EMPLOYMENT TRIBUNALS

Claimant: Mr G Ghanem

Respondent: Ministry of Defence

Heard at: Watford (by CVP) **On:** 16 November 2022

Before: Employment Judge Maxwell

Appearances
For the claimant: in person
For the respondent: Mr Paulin, Counsel

JUDGMENT

It is just and equitable to extend time for the Claimant's claim under section 123 of the Equality Act 2010.

REASONS

Background

The Claim

1. The Claimant complains of disability discrimination. He says that he received an offer from Trant Engineering on 14 May 2021 to work for them on a contract in the Falkland Islands. He had worked at this location previously in June 2019, January 2020 and July 2020. On this occasion, however, the offer was withdrawn because of his diabetes.

2. The Claimant contacted ACAS on 31 December 2021, a certificate was issued on 11 January 2022 and he presented his claim on 11 February 2022.

The Response

3. The Respondent says that on 12 July 2021, it decided not to approve the Claimant to work for its contractor Trant Engineering Ltd, due to limited healthcare resources on the Falkland Islands. The Respondent carries out health screening of contractors so as to be satisfied they are medically

supportable whilst working at that location. The Claimant was informed of this decision on 16 July 2021.

4. The Respondent says the Claimant's services were provided by way of an employment agency to its contractor and for that reason, it denies any employment relationship or other basis upon which liability could be established under the **Equality Act 2010**.

5. Separately, the Respondent contends the Tribunal has no jurisdiction because the Claimant's claim is out of time. The Respondent said that as the decision about which the Claimant complains was made on 12 July 2021, he had until 11 October 2021 in which to bring a claim in the Tribunal. As the limitation period had already expired, time was not extended by the Claimant engaging in ACAS conciliation. In the circumstances, his claim on 11 February 2022 was four months late.

Evidence

6. I was provided with a bundle of documents running to 99 pages, including the index. This comprised the pleadings and case management orders, a screenshot and a copy of one of the Respondent's policy documents.

7. I heard oral evidence under oath from the Claimant. I invited him to confirm the truth of the information he had provided in his claim form and asked him a number of questions about the circumstances in which he came to present his claim when he did. Mr Paulin cross-examined the Claimant on behalf of the Respondent.

Facts

8. The Claimant found out about the Respondent's decision on 16 July 2021, when he was informed the Respondent's Medical Officer would not allow him to travel to the Falkland Islands. There is no evidence before me today on which I can make finding about when the Respondent made the relevant decision, although I am aware it's position is this was on 12 July 2021.

9. Following this turn of events, in August 2021 one of the Claimant's friends suggested to him that he should bring a claim. The Claimant decided to look into this and carried out some research online in mid-September 2021. At this time, he found his way to the ACAS website and discovered there was a three-month time limit for bringing a claim in the Employment Tribunal. This is something the Claimant wished to do, although he found it difficult to take it forward. He has some difficulty with reading and writing. The Claimant describes himself as being dyslexic. Whilst he might then have sought some support in this from his brother, he decided not to. The Claimant explained and I accept that he is embarrassed by his difficulty with reading and writing. He tries to find ways around the difficulties he encounters. The Claimant works long hours in a physically demanding role.

10. The Claimant works far away from home most of the time. He went back home to South Shields, in late December 2021. On Christmas Day, his brother asked him what he had done about bringing a claim. Prompted by this the Claimant

contacted ACAS. He was later assisted in presenting his claim, which was done on 11 February 2022.

11. The Claimant's claim was circa 4 months late (with time running from either 11 or 16 October 2021).

Law

12. Section 123(1) of the Equality Act 2010 ("EqA") provides:

> **(1) Subject to sections 140A and 104B proceedings on a complaint within section 120 may not be brought after the end of—**
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> > **(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.**

13. An Employment Tribunal applying section 123 has a broad discretion. A useful summary of the case law and multifactorial approach was given by the EAT in **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283** per HHJ Peter Clark:

