EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100150/2022

Hearing Held at Edinburgh on 18th August 2022

Employment Judge McFatridge

Mohammed Raffi	**Claimant** **Representing himself**
NHS Lothian	**Respondent** **Represented by:** **Ms Gallagher, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the Tribunal does not have jurisdiction to hear the claim as it is time barred.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had unfairly dismissed and unlawfully discriminated against on grounds of disability by the respondent. The respondent filed a response within the statutory time limits. Amongst other things they indicated that in their view

the claimant did not have sufficient qualifying service to make a claim of unfair dismissal. In addition it was their position that the claim of disability discrimination was time barred. The claimant had been dismissed from his employment on 24th September 2020. The claimant had notified ACAS in terms of the Early Conciliation Regulations on 8th January 2022 and submitted his claim on 10th January 2022. The claimant subsequently withdrew his claim of unfair dismissal which was thereafter dismissed. A Preliminary Hearing was fixed for the purpose of determining whether or not it would be just and equitable to extend time so that the Tribunal would be able to hear the discrimination claim. At the Hearing the claimant gave evidence on his own behalf. A joint bundle of productions was lodged which was referred to by both parties. On the basis of the evidence and the productions I found that the following facts relevant to the issue of whether or not it would be just and equitable to extend time in this case were proved or agreed.

Findings in Fact

2. The claimant commenced employment with the respondent on 11th November 2019. The claimant was initially advised he was on a period of probation which was subsequently extended. A number of probationary period review meetings was held with the claimant at which feedback was given on his performance. A final probationary review meeting took place with the claimant on 17th September 2020. Following an adjournment to consider matters the meeting was reconvened and the claimant was informed on 17th September 2020 that the decision had been taken not to confirm his Contract of Employment. He was given one weeks notice of termination. The claimant was therefore dismissed and the effective date of termination of his employment was 24th September 2020. In an email to the Tribunal dated 4th April 2022 the claimant accepted that 24th September 2020 was the effective date of termination of his employment.

3. The claimant's position is that during the course of his employment he suffered a number of incidents of disability discrimination. For the purpose of determining the issue of time bar I have taken the claimant's proceedings at

their highest and proceeded on the basis that all of these allegations are factually correct. The claimant indicated that prior to the commencement of his employment he advised the respondent of his disability and the particular arrangements needed for work. The first incident of detriment listed is on 4th September 2019. The final one mentioned is the claimant's final review meeting attended by the claimant which is said to have taken place on 19th September 2020 but which the claimant advised took place on 18th September. Subsequent to this the claimant appealed his dismissal however he did not attend the appeal. My finding is that the last incident on which the claim is based took place on 18 September 2020. The last possible date on which any adjustments could be made by the respondent was 24 September 2020 which was the effective date of termination of employment although it is likely that time started to run on this claim earlier than this. Throughout the process the claimant was represented by his Trade Union. An officer of the Trade Union attended the various meetings which took place between the respondent and the claimant regarding his probation review including the Hearing at which he was dismissed and the appeal.

4. In or about 2010 the claimant suffered back injury following a fall whilst in the course of his employment with a previous employer. The claimant is in virtually constant pain from this back injury. From the outset of his employment the claimant was aware that the respondent had various legal obligations to him as a disabled person. He raised the issue on numerous occasions. He completed a pre recruitment questionnaire setting out the adjustments he considered he required. The claimant had previously done this with other employers.

5. Part of the claimant's claim relates to the respondent's alleged failure to provide him with a suitable chair over a lengthy period of time. In addition to his back injury the claimant also suffered from hemiplegic headaches which appeared to have commenced in or about February 2020 on the basis of the claimant's pleadings. These were excruciatingly painful. At times the claimant was in such pain he wished that he could cut his head off. The

claimant considered that these headaches may be linked to his work location which was in a basement at a hospital.

6. From around July 2020 onwards the claimant engaged with correspondence with the respondent regarding the lighting and ventilation of this work area. The claimant made a Freedom of Information request of the respondents in relation to this around July 2020.

7. Having been dismissed with effect from 24th September 2020 the claimant ought to have lodged his ET1 in respect of any discrimination occurring during his employment or at least started early conciliation no later than 23rd December 2020. The claimant did not do this. During this time the claimant was suffering from the headaches and back pain which he had suffered during his employment. He was also providing support to his elderly parents.

8. In or about February 2020 the claimant's GP had prescribed the claimant sumatriptan in order to assist with his headaches. The claimant took one of these but suffered side effects and therefore advised his GP that he would not be taking any more. The claimant did not receive any replacement medication for his headaches until October 2021 when he was prescribed propranolol.

