EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Adeyinka	**v**	**MBS Lighting UK Ltd**

Heard at: Reading (by CVP) **On:** 15 November 2022

Before: Employment Judge Eeley

Appearances:

For the Claimant: In person
For the Respondent: Ms L Hatch, Counsel

JUDGMENT having been sent to the parties on 15 November 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a preliminary hearing in relation to the out of time/jurisdiction point in the claimant's claims of direct race and disability discrimination. I have heard evidence from the claimant and representations on behalf of the claimant and on behalf of the respondent and I have referred to the documents in a Preliminary Hearing bundle (to which I was directed in the course of the hearing.)

2. The effective date of termination was 25 August 2020. It is the dismissal which is the act of discrimination complained of for both the race and the disability claims. There is no earlier allegation of discrimination. The ACAS Early Conciliation Certificate is dated 15 January 2021. It was issued on the same day that the ACAS conciliator was contacted. The claimant presented his Tribunal claim form to the Tribunal on 8 January 2021. If he had complied with the three-month time limit he would have presented the Tribunal claim by 24 November 2020 at the latest. As things turned out he presented his claim six weeks late. The question for me is whether it is just and equitable to extend the time to allow the claimant's claim to continue even though it was presented six weeks late.

3. I have been referred to the relevant case law and legal principles by counsel for the respondent. I have been reminded (in line with Robertson v Bexley Community Centre [2003] EWCA Civ 576) that there is no automatic right to an extension of the time limit to present the claim to the Tribunal. It is a discretion to be exercised judicially and it is for the claimant to persuade the

Tribunal that it is just and equitable to extend the time limit. I have also had my attention drawn to the long line of cases which make reference to the so-called Keeble factors (British Coal v Keeble [1997] IRLR 336). I am asked to consider the balance of hardship and injustice between the parties and I look at the practical consequences of my decision for both parties to the case. The Keeble factors (for the record) are firstly, the length of and reasons for the delay. Secondly, the impact of the delay on the cogency of the evidence. Thirdly, the co-operation (or lack of it) of the respondent with any requests for information (if relevant.) Fourthly, the promptness with which the claimant acted once he knew of the facts giving rise to his claim. Fifthly, the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action. Although there is guidance given in the case law, I must consider all the relevant circumstances of the case and come to a fair and balanced conclusion.

4. I have looked at the facts in this case. The respondent has conceded that the claimant was disabled by reason of post-traumatic concussion during the period from the accident in October 2019 through to (and past) the date of dismissal. However, (and I understand why the claimant might struggle with this) his disability is not an automatic justification for the claim being presented to the Tribunal outside the relevant time limits. Disabled individuals can (and do) satisfy the definition of disability in the Equality Act whilst still being able to bring their claims to the Tribunal within the relevant time limit. This can be so even where the disability is a mental health condition or a condition which affects their ability to think and to give instructions. So, it is not automatically the case that just because the claimant was disabled it is 'just and equitable' to extend the time limit for presentation of the claim on the basis or assumption that he could not bring the claim within the time limit.

5. I look at the relevant facts here, bearing in mind the claimant's disability. The accident happened on 9 October 2019. After that accident the claimant returned to work on 10 October and worked for the respondent for six months (until 6 April 2020.) At that point he was furloughed in the middle of the Covid pandemic. He was furloughed for three months (until July 2020.) During his period of furlough, he undertook two sessions of 'remote learning' (for this job with the respondent) on 28 May and 22 June respectively. However, I do appreciate that that online learning was not particularly taxing. There was a limited need for the claimant to actively participate. It was more a question of him listening to/watching a video and then asking any questions which arose from the video.

6. In any event, he was asked to return to work on 1 July. The only reason he could not then continue with work at the beginning of July was because of a suspected case of Covid. In the end, the request was for him to return to work on 13 July. The claimant then was signed off work on sick leave from 20 July. This was the first time that he had apparently been signed off work with headaches (which were apparently connected to the accident that he had suffered in October 2019.)