> **11. A useful starting point is the judgment of Smith J in British Coal Corpn v Keeble [1997] IRLR 336. That was a case concerned with the just and equitable extension of time question in the context of a sex discrimination claim. Smith J, sitting with members, in allowing the employers' appeal and remitting the just and equitable extension question to the employment tribunal, suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980, the provision for extension of time in personal injury cases. The first of those factors, as Mr Peacock emphasised in the present appeal, is the length of and reasons for the delay in bringing that claim.**
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> **12. However, as the Court of Appeal made clear in Southwark London Borough Council v Afolabi [2003] ICR 800, in deciding the just and equitable extension question, a tribunal is not required to go through the matters listed in section 33(3) of the Limitation Act 1980, provided that no significant factor is omitted. That principle was more recently reinforced in a different context by the Court of Appeal in Neary v Governing Body of St Albans Girls' School [2010] ICR 473, where the leading judgment was given by Smith LJ. There, it was held that a line of appeal tribunal authority requiring a tribunal to consider the factors in the CPR, rule 3.9(1), as it then was, when deciding whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect. Following Afolabi it is sufficient that all relevant factors are considered.**
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> **13. Section 33(3) of the 1980 Act does not in terms refer to the balance of prejudice between the parties in granting or refusing an extension of time. However, Smith J referred to the balance of prejudice in Keeble, para 8, to which Mr Peacock has referred me. That, it seems to me, is consistent with the approach of the Court of Appeal in the section 33 personal injury case of Dale v British Coal Corpn, where Stuart-Smith LJ opined that, although not mentioned in section 33(3), it is relevant to consider the**

> **plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. That passage neatly brings together the two factors which, Mr Dutton submits, were not, but ought to have been, considered by this tribunal in the proper exercise of its discretion: prejudice and merits. I shall return to those factors in due course.**
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> **14. What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see Hutchison v Westward Television Ltd [1977] ICR 279) involves a multi-factoral approach. No single factor is determinative.**
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> **15. Returning to the balance of prejudice, this concept arises elsewhere in our jurisdiction. For example, in deciding applications to amend the form ET1, the Selkent principle: Selkent Bus Co Ltd v Moore [1996] ICR 836.**

14. Importantly, there is no presumption that time will be extended; see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 343 CA**, per Auld LJ:

> **25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. […]**

15. The Court of Appeal considered the exercise of this discretion again in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, per Leggatt LJ:

> **18. 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 section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (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: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. […]**
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> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).**

Conclusion

16. The reason for the delay in this case is that after having undertaken some initial online research in mid-September 2021, found the ACAS website and discovered there was a 3-month time limit, the Claimant was put off because he was busy at work, thought it would be too difficult to prepare the paperwork and was too embarrassed to ask his brother for help. Prompted and supported by his brother, following a conversation on Christmas Day the Claimant began to take the steps to present a claim. Whilst this explanation would not show a lack of reasonable practicability that is not the test I must apply. The sequence of events is an understandable one and I am satisfied the Claimant faced some obstacles, although these were far from insurmountable.

17. Mr Paulin did not say the Respondent was prejudiced by the delay and it is difficult to see how that would be so, as the decision made by the Respondent's medical officer must have been documented.

18. The other potentially relevant consideration was merits. Mr Paulin referred me to the recent EAT decision **Kumari v Greater Manchester Mental Health NHS Trust** in connection with the proposition that I should take into account merits. This is not a new principle and I accept that in an appropriate case, the apparent merits (if these were sufficiently clear) would be a relevant consideration. Mr Paulin argued the Claimant would not be able to show he was an employee, worker or contract worker. In the course of being cross-examined, the Claimant said he was self-employed, working for an agency, Fusion People, who supplied his services to Trant Engineering Limited. He did not agree that Fusion supplied him to PSI, who then in turn supplied him to Trant. The Claimant agreed he did not have any contract with the Respondent. Mr Paulin said the Claimant's claim lacked merit because he was not an employee or worker (i.e. within the extended definition of employment under EqA section 83) or contract worker (EqA section 41).

19. I have given careful consideration to the Respondent's argument on merits. The Claimant appears very unlikely to be in employment, within the meaning of EqA section 83. The position on section 41 is, however, less clear. The Respondent has provided no documentary or witness evidence to show the nature of the various contractual relationships leading from the Claimant to the Respondent. I have not been referred to any case law on the interpretation of EqA section 41 or whether this can apply where there is an additional "link in the chain" such as an agency (Fusion) between the Claimant and the party the Respondent contracted with (Trant). Nor do I consider it safe to rely upon the Claimant simply having agreed he was self-employed, in circumstances where it appears he was working on a succession of assignments doing the same of similar work for clients of that agency.

20. Taking all of these matters into account, I have decided it is just and equitable to extend time. As far as the Claimant's reason for delay is concerned, his explanation is understandable even if it is capable of some criticism. There would be no prejudice to the Respondent in facing the claim presented when it was, as opposed to when it should have been. As far as merits are concerned, whilst he has little or no prospect of showing he was in employment per EqA

section 83 (and I would not have extended time on that basis) the position on section 41 was not sufficiently clear today and that requires a determination.

EJ Maxwell

Date: 16 November 2022

Sent to the parties on:

17/12/2022

For the Tribunal Office:

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