EMPLOYMENT TRIBUNALS

Claimant: **Mr P Parr**

Respondents: **(1) MSR Partners LLP (formerly Moore Stephens LLP)**
(2) Mr S Gallagher
(3) Mr P Stockton
(4) Mr S Singh Aulak
(5) Mr S Baylis
(6) Mr T West
(7) Mr R Moore
(8) Mr J Willmont

PRELIMINARY HEARING

Heard at: **London Central** **On: 27 and 28 June 2022**
(28 June in Chambers)

Before: **Employment Judge Elliott**

Appearances
For the claimant: **Mr J Cohen, one of Her Majesty's counsel**
For the respondent: **Mr D Stilitz, one of Her Majesty's counsel**

RESERVED JUDGMENT ON REMITTED HEARING

The judgment of the tribunal is that the claim is out of time and it is not just and equitable to extend time.

REASONS

1. There are two consolidated claims in these proceedings. The first claim 2200196/2019 was presented on 17 January 2019. The second claim 2200243/2019 was presented on 25 January 2019.

2. The claimant Mr Philip Parr was an equity partner of the first respondent. The second respondent was the managing partner at the material time and the other respondents were members of the first respondent's Partnership Committee.

The background

3. At a preliminary hearing on 11 and 12 September 2019 I made a decision that there was a continuing act of discrimination and that the claim was within time. The respondents appealed to the Employment Appeal Tribunal which handed down a Judgment on 24 June 2021 and overturned that decision, holding that there was a one-off act with continuing consequences and that the claim was out of time.

4. The claimant appealed to the Court of Appeal which handed down its decision on 14 January 2022, upholding the decision of the EAT. The claimant has sought permission to appeal to the Supreme Court on the "continuing act" point but that application has not yet been determined.

5. The case was remitted to this tribunal to consider the "just and equitable" extension under section 123(1)(b) Equality Act 2010.

This remote hearing

6. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

7. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

8. The parties were able to hear what the tribunal heard. From a technical perspective, there were no difficulties of any substance that were not easily resolved.

9. The participants were told that was an offence to record the proceedings.

The issues for this preliminary hearing

10. The issue for this hearing was, given that the claims were out of time, was it just and equitable to extend time?

11. I found at the hearing in September 2019 that if there was no continuing act, the claims were out of time by 5.5 months as time ran from the date on which the claimant ceased to be an equity partner. This was on 30 April 2018. The first ET1 was issued on 17 January 2019.

Witnesses and documents

12. There was an electronic bundle of 691 pages and an authorities bundle of 261 pages. There was also an additional authority and a copy of the claimant's application to stay proceedings dated 13 July 2019. A further authority was introduced by the claimant during the respondents' submissions.

13. There were skeleton arguments from both parties which are not replicated here and to which leading counsel spoke. All submissions and case law referred to were fully considered even if not expressly referred to below.

The respondents' application to admit a further witness statement

14. The respondents sought to introduce a short two-page supplemental statement from the second respondent Mr Gallagher to *"update the tribunal on developments since the hearing*". The claimant objected to the introduction of that statement. The respondents considered it appropriate for the tribunal to be brought up to speed on uncontroversial matters.

15. The statement gave an update on the Mr Gallagher's role within the first respondent and the position in relation to (a) the other personally named respondents and (b) the claimant's former line manager. There are 8 respondents, it is nearly 2 years since the previous hearing before this tribunal and the respondents say it is relevant to prejudice. It is a short factual statement updating the tribunal on the position of the individual respondents.

16. The claimant said that the case had been remitted by the Court of Appeal based on the findings made in September 2019 and it was open to the parties to make further submissions, but not to re-open the evidence. The claimant referred to the respondents' application of 13 July 2021 for a stay of proceedings in which they said: "*We believe that little, if any, prejudice will be caused to the Claimant by granting this application and any prejudice caused to the Claimant by a stay would be outweighed by the prejudiced caused to the Respondents should the case not be stayed".* The claimant submitted that this was inconsistent with the position now taken by the respondents that they are prejudiced by delays.

17. In addition, in relation to this hearing to decide the "just and equitable" issue, the respondents said (at numbered point 2 on page 2 of that application), that they did not consider there to be a need for any additional evidence, yet they now wish to introduce an additional statement.

18. The claimant said that under section 123(1)(b) Equality Act it follows that the tribunal was considering the period between the expiry of the time limit and the presentation of the ET1, so the legal relevance of this witness evidence was unclear. Mr Gallagher did not say in that statement that there was a dimming of recollections or whether he had approached any of the individual respondents who had left the first respondent's employment.

19. In the interests of saving time, both parties were content for the tribunal to make a decision on this point at the end of the hearing. The claimant confirmed that he did not propose to cross-examine Mr Gallagher.

20. The respondents said there was no dispute that the findings made in September 2019 were binding, but that there was nothing wrong with looking at how matters had developed in the interim. They said that had the claimant presented his claim within time, it would have been heard in 2019 but will now not be heard

until 2023. This would not have been the case had he presented the claim within time and to exclude the statement "*would be inappropriate*".

21. The claimant said that it did not follow that if the claim had been presented in time, it would have been heard in 2019 because preliminary points could arise on different matters and this can cause delay. Their position was the issue on delay was the period between the expiry of the limitation period and the presentation of the claim.

Decision on whether to admit the second statement of Mr Gallagher

22. I agree with the respondents that the reason for the delay in this particular case is connected to the late presentation of the claim and that it is pertinent for the tribunal to consider the brief updated statement of Mr Gallagher on the issue of prejudice to the respondents if time is extended and I admitted and considered the statement. The statement deals with the issue of relevant witnesses who have retired or moved on.

Summary of relevant findings of fact made at the hearing in September 2019

23. The full findings are set out in the Judgment sent to the parties on 13 September 2019. In summary, the findings were as follows.

24. The first respondent firm provides accountancy and advisory services and transferred its business on 1 February 2019 to BDO Services Limited. The other respondents are or were partners in the firm.

