EMPLOYMENT TRIBUNALS

Claimant: **Mr A McMellon**

Respondent: **Royal Mail Group Limited**

Heard at: **Birmingham Employment Tribunal**

On: **17 February 2020**

Before: **Employment Judge Cookson**

Representation
Claimant: In person
Respondent: Mrs Kent (solicitor)

JUDGMENT

The claimant's claim for disability discrimination was not submitted within 3 months starting with the date of the alleged act of discrimination and in the circumstances it is not just and equitable to allow extra time for presenting the claim. Accordingly the claim is dismissed.

REASONS

1. Mr McMellon ("the claimant") was employed as a postman from 2004. He has brought a claim for unlawful discrimination following the termination of his employment on 4 May 2017. His employment ended by reason of ill health early retirement. He felt that the circumstances of that decision were unfair and brought an appeal and eventually he brought a tribunal claim on 16 August 2019 following early conciliation on 5 and 6 August 2019.

2. The claimant's claim was brought outside the 3 month statutory time limit and he acknowledges that that is the case. The purpose of this preliminary hearing was to establish whether his claim has been brought within a further period

which this tribunal considers to be just and equitable to enable to the claim to proceed.

3. I received oral evidence from the claimant and had before me a bundle of documents prepared by the respondent. Pages numbers in this judgment refer to the bundle of documents. I also received submissions from the claimant himself and Mrs Kent.

My Findings of Fact

4. I make my findings of fact on the basis of the material before me taking into the account the documents, and the conduct of those concerned before me. I have resolved any conflicts of evidence as arose on the balance of probabilities.

5. The respondent procedure which had been applied to the claimant and which led to the termination of his employment in this case, is included in the bundle at pages 76 to 87. The appeal procedure is set out at page 81 and following. Importantly there is nothing in the procedure to suggest that employment will be deemed to continue during an appeal process.

6. The background to termination is not material at this stage, but the claimant has a very serious condition, vasculitis with polyangiitis granulomatosis, which caused him to have significant time off work. His employment was terminated under the respondent's "Leaving the business due to ill health policy" which is underpinned by a collective agreement, although the claimant says that no proper procedure was followed. The details of the claim do not concern me here because I have to satisfied that the tribunal has jurisdiction to hear the claim and that issue dependent on the time limits for bringing a discrimination claim being satisfied..

7. Following the termination of his employment on 4 May 2017 the claimant says that he indicated he wished to bring an appeal. The request for an appeal was, submitted on 17 May 2017 and the respondent acknowledges that no response to that request was ever given (see page 54 of the bundle). For reasons which are inexplicable to me, the respondent failed to act on the "request for an appeal". It appears that the CWU, the claimant's trade union who were acting on his behalf, sought to progress matters. In October 2018 there was a meeting between the employer, represented by Mr Morgan, the claimant, and a representative of the CWU Mr Brosman. At that meeting Mr Brosman refers to the possibility of employment tribunal proceedings being brought against the respondent. There is therefore at least some knowledge of the ability to bring a claim at that stage, but it appears that neither the claimant nor Mr Brosman investigated exactly what the possible time limits for bringing a claim were.

8. The claimant has told me that he was advised by a trade union representative told that he had 3 months from his appeal being heard to bring his claim. I have not seen any corroborating evidence that that advice was given but if he was given that advice it was clearly wrong. I can sympathise with the claimant's

feelings of having been let down by his trade union although of course I have not heard from them.

9. Mr Morgan wrote to the claimant in December 2018 – the claimant tells me that he received that letter shortly before Christmas in 2018. That letter states "this letter is final and the procedure is now closed"

10. There is a letter from the claimant dated 31 December 2018 (p56) where he expresses his dissatisfaction with that with the outcome he has been notified of because he has never had an appeal hearing. I have some considerable sympathy with the claimant. It seems extraordinary to me that an employer will delay hearing an appeal and then refuse to hear it because of their own inaction. That seems to me to be manifestly unjust. However, the employer had made its position clear at that stage, even if the claimant thought that was wrong. It must have been clear to the claimant that if he wanted to challenge the employer he needed to act at that stage and that he, or at least his representative, had in mind the possibility of bringing tribunal proceedings at that time. Oddly, the trade union, on the claimant's behalf, appears to have simply accepted Mr Morgan's refusal to consider appeal at that time without immediately robustly challenging the respondent, or initiating proceedings which perhaps would have been the expected course of action..

