EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4120679/2018

Preliminary hearing held by video on 16 September 2021 (hearing) and 4 October 2021 (in chambers)

Employment Judge M Whitcombe

Steven Mulheron	**Claimant** **Represented by:** **Mr D Hay** **(Advocate)**
Her Majesty's Revenue and Customs	**Respondent** **Represented by:** **Dr A Gibson** **(Solicitor)**

JUDGMENT ON A PRELIMINARY ISSUE

The claim was presented outside the period specified by section 123(1)(a) of the Equality Act 2010 and was not presented within a just and equitable other period for the purposes of section 123(1)(b). Consequently, the Tribunal has no jurisdiction to hear it and it must be dismissed.

REASONS

Introduction and background

1. The claimant was formerly employed by the respondent between 15 February 2016 and 10 April 2017 at Portcullis House in Glasgow as a RIS PCD Production Officer, a role which involved the production of intelligence packages. By a claim form presented to the Tribunal on 22 September 2018 he brought claims for disability discrimination and victimisation under sections 15, 19 and 27 of the Equality Act 2010. The claimant relies on acts or omissions in the period 12 July 2016 to 10 April 2017. The claimant has been diagnosed as suffering from a major depressive disorder (moderate) on the DSM-V classification and a general anxiety disorder.

2. This preliminary hearing was arranged to deal with the jurisdictional time limit as a preliminary issue. Subject to extensions generated by the ACAS early conciliation procedure, the basic rule is contained in section 123(1) of the Equality Act 2010. Proceedings 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 considers just and equitable.

3. The claimant tackled that issue head on in the attachment to the claim form (ET1) when it was said on his behalf, "*This claim is submitted out of time, by some considerable margin*". It is not argued that any "conduct extending over a period" within the meaning of section 123(3)(a) of the Equality Act 2010 meant that the claim was presented within time. Whether there was "conduct extending over a period" or not, that period did not end any later than the effective date of termination on 10 April 2017. The claimant's argument is that the claim was presented within a just and equitable "other period" for the purposes of section 123(1)(b) of the Equality Act 2010, such that the Tribunal nevertheless has jurisdiction to hear it, despite what the claim form frankly characterises as "*exceptional delay*". The basis of the argument is that the

claimant's disability impaired his comprehension, focus, ability to identify and progress the claim and also his ability to cope with the impact of a full hearing on his health. This is not a case in which the claimant alleges any ignorance of time limits but a key issue is his ability to comply with them. By that I do not simply mean capacity in the strict sense, but also whether it would be more difficult for the claimant to comply, so as to have a bearing on the justice and equity of the position.

4. The case has been much delayed by a protracted dispute about expert evidence and an unsuccessful appeal against orders made by the Tribunal in relation to that expert evidence. Regrettably, the jurisdictional time point is now being decided more than three years after the date on which the ET1 was presented to the Tribunal.

Evidence

5. This hearing was conducted on the basis of documentary evidence contained in a joint file running to 135 pages. The joint file included a report dated 27 February 2018 from Mrs Mary Keenan Ross, Consultant Clinical Psychologist. That report was obtained by the claimant, prior to the instruction of a joint expert (see below).

6. The claimant was the sole lay witness. He gave evidence on affirmation and was cross-examined. I found him to be an honest and straightforward witness, but that does not mean that I necessarily accept his subjective assessment of his own cognitive impairments and abilities at particular times. The claimant's own perception must also be assessed in the context of the objective facts and the evidence of his activities.

7. The respondent called oral expert evidence from Dr Una Graham, a jointly instructed expert witness who produced a written report dated 17 November 2019. Dr Graham is a Consultant in Adult General Psychiatry and Clinical Director (South Glasgow), Glasgow City Health and Social Care Partnership,

based at the Leverndale Hospital.

8. Each of the experts had commented in writing on the conclusions of the other. Dr Graham also did so in her oral evidence.

Findings of fact

9. The following facts were either agreed, undisputed, or my findings on the balance of probabilities.

Procedural chronology

10. First of all I will set out some of the key procedural dates as a separate chronology. I understood all of them to be agreed.