25. The claimant Mr Philip Parr had a long career with the first respondent commencing in 1982. He became an equity partner in 1995. On 1 May 2018 he was demoted to fixed share profit partner because he had reached the firm's normal retirement age for equity partners being age 60. The relevant provisions as to normal retirement age were set out in a Members' Agreement, the details of which are set out in the decision of September 2019. The Agreement contained a discretion to extend the normal retirement age where there was a business case for doing so.

26. On 28 September 2017 the second respondent prepared a document setting out a recommendation that the claimant should remain as a partner, but not an equity partner, for two years until 30 April 2020.

27. On 13 October 2017 the parties entered into a DeEquitisation Agreement, by which the claimant remained with the firm as a partner but not an equity partner. This took effect from 1 May 2018.

28. On 13 September 2018 the claimant learned at a partners' meeting about the first respondent's decision to sell two parts of the business known as Projects Lex and Palace. It is accepted by the claimant that nothing was said at that meeting about the way in which the proceeds would be distributed if the sale went ahead. The Management Board made the decision to try to sell those parts of the business on 14 February 2018. This was four months after the claimant entered into the DeEquitisation Agreement. This tribunal made a finding of fact that the claimant was not misled in relation to these transactions.

He does not assert that a sale was in train when he entered into the DeEquitisation Agreement.

29. A prospective merger with BDO was first explored at a meeting on 1 March 2018 between the key personnel of the two firms and the completion of the merger took place on 19 February 2019. On 25 October 2018 minutes were published of a Partnership Committee meeting in which it was confirmed that the proceeds of sale would be distributed to "Members" and was not confined to equity partners (page 605 and following of the bundle for this hearing).

30. On 3 December 2018 the claimant was told that he would not receive a share of the proceeds of these transactions. The claimant raised his objection to this and was told by Mr Gallagher at a meeting on 17 December 2018 that this decision would not change. His position was that he acted promptly thereafter in the bringing of his claim.

The submissions

31. As stated above there were detailed written submissions from both sides which are not replicated here. In addition there were oral submissions. All submissions were fully considered along with the authorities referred to, whether not expressly referred to below. What is set out below is not intended as a full replication of those submissions.

The claimant's submissions

32. The claimant began by reminding the tribunal of the importance of not conflating the reasonably practicable test with the just and equitable test and that it was for the Judge to consider what factors were important. The authorities say it is a "*wholly unfettered*" discretion. This makes it more difficult to apply because on the claimant's submission it does not give guidance as to what factors are important and the weight should be attached to them.

<u>Latent damage and the Limitation Act</u>

33. Both parties had considered the issue of 'latent damage'. The claimant accepts that knew he would suffer some damage as a result of the discrimination claimed, but he had no idea as to the magnitude. As set out in the findings from September 2019, what he had envisaged as a loss of around £30,000 per annum over two years, became a loss he now quantifies at around £3.75 million.

34. The claimant noted that the respondents relied on the decision of the EAT in ***Birmingham Optical Group plc v Johnson 1994 ICR 459***, said to be a latent damage case on the reasonably practicable test relating to an adverse change to a commission arrangement where it was held that this did not make it "not reasonably practicable" to present the claim. The claimant relied on ***London Underground Ltd v Noel 1999 ICR 109***, Court of Appeal, also on the reasonably practicable test and dealing with latent damage. Time was not extended in that case and there was comment that this was hard on the employee (judgment page 119 paragraph C, Waller LJ) and observations were made relating to the more liberal test rather than the practicability test.

35. The parties were not aware of a latent damage case on the just and equitable test. The respondents did not accept that this was, in any event, a latent damage case.

36. The claimant took the tribunal to provisions within the Limitation Act 1980 as to the date of knowledge for the purposes of sections 11 and 12 as to the time limits for personal injury and fatal accident claims as set out in section 14. For example under section 14(1)(a) the date of knowledge is when it is known that the injury in question was significant. Section 14(2) provides that an injury is significant if the person whose knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings.

37. Section 14A covers special time limits in negligence actions with section 14A(7) as to knowledge being when it is known that the damage is sufficiently serious to justify bringing proceedings. There is a "*hard stop*" limitation period of 15 years for negligence actions under section 14B(1).

38. The claimant submitted that in tort the time runs from when the claimant knows about severity of the injury but the employee who has been discriminated against is "*stuck"* with 3 months if they later learn that their loss is substantially more. The claimant submits that this position would be inconsistent.

39. The claimant did not suggest that the Employment Tribunal should apply this test, but said that in the general law of limitation it is considered to be sufficiently important to consider when someone discovers they are injured and sufficiently so to consider issuing proceedings. The claimant submitted that when considering the just and equitable test the tribunal should put considerable emphasis on the fact that the claimant did not know he was going to suffer a substantial loss.

<u>The Equality Act authorities</u>

40. On Section 123 Equality Act, ***Robertson v Bexley*** *(CA)* (below) is the authority often cited by respondents because of the passage at paragraph 25 which says time limits are to be "*exercised strictly*". The claimant referred to the decision of the Court of Appeal in ***Chief Constable of Lincolnshire Police v Caston 2010 IRLR 327***, in which the Court of Appeal commented on ***Robertson*** saying that it was "*in essence, an elegant repetition of well established principles relating to the exercise of a judicial discretion"* and that it emphasised the *"wide discretion which the ET has*". At paragraph 31 Sedley LJ said that there was "*no principle of law which dictates who generously or sparingly the power to enlarge time is to be exercised*". The claimant submitted that it was necessary to be "*extremely cautious*" about the application of ***Robertson***.

41. The claimant relied on ***Abertawe Bro Morgannwg (CA)*** (below) emphasising for example paragraph 20 of that decision as to the width of the discretion given to the Employment Tribunal to proceed in accordance with what it thinks is just and equitable.