9. In December 2020 the respondent sent the claimant certain information in response to his Freedom of Information request. The claimant was dissatisfied with their response and lodged a formal complaint with the Information Commissioner. The claimant thereafter pursued his claim with the Information Commissioner. The Information Commissioner's Decision Notice (172/2021) was published on 27th October 2021 and was lodged. This notes that the claimant had been contacted by the Investigating Officer in March 2021 and had responded providing an extract of the information disclosed to him providing a copy of an email chain in which the ventilation and lighting issues were discussed. The claimant had also engaged in correspondence with the ICO Investigating Officer from March to July 2021 and indeed towards the end of the investigation corresponded with them to

indicate where he considered the respondent had failed to comply with their obligations.

10. The Information Commissioner finally responded to the claimant on 27th October 2021. The letter was lodged (page 60). The Commissioner did not require NHS Lothian to take any action in respect of the various failures which had been mentioned.

11. At some point (which the claimant was unable to state with certainty) the claimant decided that he may have a claim which could be made to the Employment Tribunal. The claimant discussed matters with friends and relatives. In particular the claimant discussed the matter with his niece. The claimant's niece worked in Ireland and over the period 2020-2021 she moved on various occasions from Ireland to Glasgow and then back again. When she was in Glasgow the claimant could meet with her face to face. The claimant also used various online resources. He looked on the CAB website. He did not try to make contact with the CAB either by telephone or to arrange an in person meeting. He was aware that there was a web chat facility but he did not use that. At this stage the claimant was unaware of any time limit for lodging a Tribunal claim.

12. The claimant finally prepared an ET1 with the assistance of his niece. This is an extremely detailed document extending to over 150 paragraphs. The claimant contacted ACAS on or about 8th January 2022. A Certificate was issued on 10th January and his ET1 lodged on the same day. There was a glitch with his ET1 in that the name on the ACAS Conciliation Form and on the ET1 were different however this was accepted by the Tribunal. The claimant was unaware of the existence of a time limit for making a Tribunal claim until he was advised by the Tribunal that his claim may be time barred shortly after it was submitted.

13. In or about July 2022 the claimant attended his dentist to discuss the headaches with her. His dentist felt that a referral to an oral maxillary specialist might be helpful and the claimant attended the Dental Hospital

who wrote to the claimant on 22nd July 2022 indicating that their diagnosis was migraine/temporal mandibular disfunction. The claimant was thereafter provided with a dental appliance to wear at night in the hope this might alleviate his headache symptoms. (page 73).

Observations on the Evidence

14. Whilst an extremely loquacious witness the claimant was very reluctant to be pinned down and give straightforward answers as to what his position was in relation to certain facts. For example he was repeatedly asked when he first became aware he could make a Tribunal claim. He did not answer the point. At the end of the day he simply said that it was too far in the past for him to remember his thought processes. He did not give any specific information as to the dates when his niece was available to him. He did not say when he first discussed matters with her. He was repeatedly asked why he professed himself to be unable to complete a claim form as a result of his disability during a period when he was engaged in complex correspondence with the Information Commissioner's Office. He gave various answers. He said that he required to prioritise matters and his priority was to find out what might be causing his headaches. He also said that as a result of his disability and the headaches he was simply not thinking straight. He also said that there were many other things going on at the same time including looking after his aged parents and dealing with the fact that both of them had serious health conditions at a time when it was very difficult to access medical help. On numerous occasions the claimant said that he was unable to answer questions about dates or what he says happened without checking emails etc. The claimant was asked why there was very limited medical evidence lodged. He said he had been unaware of the need.

15. At the end of the day I found it very difficult to put together a clear timeline as to the claimant's state of mind and why it was that there had been a delay in him submitting his claim form. The best the claimant could really do was to say that he was disabled and that the delay had been due to his disability.

During his final submission he said that the last paragraph of his witness statement really summed matters up. This stated:

> "I felt it was necessary to prioritise my time towards the evolving situation regarding Covid 19 while minimising my exposure to stressful situations such as the submission of my claim given the exacerbative condition of my physical and mental wellbeing."

Issues

16. The sole issue which I required to determine was whether or not the claim was time barred. It was common ground between the parties that the claim had been submitted outwith the initial 3 month time limit set out in section 123 of the Equality Act. The claimant's position was that section 123(1)(b) applied and that the Tribunal should extend time on just and equitable grounds.

Discussion and Decision

17. The respondent's representative was allowed to make her submission first and lodged a written submission which was supplemented orally. The respondent's representative helpfully produced a list of the leading cases. As I generally agreed with the respondent's summation of events I will not attempt to repeat her submission but will refer to it as appropriate below. The claimant made a much shorter submission which as noted above essentially referred to the explanation set out in his witness statement.