10/4/17	Effective date of termination and the latest date on which time began to run.
7/7/17	Receipt by ACAS of EC notification (within time).
24/7/17	Issue of ACAS certificate.
24/8/17	Extended limitation date.
17/9/18	Second receipt by ACAS of EC notification (of no relevance for time limit purposes).
22/9/18	ET1 received by the Tribunal.

11. On that basis the claim was presented one year and 29 days out of time. I will now set out my other findings of fact, again in chronological order.

Background to the submission of the claim

12. The claimant brought an ET claim against a former employer in about 2009. He instructed Livingstone Brown solicitors in that claim. That litigation had also commenced with a time limit problem which the claimant said had been the fault of Livingstone Brown. It seems that time was nonetheless extended

and that the claim subsequently settled.

13. The claimant raised an internal grievance on 12 July 2016 but withdrew it the next day. He submitted a further grievance on 23 August 2016 which revived and added to the matters raised in the original grievance. The grievance was not upheld. I find that whatever the claimant's state of health may have been at that time, it did not prevent him from commencing and participating in an internal grievance process. There was no objective evidence that it made those tasks excessively difficult either.

14. At around the time of the claimant's dismissal on 10 April 2017 he felt that his mental health was deteriorating. He found it hard to sleep and he had been falling behind in his work. He found it hard to concentrate and felt under stress. He was very anxious and unable to relax. When he found out that he was to be dismissed he felt worthless, had suicidal thoughts and considered a particular location at which to commit suicide. He was able to avoid acting on those thoughts but felt low, numb, humiliated and victimised. His mind was racing and he was not thinking straight. At that time, the claimant thought that his treatment might have been related to his sexual orientation.

15. However, the claimant represented himself throughout the internal disciplinary proceedings and I find that his state of health did not prevent him from doing so. He was able to attend meetings and to defend himself and there was no evidence to show that he found those things excessively difficult.

16. At around the same time the claimant pursued at least one subject access request. His state of health neither prevented that activity nor made it excessively difficult.

17. On 17 April 2017 the claimant's father fell and broke his hip, ending up in intensive care. The claimant lived in the same household as his father and the claimant said that he became focussed on his father's health and care

rather than on his own ET claims. However, I do not accept that the claimant was *wholly unable* to focus on ET claims, as the following findings demonstrate.

18. The claimant first consulted solicitors on 20 April 2017. The claimant could not remember the precise date but it was helpfully confirmed by Mr Hay on instructions from those solicitors. The firm was once again Livingstone Brown, who have continued to act for the claimant since then and in connection with this hearing. The claimant's purpose in contacting them was, "*to get some advice on raising a claim to take [the respondent] to a Tribunal*". The claimant had a face-to-face appointment with a specialist employment lawyer.

19. At that time the claimant's thoughts were focussed on a claim for sexual orientation discrimination and he was not considering a disability discrimination claim. However, he had raised disability discrimination issues in his grievance. The claimant attributes that anomaly to the fact that he had been traumatised by the experience of coming forward as a victim of historic sexual abuse.

20. I find that whatever the claimant's state of health may have been at the time, he was able to identify a suitable firm of solicitors to act for him, to contact them, to make an appointment and to attend their offices. By that stage the claimant was in possession of his grievance documentation, the grievance outcome, the appeal outcome and his dismissal letter. He had access to the expertise of a specialist employment lawyer trained to identify the claims which might be brought on the facts of the claimant's case. The claimant accepted that he would have spoken to that lawyer about his employment situation, his grievances and his dismissal. I find that with reasonable diligence the claim now brought could have been identified at around that time.

21. The claimant's solicitors contacted ACAS on his behalf on 7 July 2017. I find that they must have done so on the claimant's instructions and would not

have taken that step without instructions. The claimant was uncertain whether time limits were discussed with his solicitor at around that time. On the balance of probabilities I find that they probably were. The claimant had the benefit of advice and representation from an experienced employment lawyer. I do not think it is likely that the solicitor would have commenced ACAS early conciliation on the claimant's behalf and on his instructions without also advising on the implications for time limits. It is all the more likely that advice was given on time limits because that same firm of solicitors had apparently made a mistake leading to a preliminary time limit issue in previous litigation against a different employer in 2009. The claimant has not suggested that he received poor advice or poor service from his solicitors in 2017 or 2018.

