EMPLOYMENT TRIBUNALS

Claimant: **Mr P Hesketh**

Respondent: **Avon Fire and Rescue**

Heard at: **Bristol Employment Tribunal (via the Video Hearings service)**

On: 16 March 2023

Before: Employment Judge Cuthbert

Representation:

Claimant: **In person**
Respondent: **Mr F Currie (Counsel)**

PRELIMINARY HEARING RESERVED JUDGMENT

The last act of alleged discrimination, namely the alleged discriminatory constructive dismissal of the claimant by the respondent on 24 February 2021, was presented outside of the primary time limit in section 123(1)(a) of the Equality Act 2010.

It **is,** however, just and equitable to **extend time** under section 123(1)(b) of the Equality Act 2010 in respect of that alleged act.

The claim will therefore proceed to the full hearing in June 2023 to determine the remaining issues identified in the CMO dated 29 September 2022.

REASONS

Introduction

1. This was an open preliminary hearing, by video, convened to determine the following issue (as set out in the CMO dated 29 September 2022):

Was the last allegation of discrimination presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it?

2. The claimant's claims of discrimination (disability, age, sex) are listed for a five-day full hearing (liability-only) from 26 to 30 June 2023.

3. The preliminary hearing today was originally listed to take place on 14 December 2022, but was postponed. The reasons for that postponement were not apparent from the papers before me.

4. I was provided with a 98-page agreed bundle of documents, a three-page witness statement from the claimant and a skeleton argument from Mr Currie (with copies of several authorities referenced in it).

5. The claimant had applied to postpone the hearing today on grounds of his ongoing ill health but the postponement application was refused by the REJ. I asked the claimant at the start of the hearing about reasonable adjustments he needed in view of his health, and it was agreed that he could take breaks as and when he required, if he was struggling.

6. The hearing was listed for three hours but unfortunately started 30 minutes late due to problems with the claimant's laptop microphone. There were no other technical issues during the hearing.

7. During the remaining time, I heard oral evidence from the claimant, which lasted for around one hour and, after a break, heard oral closing submissions from Mr Currie and then from the claimant. As insufficient time remained for me to consider, deliberate and give oral judgment and reasons, I explained that I would reserve judgment but aim to send this out as soon as possible (particularly in view of the fact that a five-day full merits hearing was listed in June 2023).

The issues

8. There was no dispute that the claimant's claim was on its face out of time.

9. He resigned from his employment without notice on 24 February 2021 (the last alleged act, namely an alleged discriminatory constructive dismissal). He contacted Acas to commence Early Conciliation on 24 February 2021 (Day A) and the early conciliation certificate was issued on 7 April 2021 (Day B).

10. There are 42 days between Day A and Day B. If the deadline had not been extended by sections 140B of the Equality Act 2010 and 18A of the Employment Tribunals Act 1996, the limitation date would have been 23 April 2021 (i.e. within three months of the last alleged act). 42 days from 23 April 2021 is 4 July 2021, the extended deadline. The claimant presented his claim on 9 August 2021 and therefore the claim was presented over a month out of time, subject to any extension of time.

11. The only issue to be determined was whether it was just and equitable to extend time for the final alleged act of discrimination.

Evidence and findings of fact

12. I heard oral evidence from the claimant and read the documents in the agreed bundle. My findings on the facts relevant to the issue to be decided at the Preliminary Hearing are set out below.

13. The claimant's evidence strayed on a number of occasions into the substantive issues about which he complains. I reminded him that the only issue I was considering was whether it was just and equitable for me to extend time. The focus of the evidence needed to be on the reasons why his claim was late, not on the underlying basis of the claim. Neither side was arguing that the merits or otherwise of the claim were a relevant factor in my decision in this particular case, and on the very limited documents and evidence before me, it would not have been possible to have formed a meaningful view of the merits or otherwise of the underlying complaints.

14. The claimant resigned without notice by way of a letter dated 24 February 2021. He did not receive advice or assistance with the content of the letter, other than via a template which he obtained from the internet, which he adapted.

