionate means of achieving a legitimate aim. The cogency of that evidence is not affected by the delay. While it was some time since the rebalancing exercise was carried out which led to the claimant's redundancy the issue in this case will be the use of the policy. The terms of the policy and the reasons for its eligibility being restricted by age will not have changed.

Cooperation with Requests for Information

93. No issue arises here. It would not appear that either party have delayed in the requests for or supply of information.

Promptness with which the claimant acted

94. Criticism was made of the claimant's dilatory application when he became aware that his claim was out of time. He may be criticised for this but at the same time it seemed clear he was trying to understand what had happened in the communication between himself, his advisor and ACAS. It would also be necessary for him to formulate the grounds of the complaint to the Employment Tribunal. The evidence was that he found alternative assistance on an "informal basis". While there might be some criticism of him in not making immediate application I do not think there was any significant issue in the delay between 22 July 2020 (when he got the EC Certificate) and received advice to make an immediate claim and 6 August 2020 (when the claim was lodged).

Balance of Prejudice

95. The case law regards this as an important and weighty factor. If there is no extension the claimant would lose his right to bring this claim. If time extended the respondent would require to defend the matter through the Employment Tribunal. However they had clearly given it consideration over the period to February 2020. There is documentation on which they will rely. They have not been inhibited or disadvantaged in the investigation of the claim while matters were fresh. I consider the balance of prejudice is in favour of the claimant.

96. In those circumstances I take the view that the balance of prejudice does favour the claimant; that there is explanation for him not taking action at an early stage namely reliance on skilled advice which was incorrect; he took action within a reasonable time once he became aware of all the facts; and the cogency of the evidence is not likely to be affected. I take this view even if the time limit started to run from 15 November 2019. I consider that these factors would be in favour of exercising discretion on a just and equitable basis to extend time to 6 August 2020 for the presentation of his claim which can now proceed to a full hearing on the merits.

J D Young
Employment Judge

7 January 2021
Date of Judgment

Date sent to parties **29 January 2021**