18. In the usual course the first step which one requires to take when considering the issue of time bar is to establish the date from which time runs. In terms of section 123 a period of 3 months starts with the date of the act to which the complaint relates. Section 123(3) states that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

19. In her submission the respondent's agent indicated that it was her view that the various events set out by the claimant in his ET1 could not be regarded as a continuing act but as a series of discreet acts where the time limit from bringing proceedings would be in each case 3 months from the date of that act. She indicated that if I were not with her on this then the very last date on which the 3 month period could be said to have commenced would be 24th September 2020 which was the date the claimant's dismissal took effect.

20. I felt that there was considerable force in the respondent's agent's submission in that it did appear to me that it was somewhat of a stretch to say that all of the acts complained of were part of a single continuing act. That having been said I did not consider that it would be a useful use of judicial time to analyse each act referred to in the 150 page ET1 where it was my view that even if I were to accept the contrary position the last possible date on which time could be said to have started running in respect of all of the alleged acts of discrimination was 24th September 2020. I agreed with the respondent's representative that there was no suggestion in the pleadings that there had been any acts of discrimination in their appeal process and the claimant had not in fact attended the appeal meeting. I therefore considered that in this case it would be appropriate for me to at least initially look at matters on the basis that if there was a single continuing act of discrimination and this came to an end on 24th September 2020. If I had found it appropriate to extend time from that date I would then have required to go back and look at each individual act to see if it formed part of this continuing act but in the event as can be seen below this is not necessary.

21. I was referred to the usual leading authorities by the respondent's agent. The case of **Robertson v Bexley Community Centre** [2003] IRLR 434 makes it clear that time limits are exercised strictly in employment and industrial cases. There is no presumption that Tribunals should exercise their discretion to consider a claim out of time unless they can justify failure to exercise the discretion. The position is that the Tribunal requires to look at the matter in the round taking all of the relevant facts into account and decide

whether or not it is just and equitable to extend time. Paragraph 25 states that the exercise of discretion is the exception rather than the rule. I was also referred to the case of **British Coal Corporation v Keeble**. This case indicated that whilst it was not prescriptive it would be appropriate for Tribunals approaching the issue of whether or not to exercise their discretion to follow the checklist set out in the English Civil Procedure Rules. Although these Rules do not have application in Scotland, Tribunals routinely use the approach set out in the Keeble Judgment as providing a useful guide as to how to approach the issue. The Tribunal requires to take into account 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 parties have cooperated with any requests for information, the promptness with which the claimant acted once he or she knew the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

22. In this case it has to be said that in any view the length of the delay is considerable. Even adopting my somewhat generous approach and accepting, for the purposes of these proceedings only, that the claimant is alleging a single continuing act then this came to an end at the latest on 24th September. The claimant ought to have lodged his claim or at least started early conciliation by 23rd December 2020. He did not. Given that the claimant did not start early conciliation by that date the early conciliation provisions set out in section 140A have no application and the claimant is not entitled to any extension of time in respect of the early conciliation which he did apply for in January 2022. We are therefore faced with a situation where the claim, on the best view for the claimant, was lodged some 13 months late. With regard to the reason for delay the claimant essentially points to a number of fairly vague and diffuse matters. He replies on the fact of his disability and the severe debilitating headaches which he suffered from from February 2020 and which still continue. He pointed to the fact that he required to prioritise his time and energies and that during this period he was looking after his aged parents as well as conducting correspondence with the Information Commissioner. He also indicated that he was unaware of the

time limit until he was told about it by the Tribunal after he submitted his claim.

23. Although he was asked questions about this several times the claimant did not specifically state that he had been waiting on the outcome of the Information Commissioner Report before submitting his claim. The claimant in evidence skirted round the matter several times saying that he was aware there was a delay of several months between him getting the Information Commissioner outcome and submitting his claim. He did not at any point specifically come out and say that he had been waiting on this.

24. With regard to the issue of the claimant's headaches I had considerable human sympathy for the position the claimant finds himself in. His description of these headaches was graphic and I have no doubt that these are extremely debilitating. That having been said I was, like the respondent's agent, struck by the complete lack of any relevant medical evidence in relation to these headaches. In his witness statement the claimant had referred to various medical appointments however there were no relevant medical appointments listed relating to his headaches from the date of dismissal up until October 2021. The only appointments listed were physiotherapy appointments for his back injury. It was also clear from the claimant's own evidence that during this period he was not actually taking any medication for his headaches. Whilst I accept these headaches were debilitating it is a common place observation that all those who submit disability claims to the Tribunal believe that they have a disability. The mere existence of a debilitating disability does not exempt claimants from the time limits. I also have to agree with the respondent's representative that clearly the claimant had the ability during this time to carry on a complex correspondence with the Information Commissioner's Office. There is no real explanation as to why, if the claimant was fit enough to do this, he was not sufficiently fit to lodge his Tribunal claim. With regard to the issue of his ignorance of the time limit part of the difficulty is the claimant's complete refusal to give any date as to when he became aware that he could make a claim to the Tribunal at all. I was prepared to accept in the absence of any