15. The respondent considered that the letter included a number of grievances and it wished to investigate them, including via a meeting with the claimant.

16. The claimant commenced the Acas Early Conciliation process on 24 February, the day of his resignation. He was a member of the Fire Brigades Union (FBU) and whilst he had received assistance from an FBU rep during his employment, he was not being advised or assisted at the time of his resignation in February 2021.

17. He said that, during subsequent conversations with Acas, he discussed different areas in which he felt he had been treated unfairly. During March 2021, he said he became aware via Acas that he may have a basis to bring a complaint in the Tribunal. He could not recall if he was given specific advice about time limits by Acas at that time.

18. He was seeking legal advice and assistance via the FBU but he found this difficult to obtain (and evidently was not being supported by the FBU with the present Tribunal proceedings). He continued to be in contact with his FBU rep as 2021 progressed, but the rep did not give him advice about Tribunal time limits.

19. On 7 April 2021, Acas issued the claimant with an Early Conciliation certificate. At this stage, the claimant became aware via Acas that there was a time limit, plus a period of extension, for submitting a claim to the Tribunal, but he did not know precisely what the time limit was.

20. By this stage, the claimant had agreed to meet with the respondent about his grievances, although the meeting was delayed due to the claimant's health. The meeting took place on 22 April 2021. The claimant said in evidence that he wanted to know the outcome of that meeting, in order to make a decision on what to do next. He also said that the grievance response may have come back with answers he found acceptable. The claimant incorrectly assumed

that the Tribunal time limit ran from the date of the outcome of the meeting about his grievances and said that he *"did not know the process"*.

21. There was a substantial delay in the respondent providing the outcome of the grievances. The claimant believed that this was deliberate and the respondent gave various reasons for the delay when it eventually responded in October 2021 which it asserts are genuine. I make no finding about this issue either way, save to note that there was plainly a substantial delay of nearly six months following the meeting, in providing the outcome.

22. The bundle before me contained several emails from May to August 2021 between the claimant and either the respondent or the claimant's FBU rep. In summary, these show the claimant wanting and chasing an outcome to the grievances and stating that the delayed process was affecting his mental health, causing him stress and anxiety. In one email dated 6 August 2021, the claimant referred to being monitored by his GP and the mental health team due to having increased thoughts of suicide. A further email dated 6 August referred to the claimant sending a screen capture of his medical records to his FBU rep on 6 August but these were not before the hearing today (see further below on the issue of medical evidence).

23. The claimant said that he discovered in early August 2021 that he needed to submit his claim as soon as possible. He could not recall whether he had been advised of this by someone or if it was something he had read. He said that someone had advised him to make an application to the ET out of time and he did so.

24. He submitted his ET1 on 9 August 2021, one month and five days late. It was accompanied by a copy of resignation letter, which served as the grounds of his claim.

25. I asked the claimant if, when he had referred to submitting an application out of time, he was referring to paragraph 15 of the ET1 form, and he said that he was. In that "additional information" section of the ET1, he stated as follows (sic):

> *I am still yet to receive a copy of the outcome letter for my meeting to discuss my resignation. This meeting was in March 2021 and I'm still yet to get van outcome. I have been waiting for this letter before deciding what I would do to resolve this matter but as its already been almost 4 months I am not willing to wait any further and respectfully request the tribunal service to allow my claim as its the fault of Avon Fire & Rescue that this matter has dragged on without good reason*

26. In an email to his FBU rep dated 10 August 2021, the claimant stated:

> *Still no letter! Thought I may have got it Saturday or at the latest Monday but NO! I've had enough now so have decided to take AFRS to an Employment Tribunal on various grounds.*
>
> *Yesterday I applied to the court to begin proceedings against AFRS. The hope is for me to take back some control and hopefully in doing so, reduce the stress, anxiety and depression that I am experiencing.*

27. The claimant was challenged by Mr Currie in cross examination about the lack of supporting medical evidence before the Tribunal today on the issue of his mental health during the period in 2021 after his resignation and until he submitted the claim. It was **not** suggested on behalf of the respondent that the claimant was fabricating or exaggerating his mental health issues, insofar as he made reference to them.