11. There is then further correspondence in the bundle from some time later. It appears that the trade union did continue a thread of correspondence with the respondent about the appeal but on 7 June Lesley Sadler, who works for CWU, wrote to Mr Brosman to say "there is nothing further I can do" in relation to the appeal. It is clear that there had been discussions between CWU and senior officers at the respondent when it had been again repeated that the appeal would not be considered, and this must have been in the period prior to June 2019. Around 5 weeks later on 16 July 2019, the claimant to wrote to the respondent's head of employee relations (Mrs K Mckay) himself again asking for his appeal to be considered. By the time he received a reply to that letter he has already initiated early conciliation. In any event Ms McKay simply replies on 12 August 2019 that too much time has now passed and the appeal will not be progressed. This is not however part of the procedure and she says no more than Mr Morgan had done in December. The claimant lodged his tribunal claim a few days later.

12. The claimant has also disclosed correspondence he received from the Equality Advisory Support Service which refers to the relevant time limit, although not the extension provisions set out in s123 of the Equality Act. There is still a delay of some three weeks before the claimant lodges proceedings.

The law

13. Turning now to the law, the approach to the time limits in unfair dismissal cases is strict. In the judgment of Lord Denning in *Walls Meat Company Limited -v- Khan* [1978] IRLR 499, he set out the test which should be applied, "*had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights or ignorance of the time limit is not just cause or excuse unless it appears that he or his advisors could not reasonably be expected to have been aware of them. If he, or his advisors could have been so expected, it was his or their fault and he must take the consequences*". However, in discrimination claims I must apply a rather different test. Under s123 of the Equality Act 2010 a claim must be submitted "*within 3 months starting with the date of the act to which the complaints relate, or such other period as the employment tribunal thinks is just and equitable*".

14. The most recent Court of Appeal guidance on how I should exercise my discretion in a discrimination case to determine what is "just and equitable" was given in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640. In that case, Leggatt LJ said as follows: -

    "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, 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. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998. 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) "

15. That means that when I consider how to exercise this broad discretion I must take a multi-factual approach, taking into account all the circumstances of the case in which no single factor is determinative in addition to the length and reason for the delay, the extent to which the weight of the evidence is likely to be affected by the delay, the merits, and balance of prejudice. Other factors which may be relevant include the promptness with which a claimant acted once he or she knew of factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.

16. I have also taken into account the guidance of the Court of Appeal in *Robertson -v- Bexley Community Centre* which reminds me that it is important to note that time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim on the amount of time on just and equitable grounds, there is no presumption that they should do so, unless they can justify their failure to exercise the discretion, quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise for discretion is the exception rather than the rule.

My conclusions and reasons

17. In determining what is just and equitable I have to determine what is just and equitable. That means I have to take into account the potential prejudice to both parties. Clearly there is potential prejudice to the claimant if his claim cannot proceed, but that is always the case if a claim is not allowed to proceed because it is submitted out of time. If claims were always allowed to proceed simply on that basis, the time limits set by the legislation would be meaningless. What is important is that I also consider the potential prejudice to the respondent. A considerable amount of time has passed and memories will have faded. I remind myself that is one of the reasons for short time limits in the legislation. Mrs Kent has explained that relevant witnesses have now left the respondent's employment and correspondence has gone astray and it is clear that the respondent will face considerable prejudice if this claim proceeds.

18. When I consider the reasons for the claimant not acting earlier, I note that the claimant's trade representative referred to the possibility of brining a tribunal claim in December 2018. It was clearly in his mind at that time. It is regrettable that claimant did not receive sound advice from his advisors, on his version of events at least, but I cannot accept that as meaning I should simply disregard his failure to act. The union owed the claimant a duty of care and if it is correct that they failed in that duty of care he may have grounds for bringing a complaint against them. That is a matter between the claimant and those who advised him, but it cannot mean the actual legislative limitation period is rewritten or falls away. That would create a lacuna in the legislation.

19. Putting to one side what he says he was told by the trade union, the claimant had been told by December 2018 at the latest that his appeal was not going to be considered. On the basis of what he says he had been told by the trade union about time limits it should have been clear to the claimant that he needed to act at that point. If a claim had been brought within 3 months of the claimant being told of Mr Morgan's decision, although it would have been out of time, I may well have been persuaded that it would be just and equitable to extend time from the date of that decision, but the claimant did not act then and a further 7 months pass from receiving Mr Moran's letter before the claim is brought. I am not convinced by his explanation for acting. It seems to me that he held on to the belief that he could resolve this by means of the respondent's procedure. He was aware that there was relevant legislation and that the tribunal process existed but chose not to investigate that further. I am not

satisfied by is explanation for not acting earlier. In those circumstances I find that in light of the prejudice to the respondent and as well as the prejudice to the claimant I find that it would be just and equitable to extend time to the extent required to allow the claimant's claim to proceed. Accordingly, his claim is out of time and is dismissed.

Employment Judge Cookson

Date 28 April 2020