22. When Dr Gibson suggested to the claimant in cross-examination that by about 24 July 2017 (the date of the ACAS certificate) he would have known that he had a month from then to lodge a claim in time, the claimant replied "*quite possibly*". I find that it is likely that he did have that knowledge.

23. There is no record of any further consultation with the solicitor resulting in a conscious decision not to proceed. The claimant accepted that the most likely explanation is that he simply did not follow things up. He attributed that to impaired concentration and focus. As will be clear from my conclusions below, I do not accept that explanation.

24. By no later than 7 August 2017, and once again with the assistance of Livingstone Brown, the claimant made a claim for criminal injuries compensation (CIC). While a different fee earner at that firm was involved, I find once again that the claimant was able to engage with him sufficiently to understand the claim being made and to give instructions to commence it. The claimant fully appreciated the difference between a CIC claim and an ET claim. In his answer to questions in cross-examination he referred to his own MSc, stating that he could suffer from mental health conditions and still identify the need to go to a lawyer.

25. On 14 November 2017 the claimant wrote to the respondent complaining about "*a [series] of alarming and possibly illegal incidents*". Having considered the contents of the ET3 and Mr Hay's submissions on behalf of the claimant I accept that the handwritten letter is probably incorrectly dated 14 October 2017 and was actually written a month later. The issues raised were substantially the same as those raised in the previous grievances. On 21 November 2017 Mr Dorby of the respondent replied to say that the letter added nothing to complaints which had already been fully investigated in September and October 2016. The complaints had been rejected and an appeal had not been upheld. Consequently, the respondent would not take any further action in relation to the claimant's letter.

26. The claimant highlights the fact that the letter was focussed on possible sexual orientation discrimination rather than disability discrimination. I find that it demonstrates his ability to formulate and express a complaint in writing, even without the direct involvement of a solicitor. Further, the claimant is an intelligent and highly qualified man who additionally had access to specialist legal advice. I find that he was in a good position to identify the claim that he now brings, as well as possible complaints about sexual orientation discrimination which are not part of the current claim.

27. In re-examination the claimant explained that when he wrote the letter on 14 November 2017 he thought that "*my legal avenue was closed*" because he was too late. That demonstrates either an awareness or certainly a strong suspicion that the time limit had been missed less than 3 months after its expiry, rather earlier than the "*4 or 5 months later*" initially estimated by the claimant in response to my questions.

28. In about January 2018 the claimant authorised a solicitor at Livingstone Brown to instruct Mrs Keenan Ross to report in connection with the CIC claim.

29. The claimant once again began to contemplate an ET claim in about February

2018 because Mrs Keenan Ross suggested that he might wish to consult Livingstone Brown again. However, the claimant did not feel ready to go ahead at that stage. When Mr Hay asked the claimant carefully what he had felt was stopping or making it more difficult for him to go ahead and raise a claim, the claimant replied that "*I thought I'd be too late in going ahead*", adding that his focus had previously been on sexual orientation discrimination rather than disability discrimination.

30. The claimant accepted that it was likely that he had discussed Mrs Keenan Ross's report with his solicitor in March 2018. The report itself states that the claimant had a good understanding of the reasons for the appointment with Mrs Keenan Ross.

31. On 15 March 2018 David Linden MP wrote on the claimant's behalf to the then Chancellor of the Exchequer, Phillip Hammond MP. The letter states, "*I met with the above named constituent this week to discuss some issues he wanted to raise regarding his recent employment with HM Revenue and Customs*" and it asks for further information about the handling of the grievance lodged by the claimant in August 2016. On 12 April 2018 Sir Jonathan Thompson, Chief Executive of HMRC, replied to that letter.

32. On that basis I find that in March 2018 the claimant was able to visit a stranger (his MP) and to discuss his employment history and personal information. The focus of the complaint presented through the MP appears to have been homophobic treatment and an unsatisfactory grievance investigation. However, the claimant was also able to discuss the impact on his mental health.