28. The extent to which the claimant was seeking to rely upon his mental health as a reason for delay was unclear from his witness statement and his evidence during cross examination. So, I asked him in evidence to explain how, and the extent to which these issues had impacted on him during the period before he submitted the claim, so as to have potentially affected or delayed the submission. He referred in response in very general terms to his mental health difficulties and said these were exacerbated by contact from the respondent but he still did not identify any clear, direct or specific link between the delay in submitting the claim and his mental health issues.

29. During the course of the subsequent ET proceedings, which included complaints of disability discrimination, the claimant had provided the respondent with a disability impact statement and associated medical evidence. The claimant relied, for the purposes of disability, upon wrist/arm pain, fibromyalgia and mental health issues including anxiety and depression. On 11 March 2022 the Respondent conceded that the claimant was disabled by virtue of those conditions at all material times (although plainly this concession did not expressly relate to the period **after** the end of the claimant's employment).

30. The claimant did point out (after the evidence had concluded and before closing submissions) that his disability impact statement and supporting evidence had been copied to both the respondent and to the Tribunal in February 2022. I explained that this material was not before me at the hearing today, as it had not been included in the hearing bundle. I said that I did **not** propose to now read the impact statement or evidence, because the main reason which the claimant had given for the delay in submitting his claim was that he was awaiting a response to the grievance investigation; the health issues were part of the background but were not substantially relied upon and so the further evidence did not appear relevant.

The relevant law

31. Section 123 of the Equality Act 2010 states (emphasis added):

> *Time limits*
>
> *(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b)* ***such other period as the employment tribunal thinks just and equitable.***

32. The tribunal therefore has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable.

The nature of the discretion

33. In terms of what "just and equitable" means in broad terms, it has been held that *'Parliament has chosen to give the employment tribunal the widest possible discretion'* (per Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050).

34. In *Robertson v Bexley* [2003] IRLR 434, Auld LJ held as follows:

> *24. The Tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in Daniel and Homerton Hospital Trust (unreported, 9th July 1999, CA) in the judgment of Gibson LJ at page 3, where he said:*
>
> > *"The discretion of the tribunal under section 68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong."*
>
> *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...*

35. In *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327 the Court of Appeal dismissed any suggestion that Auld LJ's comments in *Robertson*, cited above, were to be read as encouraging tribunals to exercise their discretion in a restrictive manner, and it rejected an argument that the tribunal in *Caston*, by adopting what it had described as a *'liberal'* approach, had erred in law. Sedley LJ stated: *'there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised'* (at [31]). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case *'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it'* (at [32])

Burden

36. In terms of where burden rests on the issue of a just and equitable extension the Court of Appeal in *Caston* (above) (at [26] per Wall LJ) held as follows: *'Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour)'* and in the same case Sedley LJ described (at [31]) that *'there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them'*. However, as the EAT noted in *Morgan* (per HHJ

Shanks at [25]), the burden is one of **persuasion**, it is not a burden of proof or evidence, as such.

Potentially relevant factors

37. Section 123 does not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons.

38. The EAT had at one stage suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980 — *British Coal Corporation v Keeble and ors* 1997 IRLR 336, EAT. Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

39. The Court of Appeal in *Southwark London Borough Council v Afolabi* [2003] ICR 800, CA, confirmed that, while the checklist in section 33 provided a useful guide for tribunals, it need not be adhered to slavishly. The Court suggested that there were two factors which are almost always relevant when considering the exercise of any discretion whether to extend time:

    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).

40. In *Department of Constitutional Affairs v Jones* [2008] IRLR 128, CA, the Court of Appeal again emphasised that the factors referred to by the EAT in *Keeble* (above) are a *'valuable reminder'* of what may be taken into account but their relevance depends on the facts of the individual cases and tribunals do not need to consider all the factors in each and every case.

