Case Number: 1402514/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr C Povey

Respondent: Environment Agency

Heard at: Bristol (in public, by video) **On:** 4 April 2023

Before: Employment Judge G. King

Appearances
For the Claimant: Mr R. Downey - counsel
For the Respondent: Mr L. Dilaimi - counsel

JUDGMENT having been sent to the parties on 20 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claim

1. The Claimant was employed by the Respondent as an Environment Officer between 24 September 2004 and 1 November 2016.

2. The Claimant notified ACAS of the dispute on 28 June 2021 and the certificate was issued the same day. The Claimant presented his claim to the Employment Tribunal on 14 July 2021

The Law

3. Section 123 Equality Act 2010 2010 - Time limits

(1) Subject to 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.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Deliberation

4. The Tribunal was referred to the relevant case law and legal principles by both counsel.

5. In line with *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, 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. The Tribunal also has regard to the long line of cases which make reference to the so-called Keeble factors (*British Coal v Keeble* [1997] IRLR 336). The Tribunal is asked to consider the balance of hardship and injustice between the parties and must look at the practical consequences of the 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. The Tribunal acknowledges that these factors are not to be used as a checklist, nonetheless they are relevant considerations when looking at whether it is just and equitable to extend time. Although there is guidance given in the case law, the Tribunal must consider all the relevant circumstances of the case and come to a fair and balanced conclusion.

6. The Tribunal has looked at the facts in this case. The Respondent does not concede that the Claimant was disabled from June 2016 through to (and past) the date of dismissal. Even if I take the Claimant's case at its highest, and accept, for the moment, his arguments about disability, his disability is not an automatic justification for the claim being presented to the Tribunal outside the relevant time limits. I understand why the Claimant might struggle with this, however, disabled individuals can (and do) satisfy the definition of disability in the Equality Act 2010 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.

7. The Tribunal looked at the relevant facts here, bearing in mind the Claimant's disability as he claims it. The Claimant's case is that he was not aware that there had been discrimination until 2019. This is when he received a copy of the report of Dr Walker, which he says is specific to ill health retirement. At this stage, he believed, as he says in his witness statement, "on the facts which are available to me at the time in 2019, the way to address the error was to use the independent dispute resolution procedure". He goes on to say that he did not understand that his pension query was suitable for an Employment Tribunal case. Whether a pension query is a suitable matter for an Employment Tribunal is not something that needs to be determined in this judgement. This Tribunal is looking at whether the Claimant's claims of disability discrimination were presented in time; and if not, is it just and equitable to extend that time limit.

8. The Claimant has asked, at paragraph 27 of his witness statement, that his use of the dispute resolution process should be treated as though it "stopped the clock" in respect time limits. Section 123 of the Equality Act 2010 is clear that the Tribunal has no power to decide that certain things or processes would not count towards the time limit. The Tribunal can, of course, take such things into account when looking at whether it is just and equitable to extend that time limit.

9. The Claimant states in his witness statement that he accepts that he "could have done things differently" and "may have made poor decisions in not obtaining legal advice". He asks the Tribunal to find that he "behaved reasonably" and that there were reasons to explain his actions and omissions. On those grounds he submits that it is just and equitable to allow this claim to be brought out of time.

10. I am also aware that the Claimant has referred to absence seizures within his witness statement. He also says that he was involved in a stressful personal injury case and the dispute with the Pensions Ombudsman. Whilst I have sympathy for his position, I do not think this assists the Claimant. If anything, it shows that he was capable of engaging in a Court or arbitration process during this time. The Claimant is open and honest that he did not seek legal advice at this time, but states that if he had, he is not sure that a legal adviser would have recommended making a claim to the Employment Tribunal in any event. It is not for this Tribunal to speculate what an adviser may or may not have recommended. It is the case, however, that if the Claimant thought he had been discriminated against on the grounds of disability, it was open to him to obtain free or paid for legal advice, or simply to make a claim to the Employment Tribunal himself.

11. Even if the Claimant had made a claim to the Employment Tribunal at this point, it would have been over two, and coming onto nearly three years out of time. The Claimant, however, did not make any claims to Employment Tribunal at this time. He did not contact ACAS until 28 June 2021. The

ACAS certificate was issued that day, but the Claimant did not present his claim form until 14 July 2021. There is no real explanation the Claimant's witness statement for this delay. In cross-examination, his explanation was that he slowly became aware of the existence of his claim but even when the Respondent said this was an employment law matter in 2020, he did not believe them.

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

13. The Claimant cites his medical condition as a partial explanation for the overall delay. It is clear, however, that he was able to deal with a personal injury claim and a dispute with the Pensions Ombudsman during this time. I also note that, when he did complete his claim form to the Employment Tribunal, he did so himself. There has been no evidence that the Claimant was unable to complete and fill in forms during this period. It therefore appears to me that the Claimant could well have completed his Tribunal claim form within the time limit. It is the case that the Claimant personal injury claim, and, more relevant to these proceedings, his pensions dispute, took priority for him. I make no criticism of him for that, save as 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.