33. On 27 June 2018 the claimant's mother broke her hip. The claimant says that he was then focussed on that rather than on his Tribunal claims.

34. The second ACAS notification occurred on 17 September 2018. The claimant had seen a different employment law specialist at Livingstone Brown prior to

that.

35. When asked by Mr Hay what had changed, such that the claimant became able to commence a claim on 22 September 2018, the claimant explained that his mind had calmed down a bit, it was no longer racing, he had got into a routine and had acted on his mental health in a positive way. Having to act as the primary carer for his father had added structure to the day and the claimant was getting out more. Prior to September 2018 all that the claimant could think about were negative thoughts, he lost track of bills and he would need prompts to change his clothes. The claimant became more decisive prior to commencing his claim.

36. I note that by this stage about 17 months had elapsed since the hip injury suffered by the claimant's father. I also note that Mrs Keenan Ross did not in her report identify the improvement now described by the claimant shortly before commencing the ET claim. Rather, she describes a consistent level of symptoms and impairment from January 2017 until the date of the report (March 2019).

Expert evidence

37. No criticisms were made by either side of the independence or expertise of either Mrs Keenan Ross or Dr Graham. Where their opinions conflict, I accept the opinion of Dr Graham in preference to that of Mrs Keenan Ross because Dr Graham's opinion takes account of some of the things that the claimant *was* able to do in a way that Mrs Keenan Ross did not. Mrs Keenan Ross does not in my judgment adequately explain or analyse the implications of the various ways in which the claimant was able to formulate and express complaints or to access professional assistance during the months following his dismissal. I also found Dr Graham to be a generally impressive witness whose evidence was given in a clear and cogent manner. It was no less clear or cogent after cross-examination.

38. Dr Graham concluded that the claimant presented with depressive and anxiety symptoms of moderate intensity, as well as possible paranoid symptoms. Although the experts use different classification systems their diagnoses are essentially the same. The difference between them concerns the degree of cognitive impairment.

39. The key point is that Dr Graham concluded that the claimant was *not* suffering mental illness of such severity that he was rendered incapable of understanding and following timeframes and legal processes. He was unable to give a clear explanation to Dr Graham of the reasons why he had been unable to do so. Dr Graham later confirmed that "*Mr Mulheron would have been able to understand and engage in the employment tribunal process*" during the period 10 April 2017 until 22 September 2018.

40. In contrast, Mrs Keenan Ross considered that the impairment would have included memory problems and difficulty with complex tasks or multi-tasking leading to an inability to cope with deadlines, time pressures and any tasks involving complex activities, including the task of submitting the claim within the timescale.

41. I prefer Dr Graham's conclusion to that of Mrs Keenan Ross because Mrs Keenan Ross's opinion is much more difficult to reconcile with objective evidence of what the claimant certainly was able to do in the relevant period, with or without the assistance of solicitors. That included making several visits to solicitors to discuss litigation, giving instructions to those solicitors to contact ACAS, attending appointments with medical experts, writing a detailed letter of complaint to his former employer, commencing a criminal injuries compensation claim and consulting with his MP. Mrs Keenan Ross does not directly deal with those matters in her own report or subsequent written observations. In contrast, Dr Graham has expressly considered them and refers to them as evidence in support of her own conclusions.

42. Further, the claimant was able to attend to his father's care, attend GP

appointments and make a subject access request, all of which suggest sufficient capacity to progress an ET claim with the assistance of lawyers. Dr Graham could not conceive that the claimant would be unable to instruct a lawyer if he could do those things. I accept her reasoning.

43. Dr Graham also highlights the fact that there is no evidence that the claimant's mental state had significantly improved prior to the eventual submission of an ET claim. She reasons on that basis that if the claimant can currently engage in the ET process he was not prevented by illness from doing so at an earlier stage too. I accept that reasoning.

Legal principles

44. In this case the claimant does not argue that there was any relevant "conduct extending over a period" such that claims which would otherwise be out of time were in fact presented within time. The relevant provisions are therefore confined to section 123(1)(a) and (b) of the Equality Act 2010.