42. The claimant said that to the extent that the respondents rely on the ***Miller*** case (below) the claimant says that this is a judicial pensions case and not a latent

damage case. In ***Miller*** the claimant waited before bringing the claim and time was not extended.

The balance of prejudice

43. The claimant emphasised the importance of the balance of prejudice, accepting that the factors are for the tribunal to decide, but drew attention to a number of authorities where it has been found that it is an error of law not to balance prejudice. The following three cases are decisions of the EAT.

44. In ***Bahous v Pizza Express Ltd EAT/0029/*11** the EAT said that the balance of prejudice was "*plainly a material factor and one that is significant in this case*" (paragraph 19) and agreed that the employment tribunal did not appear to have taken this into account. It was held that it was significant because the claimant had lost, "*not simply a speculative claim but a good one*" and said that the tribunal's failure to take this significant matter into account was an error of law. The claim succeed on the facts but failed on the limitation point.

45. ***Pathan v South London Islamic Centre EAT/0312/13*** held that in considering limitation in a sex discrimination claim the tribunal wrongly failed to take into account relative prejudice, concentrating only on the reasons for the lateness of the claim and thus failed to consider what was just and equitable. The EAT also cast doubt on ***Robertson*** saying that the just and equitable extension did not require exceptional circumstances (judgment paragraph 19, Shanks J).

46. In ***Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283*** the EAT said at paragraph 17 that it seemed that the question of balance of prejudice and potential merit of the claim was a relevant consideration for the tribunal and they were wrong not to weigh those factors in the balance, but instead to terminate the exercise having rejected the claimant's explanation for the delay.

47. The claimant submitted that these 3 authorities said it was an error of law not to consider relative prejudice. The claimant then took the tribunal back to the ***Miller*** case which at paragraphs 12 and 13 did not agree that it was an error of law not to "*balance off*" the relative prejudice to the parties. The claimant relied on ***Abertawe*** (paragraphs 24 and 25 in particular) which postdates ***Miller*** and says that whether there is "*no good reason*" to extend time is not the end of the judicial enquiry. There are a number of EAT authorities which say in the general run, it is an error of law not to consider relative prejudice.

Forensic prejudice

48. On the issue of prejudice, the claimant said there was not a great deal of direction on this and it was necessary to look at section 33 Limitation Act. The claimant took the tribunal to the decision of the Court of Appeal in ***Cain v Francis 2009 QB 754*****,** a personal injury case which considered disapplying the time limit where it "*appears to the court that it would be equitable to allow it to proceed*". The language was whether it was equitable not just and equitable and the Court of Appeal said equitable meant what was "*fair and just*" paragraph 63. The rationale was to protect defendants from stale claims. The CA went on to say (paragraph 67) that any limitation bar is arbitrary and it cannot always be

fair and just to permit a claimant to proceed with an action 2 years and 364 days after the injury and what was "*deemed fair on Tuesday is deemed unfair on Wednesday"*. The claimant said that the time period can amount to "*rough justice*".

49. The claimant said that it was a matter of considering whether the respondent had lost his opportunity to defend himself and forensic prejudice was critically important. The claimant said based on ***Cain v Francis*** that the prejudice of losing a limitation defence was of little significance because if the claim is successful, the respondent should pay damages. There will always be prejudice to an employer of losing their limitation defence if the extension is granted. If it is granted, they are free of the obligation to pay damages. They will say that the loss of this absolute defence is a form of prejudice, but the claimant submitted that there is always prejudice to a claimant employee because if no extension is granted, they lose the ability to bring the claim.

50. On forensic prejudice the claimant took the tribunal to the decision of the EAT in ***Wells Cathedral School Ltd v Souter EA 2020 000801*** which at paragraph 31 made the same point that: *"In every case the implication of refusing to extend time will be that the claimant will not be able to have a complaint adjudicated on its merits, as they would, had time been extended. Conversely, the effect of granting an extension of time will be that a respondent will be obliged to defend a complaint on its merits, and exposed to the risk of losing, in a way that would not be so, were time not to be extended".* The claimant says in the present case on forensic prejudice, there has to be a forensic consideration as to whether there is a real risk of disadvantage. The claimant says it is not so in this case.

<u>Section 33 factors</u>

51. Whilst the claimant accepted that the tribunal is not required to go through the factors in section 33, he said it did no harm to analyse the situation. This was put as follows:

    - On the length of delay, this was 5.5 months which the claimant says is "*modest"* or "*short*".
    - On the effect on the evidence the claimant says he would not expect any impact on fairness. The inclusion of a mandatory retirement age of 60 was still present when the claimant filed his ET1 so the respondents were bound to defend that age just as much when ET1 issued as when the discrimination happened. Justification for that retirement age was dealt with in Mr Gallagher's witness statement. The exercise of the discretion to extend in favour of claimant is all documented so he submits that the 5.5 months makes no difference. The claimant says there is one critical witness Mr Gallagher who has already prepared a detailed witness statement. In his second witness statement he makes no suggestion that his memory of events has diminished. The claimant says that there is no reference in the witness statement to documents not being available and that as soon as litigation was apprehended they should have put a hold on all their documents.
    - The claimant relied on his earlier submissions on balance of prejudice.

- As to the explanation for the delay - was how the claimant acted understandable? In April / May 2018 he had no good reason to bring a claim as he understood his loss is circa £31,000 per annum. Compared with what it would cost to bring the litigation it would have left him out of pocket and this was not attractive to him. This is compared to the loss he later discovered, where he has a different motivation. On his initial understanding the claimant says it would have been pointless litigation. In terms of the tribunal's findings in September 2019 at paragraph 40 the claimant had a 2 year extension to remain and was "*at the mercy*" of the organisation as to whether he could stay on. The claimant submits this made it more improbable that he would bring an uneconomic claim about a small amount of money.