contrary evidence that the claimant was genuinely unaware of the existence of a time limit. The authorities however make it clear that it is not just the fact that the claimant was unaware of the time limit which is relevant but whether it was reasonable for the claimant to be unaware. In this situation I accepted there was considerable force in the respondent's submission to the effect that these days information about time limits for Tribunal claims is only a few clicks away from anyone who has access to the internet. It was clear that the claimant did have such access and moreover was in a position to carry out research. Although he was vague on the details he confirmed that he had checked matters on the CAB website and other websites. He could not recall whether he had discussed the matter with his Union representative but he accepted that he had been in touch with his Union representative at least until shortly after his appeal. He did not give a reason why he did not ask them about his Tribunal claim and time limits. He also indicated that he was aware of a web chat facility on the CAB site but had not used this. He had also not sought an appointment or telephone conference with the CAB.

25. It was clear that the claimant was aware in general terms of disability protection legislation. He made numerous references in his evidence to the respondent's obligations to him as a disabled person. He had raised these points at numerous junctures during his employment. I did not consider that the claimant had shown that his ignorance of time limits in this case was reasonable. The claimant was unable to answer the questions from the respondent to the effect that he could have put in a holding application in order to reserve his position rather than the extremely detailed 150 paragraph ET1 which he did in fact finally submit. As noted above the claimant indicated that he had assistance from his niece and that his niece had been going backwards and forwards from Glasgow to Ireland during 2021 albeit he was unable to say when precisely he had first started discussing matters with her or when she was in Glasgow or when she was in Ireland. Given the various resources available to the claimant I did not consider his ignorance of time limits to be reasonable.

26. With regard to the point made by the claimant about prioritising other matters it does not appear to me that that is a good reason for the delay. On balance therefore I considered that the length of the delay and the reason for it did not weigh in the claimant's favour.

27. I did consider that the effect of the delay on the cogency of evidence in this case was likely to be very substantial. The claimant himself indicated at numerous points in his evidence that he simply could not remember and himself made the point that we were talking about matters 2 years ago. If the case is allowed to proceed then the Hearing would require to deal with matters which took place in 2019 and 2020. It is highly likely that memories would have dimmed. The claimant made the point that he himself had various work diaries and notes which he had taken at the time and which he could rely upon. The difficulty is that the respondent's witnesses would be unlikely to have kept such information. It appears to me that there would be considerable prejudice to the respondent if the case were allowed to proceed due to the fact that their witnesses would have serious difficulty remembering many of the incidents referred to.

28. In this case there was no question of the respondents having been asked for information or responding to requests unreasonably. The Information Commissioner request had related to specific issues regarding ventilation and lighting and in any event the Information Commissioner had found that the respondent had been entitled to rely on Regulation 10(4)(a) to the Environmental Information (Scotland) Regulations in dealing with the claimant's request. The only criticism of the respondent was that they had failed to provide the claimant with adequate advice and assistance in line with Regulation 9 of the Environmental Information (Scotland) Regulations and as noted they were not ordered to take any action in respect of this.

29. It was also clear to me that the claimant had not acted at all promptly once he became aware of the facts which gave rise to the cause of action. As noted above the claimant clearly was aware that the respondents had various obligations to him in terms of the Equality Act. The claimant failed to answer

the reasonable questions posed by the respondent's agent as to when he had first became aware of his right of action but it appears clear to me that he must have been aware at least in general terms probably well before the end of his employment. As noted above he then delayed for a period of around 15 months before taking any action.

30. I also considered that the steps taken by the plaintiff to obtain appropriate professional advice once he knew of the possibility of taking action were inadequate. I quite appreciate that there can be difficulties in accessing appropriate advice however the claimant is clearly able to use the internet and was able to go on the CAB website. It was unclear why he did not take matters further. It is also clear that the claimant had the possibility of obtaining advice and assistance from his niece. The ET1 document which he provided is extremely clear and detailed. There was really nothing before me to say why the claimant would not have been able to produce such a document with the assistance available to him at a much earlier date.

31. At the end of the day I feel that this is a case where the balance favours the respondent and it would not be just and equitable to extend time. For this reason it is clear that the case is time barred and accordingly the Tribunal has no jurisdiction to hear it. The claimant's claim of disability discrimination is therefore dismissed.

Employment Judge: Ian McFatridge
Date of Judgment: 01 September 2022
Entered in register: 02 September 2022
and copied to parties