Subject to section 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.

45. In this case the key issue is therefore whether the additional period of one year and 29 days was just and equitable.

46. It is well-established that the discretion to allow a late claim to proceed on this basis is much broader than the "reasonably practicable" test applicable to unfair dismissal. The discretion is so broad that a tribunal will normally only make an error of law if it fails to have regard to a factor that is plainly relevant

and significant or if it gives significant weight to a factor that is plainly irrelevant or if its conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable (***Abertawe Bro Morgannwg Univ LHB v Morgan*** [2018] ICR 1194, CA).

47. There is definitely no presumption that a tribunal should exercise its discretion in a claimant's favour unless there is a reason not to. On the contrary, a tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time, so the exercise of the discretion is in that sense an exception rather than the rule (***Robertson v Bexley Community Centre*** [2003] IRLR 434, CA). The burden is on the claimant. That is not to say that it will only rarely be exercised in a claimant's favour, it all depends on the justice and equity of the particular case.

48. Some of the frequently relevant factors are set out in the well-known case of ***British Coal Corporation v Keeble*** [1997] IRLR 336, EAT, though they are neither a checklist nor a substitute for the statutory wording. They are nevertheless helpful in many cases. The Tribunal must have regard to all the circumstances of the case including the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any request for information, the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action.

49. A tribunal does not need to consider all of those factors in each and every case and in some cases certain factors may have no relevance at all. I mention the ***Keeble*** factors so that the parties know that the exercise of my discretion has been approached in a structured way. I have not treated them as a rigid checklist or as a substitute for the statutory wording. I have adopted a holistic rather than a mechanistic approach to the broad discretion which the statute gives me. See ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] ICR D5, CA, ***Department of Constitutional***

Affairs v Jones [2007] EWCA Civ 894, CA and ***Abertawe Bro Morgannwg Univ LHB v Morgan*** [2018] ICR 1194, CA.

50. It is wrong to focus solely on whether the claimant ought to have submitted his or her claim in time – tribunals must weigh up the relative prejudice that extending time would cause to the respondent. However, some prejudice will always be caused to the employer if an extension of time is granted, given that the case would otherwise be dismissed and the prejudice caused needs to amount to more than simply that. Similarly, there will always be equal and opposite prejudice to the claimant in losing the chance to have a determination of the relevant claim on its merits.

51. There is no absolute *requirement* for an employee to demonstrate a good reason for delay as a precondition of an exercise of discretion in their favour (***Abertawe*** again). Where there is an explanation it will always be relevant, but it is not an essential.

Submissions

52. As agreed at the end of the hearing, the representatives made their submissions in writing. In those circumstances I will not repeat or even summarise them again here, but I will deal with the main points in the next section.

Reasoning and conclusions

53. I begin with the length of the delay. It is very considerable. It is fairly rare to encounter cases that are presented as late as this one and I repeat and adopt the claimant's own description of it as "considerable" and "exceptional". This is a weighty consideration in the overall assessment.

54. I accept Mr Hay's submission that, following ***Morgan***, an exercise of discretion in the claimant's favour does not *depend* on him showing a "good"

reason for the delay, or that he was wholly "incapable" of commencing a claim any earlier. I approach matters on the basis that the nature of any explanation (good, bad, indifferent or unclear) for the delay is something to be weighed in a broad assessment of justice and equity.

55. The prejudice to the claimant in being denied a public investigation of his complaints by an independent tribunal is equal and opposite to that suffered by the respondent if a claim is allowed to proceed despite being presented outside the primary limitation period decided upon by Parliament. I am not persuaded that Mr Hay's reference to ***Anyanwu*** [2001] ICR 391 makes a difference. The public importance of the resolution of discrimination claims on their merits is relevant when considering strike out but it does not weaken the general principle that Parliament sets time limits and that they should ordinarily be adhered to in order to gain access to justice. Parliament can be taken to be aware of the public interest recognised in ***Anyanwu***.