52. The claimant took the tribunal through the chronology set out at paragraph 13 of his written submissions and commented upon this. The minutes of 25 October 2018 told the claimant he would share in the proceeds of the proposed transactions and it was not until 3 December 2018 that he was told otherwise. He tried to resolve matters internally over a short period and by 17 December he was told that the decision would not change. He took advice that same day. This explains the period of delay. At the moment of the claimant's retirement the business was in negotiations for sale although he did not know this. The claimant says this should be factored into the balancing exercise.

Merits

53. The claimant commented on the decision of the High Court in ***R (Age UK) v Secretary of State for Business Innovation and Skills 2010 ICR 260***. This was Age UK's application for Judicial Review of the *Employment Equality (Age) Regulations 2006* which permitted a retirement age of 65 as being objectively justified. The claimant took the tribunal to the passage per curiam which said that if the relevant Regulation had been adopted for the first time in 2009 or there had been no indication of an imminent review, then the conclusion would have been that the age of 65 would not have been proportionate. The claimant's submission was that in the present case, the respondents are seeking to justify a lower retirement age of 60. When the age of 65 only just survived in 2009, the claimant says the respondents do not have a good case in seeking to justify 10 years later the age of 60. This is substantially below the State retirement age which is gradually increasing.

The respondents' submissions

54. The respondent highlighted a number of points from the findings made in September 2019 as follows:

- The claimant knew when he entered in to the DeEquitisation Agreement that he had lost his equity partnership for good with the right to equity profits (paragraphs 36 and 37).
- As of October 2017 he assessed his losses at £31,000 per annum but knew it could be higher in subsequent years (paragraph 38). The

respondents say the loss he initially assessed is not a trivial amount. It was a substantial claim, had he chosen to bring it.

- The claimant knew he had a claim as at October 2017 chose not to take advice (paragraphs 38 and 39).
- As early as November 2017 it became clear his losses were greater than he had originally assessed (paragraph 42). He knew from the start that his losses could be substantial and this was the risk he was taking in not bringing proceedings.
- There was no concealment of the later transactions and he was not misled (paragraph 44). The respondents went on to say that even when he ceased to be an equity partner these transactions were at a preliminary stage and might have gone nowhere. He was not an equity partner from April 2018, the suggestion that there was some default in not keeping him abreast of explorations that were going on, he had no expectation of this. It has already been found that although he hoped to get a share of the profits it was a hope and not a realistic one (paragraph 46).
- In September 2018 he took a "*wait and see*" approach when he found out about the proposed transactions (paragraph 46).
- Even after he went to see solicitors he waited a whole month which is not an insignificant delay when considering a 3 month time limit (paragraphs 50-51).

Subsequent events

55. The respondents submitted that this tribunal is not prevented from making findings as to matters which have taken place since the previous decision in September 2019. The claimant says that this tribunal should not consider new matters. This was said in relation to Mr Gallagher's second witness statement. The respondents submit that it would be an error of law not to take into account matters since the 2019 hearing and it would be wholly artificial to pretend we are back in 2019.

56. The first respondent is being run off and dealt with by an administration company so in effect does not exist. Two partners left the firm 2.5 years ago and 1 retired in July 2020. The claimant's former line manager Mr Fussell, an important witness, retired in February 2019 and has not had any role with the respondent since then. If the claim goes ahead, the respondents will be dealing with events they have not been involved with for a long time.

Merits

57. On the underlying merits of the claim, the respondents submitted that the extent to which the tribunal could take this into account at this stage was limited. Unlike discrimination on other protected characteristics, age discrimination can be objectively justified. The respondent submitted that there were three features of the case which suggest the respondents have the better side of the argument. These were put as follows:

    - Justification was addressed in the Members Agreement and there were references to the requirements of the Equality Act and sets out what the

partners agreed. Whilst this is not conclusive the respondents say it carries great weight as to the Members' position. This was not the same as an employer imposing a retirement age, but a group of Members of an LLP deciding amongst themselves what the retirement age should be. The respondents said that those who are subject to a retirement age are also the beneficiaries of it when the older partners are removed from the profit sharing pool. The claimant was involved in the decision making process for the Membership Agreement containing the retirement age. This is not the same as a retirement age imposed by the employer or the Government.

- The respondents' case is that the claimant's financial performance is relevant to the manner in which the discretion was exercised in this case. The respondents say there were cogent reasons for exercising the discretion in the way they did.
- The case of ***Seldon v Clarkson Wright & Jakes (No 2) in the EAT 2014 ICR 1275***, which postdates ***Age UK***, said at paragraph 27: "*The issue for the employment tribunal is to determine where a balance lies: the balance between the discriminatory effect of choosing a particular age (an effect which, as the employment tribunal noted, may work both ways, both against someone in the position of the claimant but in favour at the same time of those who are associates, and thereby in the interests of other partners, whose interests lie in the success of the firm and its continued provision for them) and its success in achieving the aim held to be legitimate. That balance, like any balance, will not necessarily show that a particular point can be identified as any more or less appropriate than another particular point".*

Legal principles

58. The respondents said that whilst the claimant took the tribunal on a detour into the Limitation Act, it was necessary to look at the authorities in this jurisdiction.

59. In terms of ***Robertson v Bexley*** – time limits are to be exercised strictly, there is no presumption that time should be extended, the Court of Appeal said "*quite the reverse*". It is the exception rather than the rule. The respondents accept that what was said in ***Robertson*** has been clarified in some respects, but it is the exception rather than the rule and has been applied on a number of occasions.

60. It was applied in ***Miller v Ministry of Justice EAT/0003/15*** where some Judges adopted a "*wait and see"* approach to the pensions litigation and time was not extended on grounds that it was not just and equitable to do so. The respondents say this is analogous to the present case because what it has in common, is claimants who sought to hedge their bets and adopt a wait and see approach. In the present case it was whether there would be large profits or in the ***Miller*** case whether the litigation was likely to succeed. The respondents say that ***Miller*** also deals with what prejudice means in relation to the Equality Act. Paragraph 10 of the decision sets out five relevant points on the just and equitable test. Paragraph 10(ii) reiterates the formulation in ***Robertson*** and

rejected the submission that ***Caston*** had *"corrected*" paragraph 25 of ***Robertson.*** It "*put a gloss*" on ***Robertson*** but did not overrule it.