7. The dismissal notice was given to him on 11 August and the date of termination was 25 August.

8. I have reviewed the GP records that I have available to me. It is relevant to

note that the claimant first consulted the GP (in the records that I have) on 22 July 2020. The headaches had started after two months and were intermittent. He had taken over-the-counter medication. By 24 July the headaches were said to take place two to three times per week and could last anything between 12 and 36 hours' duration and there was some adverse impact on the claimant's vision. He was referred to a neurologist. On 7 August a CT scan came back as 'normal.' On 25 August the records disclose that the headaches were 'no worse but no better.' On 25 September the MRI scan came back 'normal' but there was a query whether the claimant was suffering from post-traumatic concussion. In any event, the claimant was referred to undertake talking therapy which apparently started soon after 14 October. He complied with that referral. I understand (from what the claimant has said to me) that that talking therapy was undertaken on the phone (not surprisingly given the Covid pandemic). I understand that, because of his symptoms, he sometimes could not attend appointments and had to re-arrange them, albeit he did his best to attend the therapy sessions.

9. A record on 19 November 2020 suggests that the side effects from medication were somewhat better. The 26 November 2020 record indicates that the GP records had been sent to "Truth Legal." Truth Legal were the solicitors that the claimant had instructed for the purposes of a personal injury claim. On 3 January 2021 there is also reference to a Project Management Course that the claimant was attempting, although he had struggled with it and his evidence to the Tribunal was that he had been unable to complete it.

10. What other relevant information do I have? In terms of documents, I can see that the claimant sent two emails regarding a breakdown of his pay slips: one on 21 August 2020; and one on 27 August 2020. I can see that on 21 October, so again within the three-month limitation period, there was a letter of claim sent to the respondent by the claimant's personal injury solicitors. Now I appreciate that the hard work will have been done by the solicitors in question, by Truth Legal. They will have drafted the letter, for example. However, the fact that they were in a position to send that letter at all indicates that the claimant had a certain level of ability to provide information and to co-operate with the necessary processes and procedures. He must have been able to give some instructions. He must have been able to devote some time to talking to his solicitors, even if his solicitor was found for him by his sister. He must have had the ability to sign the contract, the letters of authority and send the relevant documentation through for proof of identity (for example, his passport.)

11. He also accepted in his evidence to me that he had had to have at least one phone call with his solicitors to explain what had happened in the course of the accident and what the impact had been on him. That is natural. The claimant was the solicitor's client, albeit he had been introduced to them by his sister. There was information which only the claimant would have access to, not his sister. His sister could not provide all the relevant information and instructions on his behalf without his input.

12. I pause to query why the claimant's sister did not assist him to put a Tribunal claim form in to the Tribunal at around this time. I have no evidence either way on this, but I do hear and understand that the claimant's sister was very helpful and pro-active in assisting him with his personal injury claim. In any

event, it is apparent from what the claimant said to me today that his personal injury solicitors conferred with him and asked him whether he had been dismissed from employment. So, by this period (eight weeks afterwards) we can see that the claimant is on medication, doing talking therapy (albeit with sporadic inability to attend sessions) and was well enough to instruct a solicitor. We do not know whether Truth Legal would have taken on an Employment Tribunal claim or on what basis they would have done so (in terms of the costs.) However, the claimant did not ask Truth Legal about making an Employment Tribunal claim (albeit he could have done.) He did not know or understand that Truth Legal were also potential employment lawyers who could act for him.

13. I can see that the claimant had sent two emails about his pay to the respondent, within the limitation period. He also sent an email on 20 November which referred to unfair dismissal, discrimination, although there was no explicit reference to a protected characteristic (such as race or disability.) The respondent understood this to be a Subject Access Request because it made a request for various documents and referred to data protection issues and principles. Again, I understand that the claimant was helped greatly by his sister in putting that email together. However, the countervailing question is: if he felt motivated to allege unfair dismissal and discrimination (whether or not specified as race or disability discrimination), why did he not get his sister to assist him in starting or presenting a Tribunal claim at or around this time?

14. I also understand from the evidence I have heard that the claimant went so far as to phone the respondent on 20 November to check that his email had been received (although I accept that he may well have done so on the instruction of his sister and may not have gone beyond what was already written in the email.)

15. The claimant's evidence suggested that he had about two 'good days' out of every seven. The question that the Tribunal asks itself is whether he could have used those days to put in a Tribunal claim?

16. At some point the claimant realised that he needed Universal Credit because he was running out of money. This must have happened before 15 December 2021 (for reasons which I will explain.) He contacted the Citizens Advice Bureau and he tells me that they helped him to fill in the application form for Universal Credit over the phone. They also made him aware of the need to go to ACAS if he was going to present a Tribunal claim. The date on the ACAS Certificate is 15 December so this conversation with the Citizens Advice must have taken place at some point before the ACAS Certificate was issued.

17. I heard evidence from the claimant that, shortly after this, he was well enough to go looking for a High Street solicitor in Slough to deal with the Employment Tribunal claim. We do not know any more than that, save that he did not in fact instruct a solicitor for this purpose. The ACAS certificate was issued on 15 December but the Tribunal claim was not presented until three weeks later, on 8 January. Again, there is no real explanation for the gap in time between 15 December and 8 January. By the time the claimant presented his Tribunal claim he already knew that it was presented out of time. This was

firstly because Citizens Advice Bureau had told him so and had referred him on to ACAS and he had been told that there were ways to extend the time limit (although not being a lawyer he would not necessarily know the detail of the case law.) It is not clear why he did not act upon that information as soon as possible.

18. In the Employment Tribunal claim form there is reference to his memory having improved with therapy and there is also reference to the fact the claimant said he could not provide more disability information at this point. However, I pause to note that at this point his solicitors (for the personal injury claim) had his GP records and he could have asked them for those, although he did not do so. I complete my findings of fact by noting that the Tribunal claim form indicates (in the conclusion) that it has been dictated by the claimant and filled in by the contact centre.

19. Taking a step back, where does this leave the parties and the Tribunal?

The reasons for the delay

20. The claimant's medical symptoms are a partial explanation for the delay. He was clearly able to do some things but was not operating in an entirely normal way. There were periods (during the relevant period of time) where he was debilitated and periods when he was less so. He had the ability to use those periods of better health to pursue his claims and he actively did so in relation to the personal injury claim and also his benefits claim.

21. The Employment Tribunal claim form is relatively short. Relatively brief details need to be given to get the claim 'off the ground' and if the claimant was able (at some point during this period of time) to instruct solicitors on a personal injury matter, communicate with the respondent about his pay and raise a more detailed request for documentation (on 20 November), it is apparent that he could well have completed his Tribunal claim form within the time limit. It might be more difficult for him to do so than prior to his accident but, based on the evidence I have heard, it was more an issue of priorities. The Universal Credit claim and the personal injury claim were prioritized. I make no criticism of him for that save to note that it is a relevant factor to be thrown into the mix in looking at the Tribunal claim and whether it is just and equitable to extend the time limit.

22. Although the claimant's sister became unable to assist him towards the latter part of the period (around Christmas, because her husband succumbed to Covid), she did provide help and assistance and motivation for the claimant during a significant period of time and there is no explanation why she did not assist him in relation to this Employment Tribunal claim if she was able and willing to do so in relation to the other claims. There is no explanation as to why, once the claimant had the Early Conciliation Certificate on 15 December, he did not go ahead and present his claim form to the Tribunal before Christmas. That is just not clear to me.

The length of the delay

23. I appreciate that the claimant may well say that six weeks is not a particularly lengthy delay. However, it has to be looked at in the context of a three-month

time limit (the primary statutory limitation period.) The Tribunal time limits are relatively short and so that is relevant for us when considering the length of any delay. The claimant delayed by half as much time again as the original limitation period. So, it is not a minimal delay. The claimant's memory difficulties would be something extra to overcome but would not prevent him presenting a short claim form, if necessary. This is especially so if he was able to engage to some extent with talking therapies during the relevant time.

24. So, I look at the balance of prejudice between the parties. Of course, if I do not extend time on a just and equitable basis the claimant cannot continue with this Tribunal claim. However, he will have a route to a remedy with his pre-existing personal injury claim which was the priority from the outset. There could well be an overlap between the compensation on offer in that claim (in terms of loss of earnings) although, of course, we have limited knowledge of how that personal injury claim is put. So, this is not one of those cases where failing to extend time will leave the claimant entirely without a remedy. Rather, it will leave him with one remedy instead of two.

25. Let us have a look at the prejudice to the respondent on the other hand. The respondent refers to the cost burden of the claimant's failure to diligently pursue his claim. However, there is a cost burden that is attributable to the very fact of having to defend a Tribunal claim at all, even if it was presented within the time limit. Many of the issues that have created delay in this case have been in relation to clarifying the disability, obtaining the medical records, etc. So the burden may not all be attributable to the fact that the claimant was presented outside the time limit.

26. It is important to note that the final hearing in this case may well not occur before the end of 2023 and into 2024 so it will be a relatively old claim by the time it is determined by the Tribunal, albeit some of that delay will be for reasons that are not linked to the lateness of the ET1.

27. The real issue is the cogency of the evidence and the ability of the respondent to defend the claim properly. This is a case where there was no appeal in writing with an internal, documented procedure after the dismissal. There was no written grievance with grievance hearings and a grievance outcome in writing. It is one of those cases where much will turn on the oral evidence of the witnesses in the case.

28. The first that the respondent knew of a discrimination allegation was when the claim form was issued, some five months after the dismissal. It is commonly accepted that the memories of witnesses fade over time and so the respondent has been materially prejudiced by not knowing about the claim sooner. If the respondent had been aware of the claim sooner the evidence could have been collated whilst it was still fresh in the memories of those concerned. I am told that one of the respondent's key witnesses has left employment with the respondent (although that was within the limitation period and there is an argument to say that her failure to co-operate would have been a problem in any event even if the claimant presented his claim in time). However, it is a relevant matter in relation to all of the witnesses that they are dealing with matters which are becoming stale.

29. I also look at, to some extent, the merits of the claim. The respondent says

the claim is weak. It is very difficult to say on the basis of the paperwork. The one thing I will say is there are two issues that perhaps do not assist the claimant. The first is the fact that he had come back to work after the accident which caused his disability and the respondent had taken no action against him. Indeed, the respondent had extended his contract and had not dismissed him at an earlier stage when others were dismissed. So that perhaps undermines the link that he seeks to draw between his disability and the dismissal. Likewise, the fact is that several people were dismissed at various stages and one might expect (if race is an issue) for it to have been an issue at an earlier stage. That said, I am aware that I am looking at this claim before we have heard any evidence as to the substance of the claim. There is a limit to how much weight I can give to the merits argument at this stage of the process, save to say that the claim, on the face of it, does not meet the requirements of Madarassy (Madarassy v Nomura International Plc [2007] ICR 867) in terms of showing anything other than a difference in treatment and a difference in protected characteristic. The 'something else' which Madarassy asks us to look for is not present in the paperwork before me and has not been suggested to me during the hearing.

30. I also take into account the delay point in Secretary of State for Justice v Johnson [2022] EAT 1 (and also Adedeji University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5) where I have to look at the consequences for the respondent of granting an extension even if a relatively brief period of the delay is due to the claimant's failure to comply with the time limit. I have to look at the impact.

31. I note that three out of four colleagues were dismissed at the beginning of the pandemic (even on the claimant's own case). The claimant was not dismissed at that stage and his contract was renewed in June 2020. That also may be relevant to the merits of the case.

32. I have stood back from all of that and have to do the best that I can to balance up the relative prejudice and consider whether it is just and equitable to extend time. I am afraid that I have concluded that it is not just and equitable to extend time in this case. This claim therefore will not be permitted to proceed further.

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Employment Judge Eeley

Date: 13 December 2022

Judgment sent to the parties on

20 December 2022

For the Tribunal office