56. As for the reason for the delay, I find that it was not primarily medical in that the claimant's mental health neither precluded the commencement of a Tribunal claim nor made it excessively difficult. There are three broad reasons for that conclusion.

    a. The expert evidence of Dr Graham, considered in more detail above. I do not accept Mr Hay's submission that Dr Graham's reasoning is "binary" and therefore to be rejected.
    b. The objective evidence of the things the claimant *could* do during the relevant periods, including:
        i. selecting, contacting and attending solicitors in connection with an employment tribunal claim, receiving advice including advice on time limits;
        ii. selecting, contacting and attending solicitors in connection with a CIC claim, and commencing that claim;
        iii. instructing and attending appointments with a medical expert in connection with the above, with a full understanding of the purpose of the visit;

iv. representing himself in internal grievance, disciplinary and appeal procedures;

v. writing the further letter of complaint on 14 November 2017;

vi. making a subject access request;

vii. visiting his MP and through him raising a complaint with the Chancellor of the Exchequer;

viii. attending to his father's care.

c. Contrary to the claimant's case, on the basis of the expert evidence I find that there was no significant change in the claimant's condition and symptomatology in between dismissal and the date on which he ultimately commenced ET proceedings. The inference is that he was equally able to do so throughout that period.

57. For those reasons I reject the claimant's central argument that poor mental health is the blameless explanation for the delay. I do not accept that it has major causative relevance. I am driven to the conclusion that the ET proceedings were simply not the claimant's priority until much too late. He missed the time limit and even having realised that he had probably done so by about November 2017 he still failed to take prompt action to claim as soon as possible after that, taking another 10 months or so to commence proceedings.

58. Curiously, the claimant *did* act promptly to obtain advice. It resulted in EC notification occurring during the primary limitation period and an extension of that period. It is therefore all the more curious that he did not take the remaining step and issue proceedings with the assistance of his solicitors before the expiry of the extended limitation period. If the claimant had commenced proceedings in the ET at that same time that he commenced a CIC claim then the ET claim would have been in time.

59. In my judgment there would be prejudice to the respondent, over and above the usual prejudice of the loss of a limitation defence, if the claim were allowed to proceed. The claim is about events in the period 12 July 2016 to 10 April

2017. The claim was presented on 22 September 2018. That delay of over a year would inevitably cause a fading of memories. While I make the working assumption that the respondent will be able to rely on documentary evidence in relation to its own processes, the recollections of key actors and decision makers will still matter. Vagueness, lack of detail or contradiction could harm their credibility and that is now more likely as a result of the delay in starting proceedings. For the same reasons, the cogency of the evidence available to the Tribunal is most likely impaired by the delay.

60. Dr Gibson makes an additional point. In his submission, the issue is not simply the delay prior to presenting the claim. He argues that the three years since then are also relevant to the assessment of prejudice. He reasons that those three additional years have been spent trying to resolve the preliminary question of jurisdiction and that has only been necessary because the claim was presented late.

61. I think it is important to recognise that the delay *since* the commencement of proceedings has mixed causes. The magnitude of the additional 3 year delay has been caused by many other things besides the fact that the limitation period was missed, such as the dispute about expert evidence, litigation decisions made on both sides, the Tribunal's lists and the pandemic. I do not think it would be right (or just and equitable) to proceed as if the total delay caused by the claimant is in excess of 4 years.

62. The argument that the claimant would not initially have been in a position to cope with the impact on his health of contested proceedings is not one to which I give much weight. If that were the case then the claimant could and should have issued proceedings to protect his position and then made suitable applications for a delay in the listing of a final hearing until he was well enough to participate. He also had specialist solicitors to advise him on that. It is not a good or acceptable reason for the extreme delay in starting proceedings.

63. In summary, I reject the medical explanation for the delay. The delay is very significant indeed. It is likely to have caused prejudice to the respondent and it has most likely impaired the cogency of evidence. The balance of prejudice between the parties weighs in favour of refusing to extend time.

64. My conclusion is that the claim was not presented within a period which I consider just and equitable, and that it must therefore be dismissed on the basis that the Tribunal has no jurisdiction to hear it.

Employment Judge: Mark Whitcombe
Date of Judgment: 08 October 2021
Entered in register: 12 October 2021
and copied to parties