61. Paragraph 10(iv) of ***Miller*** says that the factors relevant to the exercise of the discretion and how they should be balanced are for the ET and "*The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases".* In paragraph 11 the EAT deprecates following the ***Keeble*** factors too closely and not to follow the jurisprudence of the Limitation Act too closely. The respondents submit that the Limitation Act is a different Act with its own jurisprudence.

62. Dealing with paragraphs 12 and 13 of ***Miller*** the respondents said it is for the Employment Tribunal to decide on the facts which are potentially relevant to the exercise of its discretion. Forensic prejudice will be "*crucially relevant"* (paragraph 13) but if there is no forensic prejudice it is not decisive and may not be relevant at all. The respondents say that in ***Miller*** the EAT considered two kinds of prejudice, the prejudice of having to meet the claim which would otherwise have a complete defence of limitation and the forensic prejudice in responding to the claim.

63. The respondents highlighted paragraph 20 where the EAT said that the lack of belief in the strength of the claim was not a good reason for extending time. The decision that it was not just and equitable to extend time was upheld. The respondents say this is a close analogy to the present case of the claimant hedging his bets and when the situation looked better he decided to go ahead with his claim.

64. The respondents said that ***Abertawe*** says it is not necessary to go through the ***Keeble*** factors (see ***Abertawe*** paragraph 18), but it is almost always relevant to consider the length of and reasons for the delay and whether the delay has prejudiced the respondent. The respondents submitted that nothing in ***Abertawe*** casts doubt on ***Robertson*** which was applied in ***Thompson v Ark Schools 2019 ICR 292 (EAT)*** in which HHJ Eady quotes from ***Robertson, Caston*** and ***Miller.***

65. The respondents said that whilst we were taken through the authorities on Limitation Act we would not find any desire on the part of EAT or the Court of Appeal to import the jurisdiction of the Limitation Act into the Equality Act. It was submitted that there were a number of dangers in going down the road of "*taking off the peg*" the jurisdiction under the Limitation Act and it was wrong as a matter of principle to go down that road.

- The Limitation Act is not concerned with discrimination, it is common law which has much longer limitation periods of 3 or 6 years with a 15 year backstop.
- It deals with a different species of damage such as catastrophic injury and different principles might arise.
- Discrimination claims are dealt with in the Employment Tribunal and not the civil courts. It was designed to be relatively quick and informal even

though in practice this is not always possible, so it is wrong to sweep aside EAT authorities.

66. The claim was brought 8.5 months after the claimant ceased to be an equity partner. The claimant says it is a short delay, the respondents say it is a relatively long delay where the limitation period had expired by nearly 3 times. The respondents noted that in the case of ***Rathakrishnan*** the delay was 17 days and in ***Bahous*** it was 20 days and it was wrong to compare those cases.

67. There was no doubt from the start that the claimant knew all the facts related to his cause of action and that he would suffer substantial loss. He lost his Equity Partnership and the right to participate in the profits of the firm. That is why the respondents submit that this is not a case that properly can be described as latent damage. That is classically damage that is hidden and not capable of being discovered. It is not like a hidden illness or a hidden defect in a building. The claimant knew he would suffer loss, he did not know extent of that loss as it extended into the future and the future is unwritten and this is unexceptional in terms of discrimination cases. In most discrimination cases, the nature of the claimant's loss is unknown and unknowable when the discrim takes place. The respondents gave three examples:

- A discriminatory dismissal: The worker does not know whether they will get another job in a short time or suffer career loss. The respondents say this is in no way different.
- A worker is demoted or dismissed so they lose an entitlement to a contractual bonus. The respondent does well, a large bonus is paid but this does not permit the worker to bring a late claim.
- A employee is required to sell their shares, and the company is taken over and performs well - this is not a latent damage case, it is just that at the date of discrimination the quantum is not known.

68. The respondents say that at the date of any discrimination, the quantum is not known. When the DeEquitisation Agreement was entered into, none of these transactions were known about and the respondents were in preliminary discussions. This is not a basis for treating this as an unusual case. It is not latent damage; the amount of quantum was not known at the time

69. On the length of delay, it is nearly three times the limitation period. There are good policy reasons why the time limit for discrimination is short. First, is because of the inherent difficulties in determining discrimination claims, they are nuanced, subtle and there are limits to what is justiciable, such as unconscious bias. The nature of the cause of action calls for a short limitation period. Secondly a short limitation period provides certainty for employers without the possibility of discrimination compensation hanging over them. Thirdly the claims are brought in Employment Tribunal and not the courts which was intended to be relatively swift and informal. The respondents do not accept it was a short delay, they say it was a long delay.

Prejudice

70. The respondents submit that there is the following prejudice to them. The claim is put in region of £3.75m. By the time of any merits hearing we will be looking at 2023, which is 6 or 7 years after the events in question and they say this is relevant in considering the degree of prejudice. The size of the claim and the length of time that has passed is relevant.

71. In dealing with the claimant's argument that it is only 5.5 months and that is all it is; the respondents say it is necessary to look at where we are now. If the claim was presented in time it was very likely to have been heard in 2019. It was listed and heard for a 2 day Preliminary Hearing in September 2019. There was no reason why it could not be listed for a full merits hearing at that point. All of the delay has been a function of the claimant's failure to bring the claim within time. The appeals on the continuing act point all stem from the failure to bring the claim within time and the Tribunal should not disregard this.

72. The second to eighth respondents are all individuals who face defending a discrimination claim many years after the event with stress and potential reputational damage should the defence fail.

73. Most of the respondents are now very remote from the events and no longer involved in the business in which the discrimination is alleged to have taken place. For the second, third and eighth respondents it means coming out of retirement to defend stale discrimination claims which is undesirable and should weigh heavily in the exercise of discretion.