41. The relevance of the factors set out in *Keeble* was revisited in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5, CA. The Court pointed out that the EAT in *Keeble* did no more than suggest that a comparison with section 33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.

Closing submissions

42. I heard oral closing submissions from Mr Currie, supplemented by a written skeleton argument, and then heard from the claimant. I **summarise** these submissions as follows.

Respondent's submissions

43. Mr Currie stressed that extensions of time are the exception not the rule.

44. In his evidence, the claimant had prepared a witness statement. There was some evidence provided in emails adduced by the claimant but, he submitted, that evidence did not take matters forwards. There was medical evidence adduced to support the application to extend time.

45. The claimant had made an incorrect assumption about start of the limitation period and was given advice a few weeks after his resignation about time limits. He contacted Acas and was in contact with the FBU prior to issuing his claim and that had been within time limits. There was evidence he was in touch with the FBU and awaiting assistance and updates from them

46. A delay of around a month in submitting the claim was a significant delay where the EAT and the Court of Appeal made it quite clear that a very good reason was needed to get around the statutory time-scales. The claimant had offered no proper explanation, he said.

47. The claimant had received some advice and if there were a failure in that regard, remedy lay against his advisors, not against the employer.

48. There was no medical evidence about the claimant's health at the relevant times.

49. I asked Mr Currie what the respondent's position was in terms of any particular prejudice it would suffer if an extension were granted (in view of the comments in some of the Court of Appeal authorities). He said that relevant witnesses were still employed by the respondent and there was no specific prejudice as a result of this. He reiterated that rules are there for a reason and it would be wrong just to rely just on a factor of prejudice – it was just one factor and should not sway the case in the claimant's favour.

The claimant's submissions

50. The claimant said that he had acted with the information he had. If he had been in a better state of mind, he would probably have done something differently. He had access to an FBU rep but only via email. He felt on his own against a massive organisation.

51. His submissions strayed into his feelings and views on the substantive issues in his claim and his treatment by the respondent and I reminded him that the issue at hand was whether or not I should exercise my discretion in his favour on the time limit issue and I was not deciding on any wider issues in the claim.

52. He felt that the respondent deliberately stalled the grievance outcome and by just ignoring him, they hoped that he would go away.

53. He referred to the lack of medical evidence before the hearing today and said that he had sent in his medical evidence a year ago to the respondent and the tribunal. The respondent was aware of his health issues before and after he resigned.

54. He had been honest and explained why he had done what he had. He was not legally trained and documented as being unwell.

Discussion and conclusion

55. I reminded myself of the law summarised above, including that I have a broad discretion about whether or not to extend time but also that just and equitable extensions of time are generally the exception and not the norm. It was for the claimant to persuade me to exercise discretion in his favour.

56. I considered the following matters in particular, in reaching my decision:

    a. The length of the delay. The claim was submitted a month and five days out of time, after an extended time limit window (including the Acas extension of 42 days) of around four-and-a-half months. It was not a short delay, but I did not consider the delay as being so significant that it pointed strongly against exercising my discretion. I accept the claimant's evidence that he acted promptly once he became aware that his claim was out of time.

    b. The reason for the claimant's delay. It was clear from the main thrust of the claimant's evidence that the reason for his late submission was that he was awaiting the outcome of the response to the grievances contained within his resignation. The period of time taken by the respondent to investigate the grievances was lengthy and the outcome was delayed. His belief that time would start to run from receipt of the outcome was a mistaken one. It was nonetheless evident from the emails in the bundle that he had certainly been seeking and chasing a response, both directly from the respondent and via his FBU rep, in the period between the expiry of the limitation period and the date of the presentation of the ET1. He was mistaken but he was genuinely chasing the outcome of the grievances.

        I considered whether the claimant's ignorance of the time limit was reasonable in the circumstances and considered it was just within the bounds of reasonableness; he could and probably should have done more to check on the position on time limit expiry on the one hand rather than making an assumption; but on the other hand, he might reasonably have expected his FBU rep to have raised the issue of time limits with him if they were an issue of concern, and no such concerns or advice on time limits was given (on the claimant's evidence, which I accepted). His resignation letter/grievance did expressly include allegations of discrimination and the FBU rep was assisting him in the subsequent months with the progression of that grievance and so ought reasonably to have been aware of the prospect of an ET claim and the relevant time limits.

    c. The claimant's access to advice. The claimant mentioned having spoken to Acas and to his FBU rep (but not FBU lawyers) in the period

before the submission his claim. He did not clearly recall being told what the applicable period was by Acas (nor would this be Acas' function or expected of Acas), and he did not have access to FBU legal advice. He was not advised of any limitation period by his lay FBU rep(s). He could not recall in evidence who had told him about his claim being potentially out of time in August 2021 or whether he had discovered this himself via the internet, but he did act promptly once he became aware. This was not a case where the claimant had been correctly advised earlier but had chosen to ignore that advice, or where he had been incorrectly advised. He remained a litigant in person by the time of the hearing today.

d. The claimant's mental health. I took account of the claimant's evidence that his mental health was not good during the relevant period in 2021, as part of the background – it weighed slightly in the claimant's favour but was far from determinative. He mentioned his mental health on several occasions within the contemporaneous emails in July and August 2021. He was also accepted by the respondent as having had a disability, including in respect of depression and anxiety, during his employment, which ended in late February 2021. There was, however, no specific medical evidence adduced by the claimant for the hearing to indicate (from a medical perspective) the state of his health between April and August 2021, as Mr Currie observed. This point about the claimant's health was, however, not determinative or central to my decision – this was **not** a case where the claimant was saying that he was too unwell to have submitted the claim earlier, and where he had submitted the claim only when his health was sufficiently better. In such a case, medical evidence would be crucial, as health would be *the* primary reason relied upon in support of an extension. Rather, here the claimant was specifically waiting for the outcome of his grievances, believing that the clock had not started. That was why he waited and when he realised he was wrong, he presented the claim. But for his mental health issues, he may have acted differently, as he submitted, but his mental health was just part of the background. It was not determinative of either his own inaction/delay between 4 July and 9 August 2021 or of my decision on the issue of an extension of time.

e. Finally, I considered the balance of prejudice were I grant or not grant an extension of time. This was an important but not a determinative point – it weighed in the claimant's favour. There are two types of prejudice which a respondent may suffer if a limitation period is extended.

    i. The first is the prejudice (including the cost and time) of having to meet a claim which would otherwise have been defeated by limitation – this applies in every case where an extension is granted (and the converse is that a claimant would be denied their chance of having the complaint decided and of receiving compensation in every case where an extension is refused).

    ii. The second is sometimes referred to as 'forensic prejudice' which may be suffered if the limitation period is extended for a significant period, or where there is likely to be a significant

delay before the case is heard. Forensic prejudice is caused by, for example, fading memories, loss of documents and losing touch with witnesses.

There was no evidence of forensic prejudice to the respondent in the present case. Many of the matters complained of by the claimant appear to have been investigated by the respondent during 2021 as a consequence of the grievance investigation following the letter of resignation. The relevant witnesses are still employed by the respondent. The final hearing is listed to take place soon, in June 2023, and so the relevant evidence on liability will have been heard within around three-and-a-half months of today.

57. Weighing all of these matters up, I am persuaded by the claimant to exercise my broad discretion in the claimant's favour. My decision is to extend time on a just and equitable basis in respect of the final alleged act of discrimination, namely the alleged discriminatory constructive dismissal on 24 February 2021.

58. The case will therefore now proceed to a final hearing to determine the other issues set out in the CMO of 29 September 2022. Any additional case management issues (including reasonable adjustments for the final hearing) may be addressed at the case management preliminary hearing listed for 18 May 2023, as it was not possible to address them today.

Employment Judge Cuthbert
Date: 16 March 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
17 March 2023 By Mr J McCormick

FOR EMPLOYMENT TRIBUNALS