14. I also have to consider the length of the delay. By the time the Claimant submitted his claim form, it was four years and eight months after the date of termination, and four years seven months after the last act of alleged discrimination. This has to be looked at in the context of a three-month time limit (the primary statutory limitation period). Tribunal time limits are relatively short and that is relevant for the Tribunal when considering the length of any delay. The Claimant has delayed for over 17 times as the original limitation period. It is significant, and lengthy delay.

15. I am persuaded that the Claimant was not aware of Regulations 35 and 36 of the 2013 Regulations, or the relevant provisions of the 2011 Regulations at the time his employment ended, and therefore it is likely that he was not aware of his legal position regarding disability.

16. The Tribunal notes, however, that the Claimant has the benefit of legal advice in relation to his settlement agreement and also had trade union membership in 2016. Advice by Peter Doughty, the Claimant's barrister, mentioned disability claims. The Claimant also had previously brought Tribunal proceedings against the Respondent in 2011, and he accepted that knew about employment Tribunal time limits.

17. The Claimant accepted in cross examination that he had seen Dr Fawkes report and was aware that he had not been assessed for IHER.

18. Given that the above was in the Claimant's knowledge by 2016, if the Claimant did not have knowledge of his rights to bring a discrimination claim in 2016, I do not find this lack of knowledge to be reasonable.

19. Even if the Tribunal accepts that the Claimant had no knowledge of any potential claims he had, as he said in cross examination, until late 2019, this is still six times the original limitation period. The Claimant accepted in

cross-examination that "it is a possibility" that he could have brought claim within three months in 2019.

20. Therefore, even if the Tribunal is wrong about the reasonableness of the Claimant's knowledge in 2016, such knowledge was clearly within his possession in 2019. In cross examination, the Claimant accepted that he elected to go to the Independent Dispute Resolution Process rather than go to the Employment Tribunal.

21. I also need to look at the balance of prejudice between the parties. If the Tribunal does not extend the time on a just and equitable basis, the Claimant cannot continue with his Tribunal claim. He does, however, have a right to Judicial Review of the decision of the Pensions Ombudsman, although I do accept the submission that this will not provide the same remedy as in this claim.

22. On the other hand, if the time limit is extended, the Respondent is going to have to deal with an allegation of disability discrimination from 2016. The real issue is the cogency of evidence and the ability of Respondent to be able to defend the claim properly. Memories fade over time. The Respondent has also explained that the Respondent email system automatically deleted emails after six months, and this could include very relevant information that is now lost. It is for precisely this reason that there are short time limits for claims in the Employment Tribunal.

23. I also have looked at, to some extent, the merits of the claim. The Respondent says the Claimant's claim is weak. It is not the function of the Tribunal at this hearing to make a determination on the strengths of the Claimant's claim, however, the Tribunal notes that the Claimant did not even consider that he had a disability discrimination claim until some years later. I'm not certain what was in the Claimant's mind when he initially made his claim to the employment Tribunal; it initially appeared to be on the basis that he needed to get a settlement agreement set aside. This morphed over time into a claim under section 15 of the Equality Act 2010. The Claimant's case is now that, between 11 October 2016 and 30 November 2016, the Respondent failed to make a decision on the Claimant's IHER application under regulation 35 and 36 of the 2013 Regulations; and further failed to make a decision in relation to the Claimant's application for an allowance under regulation 9(1) of the 2011 Regulations. Whilst the Claimant's disability may have entitled him to a decision from the Respondent on those issues, it appears the Tribunal that the Claimant may face significant difficulties in establishing that the Respondent's failure to make a decision arose in consequence of the Claimant's disability.

24. That said, the Tribunal is aware that it is looking at this case before having heard any evidence as to the substance of the claim. There is a limit to how much weight the Tribunal can give to the merits argument at this stage the process.

25. 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.

26. The Tribunal has to stand back from all of the above and to do the best that it can to balance up the relative prejudice and consider whether it is just and equitable to extend time. In this case there was significant length of the delay, even if the Claimant's knowledge of the basis of his claim being in 2019, the Tribunal finds there is a lack of reasonable explanation for that delay until 2021. The Tribunal does find, as did EJ Bax, that such delay has caused prejudice with respect to the evidence that will be available. The Tribunal therefore concludes that it is not just and equitable to extend time in this case. This claim therefore will not be permitted to proceed further.

Employment Judge King
Date: 19 April 2023

Reasons sent to the Parties: 02 May 2023

FOR THE TRIBUNAL OFFICE