74. The first respondent no longer exists as a trading entity, it exists purely in run off. It makes it all the more prejudicial as opposed to a respondent that remained the same.

75. There would be significant forensic prejudice to the respondents in seeking to deal with certain aspects of the claim given the delay. It is neither necessary nor realistic to expect the respondents to say the following matters are ones they can no longer remember. It can be difficult to remember events from long ago. The longer the delay the more difficult it is to resist the claim effectively. This applies to both the respondents and Mr Fussell who retired in 2019 . He is an important witness. The respondents do not suggest any breach of obligations of disclosure but say that everyone knows in all cases documents they hoped to have found can be more difficult to locate. It is self-evident that such problems can arise.

76. On prejudice the respondents referred to the Grounds of Complaint paragraph 10 on objective justification. What the Tribunal would need to do at the full merits hearing many years after the event, is to seek to examine that balance and say it was imposed in a disproportionate way. It would need to be examined as at the date of the De Equitisation Agreement and there are factual matters set out at paragraphs 12 (b) and (c) of the Grounds of Complaint which are in dispute. This would involve looking at the quality and quantity of the claimant's work, which his inherently difficult to do. The claimant says there was no suggestion that his performance had declined but the respondents say that it

had and this was part of the rationale for not wishing to retain him as an equity partner. For the respondents to deal with this 6-7 years after the event will be difficult.

77. On the matter of Mr Gallagher's witness statement the respondents say it is not the full extent of the evidence that he would wish to put forward. For example there will certainly be factual issues of dispute on the claimant's performance.

78. The respondents say that the tribunal should approach it on the basis that there will be forensic prejudice to them if they are put in position of having to respond to serious and substantial allegations at this point in time and the tribunal cannot ignore the delay occasioned by the claim being out of time. The respondents submit that not only are they prejudiced but it is a matter for consideration as to whether the claim can be fairly determined going back over events of so long ago. Justice and equity determine that the claim should not be allowed to go forward.

79. During the respondents' submissions the claimant sent through a further authority which Mr Stilitz was able to deal with. This was **A*zam v University of Birmingham NHS Foundation Trust 2020 EWHC 3384 QB***, a clinical negligence claim where there had been a death of a surgeon and the claim was 18 years out of time. Time was extended by the Birmingham County Court and this was upheld on appeal. It was a Limitation Act case. It was found in that case that the Trust had not taken steps to trace other witnesses and the Trust's assertions concerning those witnesses amounted to "*pure speculation*". The respondents said that the claimant was "*forced to use the Limitation Act as a backstop rather than use the Equality Act authorities*".

80. The respondents concluded by saying that the length of delay was great and so was the consequential delay and this provided no basis for criticising the respondents. The claimant knew of the discrimination at the time he was "de-equitised". There was no attempt to conceal anything from him. Any expectation he had was down to his own unrealistic beliefs. He did not act promptly when he knew all the facts so if one does look at it through the lens of the Limitation Act, the discretion goes against the claimant but the respondents' overriding point, is that it is wrong to be drawn into the Limitation Act when it is a claim under the Equality Act and the EAT and Court of Appeal can articulate the principles that apply without going down the route of the Limitation Act.

The claimant's reply

81. The claimant said that they analogy impressed on Tribunal by the respondents was that there is often latent damage because claimant will not know how long it will take to find another job, but the event that causes the loss has happened. In the present case there is an unanticipated event that caused a loss he could not have envisaged. The right analogy is to consider the cases such as where a claimant is exposed to asbestos but until they experience symptoms they do not know they have experienced a loss.

82. The second point was said to be illustrated by the ***Azam*** case introduced during the respondents' submissions. In that case the surgeon who carried out the

negligent surgery had died and claim was 18 years out of time. A section 33 extension was granted and the Trust appealed. The High Court said that the party wishing to assert the evidential burden must provide the evidence otherwise it is pure speculation. The claimant said that the respondents' submissions on the effect of the delay were pure speculation and in this case no one had died, and although some had retired, we were not told they had lost their critical faculties. The main witness Mr Gallagher has already given a lengthy witness statement in which he does not say that he has the slightest lack of recollection.

The relevant law

83. Section 123 of the Equality Act 2010 provides that:

> *(1) …… 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.*
>
> *(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.*

84. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend time and the tribunal has a wide discretion. There is no presumption that the tribunal should exercise that discretion in favour of the claimant - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

85. This was confirmed in ***Miller v Ministry of Justice EAT/0003/15*** at paragraph 10(ii): *"Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule,"* (Laing J).

86. Time begins to run from the act of discrimination and not from the date upon which the claimant becomes aware of it, although this is relevant to the discretion to extend time, see for example ***Virdi v Commissioner of Police of the Metropolis 2007 IRLR 24, EAT.***

87. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050, CA*** Leggatt LJ summarised at paragraph 18 the approach to be taken by the ET on the issue of a just and equitable extension:

> *"First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 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 s 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account…"*

88. At paragraph 19 Leggatt LJ went on to say in relation extending time:

> *"factors which are almost certainly 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 …"*

89. In ***Adedeji v University Hospitals Birmingham NHS Foundation 2021 ICR D5*** the Court of Appeal repeated the caution against tribunals relying on the checklist of factors found in section 33 Limitation Act 1980. The Court of Appeal (Underhill LJ) said that the best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) was to assess all the factors in the particular case which it considered relevant to whether it was just and equitable to extend time, including in particular the length of and the reasons for the delay.

90. Other authorities taken into account are set out in the section on Submissions.

Conclusions

91. The claim 5.5 months out of time as set out in the findings made in the decision sent to the parties on 13 September 2019. Time began to run from the date upon which the claimant ceased to be an equity partner, which was on 30 April 2018. The first of the two claims was presented on 17 January 2019.

92. I accepted the claimant's submission that it was important not to conflate the reasonably practicable test and the just and equitable test. To the extent that the parties sought to rely on authorities dealing with the reasonably practicable test, such as ***London Underground v Noel*** and ***Birmingham Optical***, I did not find these cases helpful on the just and equitable test.

93. I also find that ***Robertson v Bexley*** remains good law. As stated in ***Miller***, it has not been overruled or "*corrected*" by ***Caston***. It continues to be applied. Time limits are to be applied strictly, there is no presumption that the tribunal will exercise the discretion in favour of the claimant, it is a wide discretion and the burden on is on the claimant to satisfy the tribunal that time should be extended.

<u>Limitation Act jurisprudence</u>

94. I do not accept the claimant's submission that this Tribunal should take account of and be guided the authorities under the Limitation Act 1980. This is not the statutory framework that applies under the Equality Act 2010 and whilst the factors in section 33 Limitation Act may be useful, as stated in ***Abertawe,*** the

Employment Tribunal is not required to go through such a list. In ***Adedeji*** the Court of Appeal repeated the caution against tribunals relying on the checklist of factors in section 33. What is necessary is to assess all the factors in the particular case relevant to whether it is just and equitable to extend time, including in particular the length of and the reasons for the delay.

95. There is a finding of fact made in September 2019 that the length of the delay was 5.5 months. Is that a short or a long delay? The claimant says it is a short delay and the respondents say it is a long delay. In the context of the Equality Act and a three month time limit I find that it is a relatively long delay. As Mr Stilitz submitted, the time limit had run nearly three times over, the original 3 months plus a further 5.5 months. It was 8.5 months after the claimant ceased to be an equity partner. The delay was well in excess of the delays in cases such as ***Rathakrishnan*** and ***Bahous***.

96. This leads on to the consideration of what were the reasons for the delay? This is where the claimant brings in the concept of latent damage, seeking to import consideration of the case law applicable under the Limitation Act 1980. My finding is that it is not right for the Employment Tribunal to import the Limitation Act considerations. There are no equivalent provisions in the Equality Act for example to sections 14 and 14A of the Limitation Act which permits time to run from the date of knowledge that an injury was significant, or the date when it is known that the damage is sufficiently serious to justify instituting proceedings. These are statutory concepts not replicated in the Equality Act and I find that I should not read them across.

97. The discretion given to Employment Tribunals under the just and equitable test is a wide discretion and derives from section 123 Equality Act. The claimant submitted that it was inconsistent for the claimants who consider themselves discriminated against to be "*stuck with*" a three month time limit when they later learn that they have a much more substantial claim than initially envisaged. Whilst I am of the view that this does not allow this Tribunal to import the considerations under the Limitation Act, it comes down to an analysis of what is just and equitable.

98. The parties were agreed that in the employment jurisdiction the question of latent damage in terms of the just and equitable test has not yet been considered by the appellate courts. The respondents dispute that this is a latent damage case in any event and I deal with this in more detail below.

<u>The reason for the delay</u>

99. Findings of fact were made at the hearing in September 2019 as to the reasons for delay. These are set out from paragraph 37 of the Reasons. They are as follows:

- The claimant knew that as a result of the DeEquitisation agreement he was losing any right to the distribution of capital profits.
- He chose not to challenge the arrangements at the time.
- He knew he would lose out.

- He knew he would suffer financial loss but chose not to take legal advice at the time he entered into the agreement.
- He accepted that he could have brought a claim in October 2017 when he entered into the agreement.
- He was aware in November 2017 and November 2018 when he saw the firm's results for April 2017 and April 2018 that the difference in the losses he anticipated had greatly increased.
- On 13 September 2018 the claimant learned about the first respondent's decision to sell two parts of its business. He had expectations of a profit share but these were hopes and expectations rather than confirmed facts. He was alert to the fact that his losses had the potential to be greater than he expected and more than his initial assessment of around £30,000 per annum.
- He did not take legal advice in September 2018 when he became aware of this. He accepted that he could have done.
- He was not misled by the respondents.

100. There is then the matter of the month's delay from 17 December 2018 when the claimant received confirmation that the decision would not change and the date he first consulted solicitors to the issue of proceedings on 17 January 2019. As found in September 2019 (paragraph 50) the reason given by the claimant was that due to the Christmas period he was "*unable to progress matters meaningfully until the New Year*". This does not explain why no action was taking in the working week commencing Monday 17 December 2018 and while 1 January 2019 was a bank holiday, there is no explanation as to why the claim was not issued until the third week of 2019. This was at a time when the claimant was in receipt of legal advice and knew or ought reasonably to have known that his claim was already out of time.

101. What the claimant says is that in the present case there is an unanticipated event that caused a loss he could not have envisaged. This on the claimant's submission makes it a latent damage case which makes it just and equitable to extend time. I have taken into account the respondent's submissions that this is not a latent damage case, it is a case in which quantum was not known at the date the cause of action arose and turned out to be very substantially more than the claimant had envisaged.

102. I agree with the respondents on this issue. The claimant knew he would suffer loss as a result of the act of discrimination upon which he relies. Many would not regard his initial evaluation of around £60,000 as a low value claim that was not worth pursuing. The discrimination was the effect of the DeEquitisation Agreement, which gave rise to a demotion from equity partner. It is not the same, to pick up on the claimant's analogy, as having been exposed to asbestos and much later on developing symptoms. The claimant knew when he entered into the Agreement that he had lost his rights to participate in the profits of the firm. He made his own estimation of what his loss might be but he simply did not know. For all sorts of reasons, the first respondent could have done spectacularly well and he could have lost out far more than he estimated. Alternatively the first respondent could have hit misfortune due to all sorts of unanticipated events, as happened to many employers with the global

pandemic. The claimant no longer ran the financial risks due to unanticipated misfortune.

103. I agree with the respondents' submission that this is not a latent damage case. It is a case where the claimant knew about his cause of action, considered and initially decided against taking legal advice, knew that he was likely to suffer loss, but where quantum turned out to be in a different category from the amount he envisaged.

Merits

104. On merits I agree with the claimant that it is likely to be difficult to justify a retirement age of 60 in 2018 when this was well above the State retirement age which is gradually increasing. As the claimant says, that retirement age of 60 remained in place when the claimant presented his claim. However, my finding is that this case is not as cut and dried on the merits as the claimant suggests.

105. An important consideration is that the claimant was part of the decision making process that led to the Members' Agreement which contained the retirement age of 60. The Agreement sets out the reasons why the Members considered that age to be justifiable. I accept that just because the Agreement says that age 60 is considered justifiable, this is not the end of the story. Findings will need to be made as to whether the objective justification defence is made out under section 13(2) Equality Act. The claimant and respondent witnesses will need to explain in evidence their thinking and reasoning in entering into that Agreement in the context of that particular organisation. This is likely to include considerations of the interests of those reaching the age of 60 and the considerations of employees earlier on in their career, seeking promotion in the context of that workplace and the factors that led to the selection of this age.

106. For the claimant it was submitted that if, when the case of ***Age UK*** was decided, it was only just possible to justify the age of 65, based on the comments made per curiam, the respondents here do not have a good case ten years later to support a retirement age of 60, particularly in the context of an increasing State retirement age. I have some sympathy with that submission, but take the view that it is necessary for the respondents' defence to be tested in the context of the requirements of that particular workplace. The ***Age UK*** case concerned a much wider pool of the working population and it will be case specific.

107. There is also an area of factual dispute in terms of the way in which the discretion in the Members' Agreement was exercised. The claimant says there was no suggestion that his work performance had declined but the respondents say that it had and this was part of the rationale for not wishing to retain him as an equity partner. This will require a finding of fact. For these reasons I am not led to the view that the claimant has such a strong prospect of success on the merits that it supports an extension of time.

Prejudice

108. In ***Miller v Ministry of Justice*** (above) Laing J said at paragraph 20 *"The lack of belief in the strength of the claim was not a good reason for extending time."*

At paragraph 12 in that case the EAT said in relation to prejudice to the respondent: *"There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses."*

109. I saw the strength in the claimant's argument that the prejudice to the respondent of having to meet the claim is counterbalanced by the prejudice to the claimant in not being able to pursue the claim. I agree with this.

110. I have gone on to consider the question of forensic prejudice. Essentially the claimant says that there is no forensic prejudice. I accept that this is a claim where the majority of the matters in question are likely to be documented. The claimant points to the fact that Mr Gallagher, the second respondent, has already prepared a detailed witness statement. However, he is not the only witness and it is the case that memories fade with the passing of time.

111. Witnesses will need to give evidence on their thinking and reasoning in the choice of the retirement age and there will also need to be evidence on the exercise of the discretion to extend for two years. There is the factual issue of dispute as to the claimant's performance which Mr Gallagher says they preferred to allow the claimant to stay on for two years in the demoted role rather than have the difficult conversations about his performance. It is submitted for the respondents that there is more Mr Gallagher wishes to say in evidence on this and it will also be material to hear from the claimant's former line manager Mr Fussell and possibly others. It becomes more difficult as time passes to recall for example the concerns about performance from 2016 and 2017 which will be 6-7 years prior to any full merits hearing.

112. I have considered the brief updated witness statement from Mr Gallagher. To the extent that any of the personally named respondents are no longer with the firm that took over the first respondent, they are not just witnesses but parties to the proceedings. It is a matter for them as to whether they choose to defend themselves or not. Mr Fussell is not a party, he is a prospective witness. He has evidence to give about succession planning and decision making around the claimant personally. I was told that he remains a partner with the firm but has retired from practising in the firm since February 2019. As he remains a partner with the firm, I am of the view that he is not impossible to trace and I have no evidence that he is not prepared to co-operate. The more persuasive issue is the fading of memory over the passage of time in the light of a three month time limit.

113. The claimant submits that the only delay the tribunal should be concerned with is the 5.5 month delay. The respondents say that the tribunal should take account of the delay until the full merits hearing which will not take place until at least the middle of 2023. They say that this is because the delays that have taken place, with the need to deal with the time point, was occasioned by the late presentation of the claim. The claimant says that delays can happen for all sorts of reasons so the tribunal should not take this into account. My decision

is that in this particular case, the delays are occasioned by the late presentation of the claim and it is relevant to take this into account. There is therefore forensic prejudice to the respondent on at least this aspect of the claim in terms of the potential for fading memories. I find a degree of forensic prejudice to the respondent in dealing with this issue if time is extended.

In summary

114. For the above reasons I find that it is not just and equitable to extend time. I have found that the delay in presenting the claim was relatively long. The claimant knew about his cause of action and had a flag presented to him in September 2018 when he learned about the forthcoming transactions which were under consideration at that date. He knew in the autumn of 2018 that his losses were likely to be greater than initially anticipated, although not to the amount now claimed. He knew he could take advice and chose not to. He was not misled by the respondent. I find that the reasons for the delay, including the lack of a sufficient explanation for the final month of delay, are not sufficiently strong to make it just and equitable to extend time.

115. I have found that on the issue of merits, the position is not as cut and dried as submitted by the claimant and that there is a degree of forensic prejudice to the respondent due to the passage of time when the trial is not likely to come on until about 5-6 years after the events in question. This is set against the relatively short time limit of three months.

116. I have found that this is not a latent damage case but a claim in which the level of quantum turned out to be far in excess of the claimant's initial expectations. I find that it is analogous to ***Miller*** and that the lack of the claimant's belief in the strength of the claim is not a good reason for extending time.

117. ***Robertson*** remains good law; time limits are to be exercised strictly, there is not presumption that an extension will be granted and it is the exception rather than the rule.

118. For these reasons I find that the claim is out of time and it is not just and equitable to extend time.

119. I would like to express my gratitude to the legal teams on both sides for the preparation for this hearing including the well prepared authorities bundle and to leading counsel for their thorough and helpful submissions.

_____

Employment Judge Elliott

29 June 2022

Sent to the parties

29/06/2022.

For the Tribunal: