# EMPLOYMENT TRIBUNALS

| Claimant | | Respondent |
|---|---|---|
| **Mrs M Fabry (as Personal Representative of the Estate of Mr Kristof Fabry)** | **v** | **1. Statham Gill Davies Solicitors**<br>**2. Sarah Chamberlain** |

**Heard at**: London Central (by video, in public)

**On**: 12 May 2023

**Before:** Employment Judge P Klimov (sitting alone)

**Representation:**

**For the Claimant:** Mr W Young, counsel

**For the Respondents:** Mr J Ratledge, counsel

# RESERVED JUDGMENT

It is just and equitable to extend time for the claimant's second claim (case No: 2203791/2023) to proceed.

# REASONS

**The Factual Background**

1. The claimant in these proceedings is the mother of the late Kristof Fabry, who was an associate solicitor in the first respondent's firm from 5 February 2018 until his tragic death on 14 May 2019. The second respondent is a partner in the first respondent's firm. She heads up the property and private client department, where Mr Fabry worked.

2. After a short period of sickness absence due to mental health issues in April – May 2019, upon his return to work on 9 May 2019, Mr Fabry was given one month's notice of termination of his employment by reason of redundancy. Tragically, on 14 May 2019, Mr Fabry took his own life by throwing himself in front of a train at Clapham Junction station.

3. The claimant claims that her son had a disability by reason of anxiety and depression, and that the respondents discriminated against him on the ground of his disability by dismissing him for the purported reason of redundancy.

4. The discrimination complaints are advanced in the alternatives, as direct discrimination (s.13 Equality Act 2010 ("**EqA**")), discrimination arising from disability (s.15 EqA), indirect discrimination (s.19 EqA), failure to make reasonable adjustments (s.20 EqA), and harassment related to disability (s.26 EqA).

5. In short, the claimant claims that her son was dismissed by the first respondent because of his disability, or, in the alternative, because Mr Fabry's potential future need to take time off, potential requirement to make reasonable adjustments, and/or the respondents' perception of Mr Fabry's ability to perform his work, all that is said to be something arising in consequences of Mr Fabry's disability.

6. In the alternative, the claimant contends that if the reason for Mr Fabry's dismissal was redundancy, the manner, in which the respondents went about dismissing her son for that reason (in particular, by giving one month's notice without any warning or redundancy/consultation process) put him at a particular disadvantage as a disabled person. It is also alleged that the shortened/normal timescale of the first respondent's redundancy process was a PCP (provision, criterion or practice), which put Mr Fabry at a substantial disadvantaged in comparison with persons who are not disabled, thus triggering s.20 EqA duty to make reasonable adjustments, which the claimant says the respondents have failed to meet.

7. Finally, the claimant alleges that the manner, in which Mr Fabry's dismissal was done, was unwanted conduct related to his disability, which had the effect of violating Mr Fabry's dignity or creating hostile, humiliating, offensive, etc. environment.

*The First Claim*

8. The first claim (case No: 2204809/2019) was presented on 19 September 2019, following a period of Acas early conciliation between 5 and 6 August 2019. The first claim was presented by Mr Darren Rugg, a partner of Mr Fabry, as a lay representative for the claimant. The claimant herself lives abroad and was not directly involved in the preparation or submission of the first claim.

9. Understandably, at the time the claimant and Mr Rugg were overwhelmed with grief following the tragic death of Mr Fabry and did not start thinking of bringing proceedings against the respondents until mid-July 2019. They were also concerned to avoid the tribunal proceedings interfering with the inquest into Mr Fabry's death, which was due to begin in December 2019.

10. Mr Rugg is not a lawyer and did not know how and in which court to file a claim of this kind. He sought legal help from various sources, including by contacting Acas and Mind, a mental health charity.

11. Both Acas and Mind told Mr Rugg that there was a potential claim judiciable in employment tribunals and that it needed to be presented within 3 months less one day of Mr Fabry's dismissal. Mr Rugg unsuccessfully tried to get some further help by contacting his lawyer friends.

12. On 1 August 2019, Mind's specialist legal advisor emailed Mr Rugg with detailed information on submitting a claim under s. 206 of the Employment Rights Act 1996 where an employee has died. The email said: (*my underlining*):

    "*If you are unsure as to whether this applies to you we would advise you to seek assistance from a solicitor.*

    *It may be the case that the (sic) you can bring the case as a personal representative, but this will require specialist legal advice. A personal representative will have to wait until after the grant of letters of administration, which may take longer than the 3 month time limit. However, if the grant of letters of administration takes longer than 3 months then you could still bring the claim and say that it is just and equitable to extend the time limit to bring a discrimination claim and/or that it was not reasonably practicable to bring the claim if it is an unfair dismissal claim*".

13. The email also directed Mr Rugg to various sources of paid and free legal advice and representation. Mr Rugg tried to contact several lawyer friends, law centres, citizens advice, but unfortunately received no substantive help.

14. Mr Rugg in evidence said that he did not recall receiving and reading the 1 August 2019 email from Mind, although he accepted that he had received it. I accept his evidence. Mr Rugg was grieving a loss of his beloved partner of many years. He was in a very distressed state. In that email he was presented with technical legal information, which even for a trained lawyer requires some effort to digest. It is not surprising that the content of the email had escaped from his memory, and he had forgotten all about it until it has resurfaced as part of these proceedings.

15. I also accept Mr Rugg's evidence that he did not pass this or other emails related to the proceedings to the claimant herself. The claimant, living

abroad, and with English not being her mother tongue, has put the entire matter into Mr Rugg's hands to pursue on her behalf.

16. Ultimately, Mr Rugg was able to secure some help from a friend of a friend - employment lawyer, Ms Lucas, who explained to him that he needed to contact Acas for an early conciliation certificate and assisted with the preparation of the claim form and grounds of complaint. She, however, did not tell Mr Rugg that he needed to wait until the Letter of Administration had been granted before presenting the claim. It also appears that she did not advise Mr Rugg on the appropriate method of presenting the claim to the Tribunal.

17. Mr Rugg emailed the ET1 and grounds of complaint to London Central Employment Tribunal on 4 September 2019. On 18 September 2019, Mr Rugg telephoned the Tribunal to check whether the claim had been received. He was told that it had been rejected because it should have been sent to the Employment Tribunal Central Office in Leicester, which Mr Rugg did on the same day. The claim form was stamped by London Central Employment Tribunal, as being received on 19 September 2019.

18. I pause here to observe that under the Presidential Practice Direction dated 28 November 2018 (in force at that time) email was not an acceptable method of presenting a claim form, and therefore the claim was correctly rejected by the Tribunal and subsequently accepted upon it being re-presented by post to Employment Tribunal Central Office in Leicester on 19 September 2019. I suspect Mr Rugg would not have been aware of that requirement, if not advised by Ms Lucas accordingly.

19. It follows that the first claim might have been presented late, unless it is said that the alleged discriminatory conduct continued up until Mr Fabry's death on 14 May 2019. However, no point is taken on this issue by the respondents, and, in any event, in light of the claimant's concession on the first issue before me becomes a moot point.

20. In a cover letter sent with the claim form Mr Rugg asked the Tribunal to stay the claim pending the outcome of the inquest into Mr Fabry's death. On 8 November 2019, Regional Employment Judge Wade stayed the claim and ordered the claimant to provide an update by 30 January 2020. In the same letter the Tribunal informed the parties that the claim had been accepted, but the respondents were not required to enter a response, and that any issues of time limits did not need to be addressed at that time.

21. The first claim was presented by the claimant before the Letter of Administration appointing her as Administrator of Mr Fabry's estate was issued on 27 November 2019. In the first claim form the claimant stated that she brings the claim on behalf of Mr Fabry "*as his next of kin/personal representative*".

22. The claimant did not update the Tribunal by 30 January 2020 on her position, as she was ordered to do. In summer 2020, Mr Rugg did try to telephone the Tribunal several times, but his calls went unanswered.

23. On 15 October 2020, Mr Rugg emailed the Tribunal asking for an update. He received no response from the Tribunal and sent a follow-up email on 29 October 2020. On 30 October 2020, Employment Tribunal Central Office asked London Central Employment Tribunal to provide an update to Mr Rugg.

24. On 10 March 2021, having received no reply, Mr Rugg emailed the Tribunal again asking for an update. On 11 March 2021, Employment Tribunal Central Office responded stating that they chased London Central for a response and that if no response had been received by 1 April 2021 Mr Rugg should chase again.

25. No response was received from London Central by 1 April 2021, and on 7 June 2021, Mr Rugg emailed the Central Office saying that no response had been received, pointing out that he had been waiting for over a year and a half and asking for someone to get in touch with him as a matter of urgency.

26. I pause again, this time to apologise on behalf of London Central Employment Tribunal to the claimant and Mr Rugg for the delay and any distress and upset it has caused them. I ought to explain that in addition to the unprecedented impact on the operations of the Tribunal caused by the Covid-19 pandemic, on 17 December 2020, London Central Employment Tribunal was closed completely to all staff for health and safety reasons, and it stayed closed for several weeks, thus causing a further and major disruption to all administrative processes. I also extend this apology to the respondents for the subsequent delay on the part of the Tribunal in progressing the matter.

27. On 17 June 2021, REJ Wade lifted the stay of proceedings and ordered the respondents to provide a response to the claim by 15 July 2021, which they duly did, denying all the claims and seeking further and better particulars.

28. Briefly, the respondents admit that Mr Fabry had a disability at the material time but deny that they knew before notifying him of dismissal that he had the disability. They also contend that the reason for Mr Fabry's dismissal was redundancy occasioned by lack of work in the property department. The respondents say that the decision to make Mr Fabry redundant was taken in March 2019, and it was taken by the second respondent in consultation with other partners in the firm.

29. In their response the respondents did not challenge the validity of the first claim on the ground that the claimant did not have legal standing to bring it.

30. There was a further lengthy delay in progressing the claim to a hearing, with both parties chasing the Tribunal for an update, before, on 16 February 2023, the Tribunal finally listed the case for a case management preliminary hearing to take place on 30 March 2023.

*The Second Claim*

31. On 14 March 2023, the claimant instructed a solicitor, Ms Elizabeth McGlone of didlaw limited. On 22 March 2023, the claimant presented the second claim, case No: 2203791/2023. The second claim is identical to the first claim, in so far as the headline cause of action, factual background and allegations are concerned. However, unlike the first claim, it breaks down the disability discrimination claim into five separate complaints, advanced in the alternative (see paragraphs 4-6 above).

32. The second claim was presented because on advice from her solicitor the claimant accepted that the first claim was a "nullity", having been presented before she had obtained the Letter of Administration, which appointed the claimant as the Administrator of Mr Fabry's estate.

33. On 30 March 2023, there was a preliminary hearing before Employment Judge J S Burns. EJ Burns ordered a further preliminary hearing in public to determine the following issues:

> *a. whether the claims in 2204809/2019 should be struck out as a nullity/having no reasonable prospect as the Claimant did not have a grant of representation for the deceased estate at the relevant time; and*
> *b. whether it would be just and equitable to extend time for the claims in 2203791/2023 to proceed.*

*The Hearing*

34. Mr Young appeared for the claimant and Mr Ratledge for the respondents. Both Counsel prepared skeleton argument, which they supplemented by oral submissions. I am grateful to both Counsel for their submissions and other assistance to the Tribunal.

35. I was referred to various documents in the bundle of documents of 105 pages the parties submitted in evidence. I was also referred to various passages in the judgments in the claimant's authorities bundle containing the following cases:
    (i) *Ingall v Moran* [1944] KB 160,
    (ii) *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR,
    (iii) *British Coal Corporation v Keeble* [1997] IRLR 336,
    (iv) *Andrews v Lewisham and Guys Mental Health NHS Trust* [2000] ICR 707,
    (v) *Chohan v Derby Law Centre* [2004] IRLR 685 44,

(vi) *Fox v British Airways* [2013] ICR*,*
(vii) *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194*,*
(viii) *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5 80*, and*
(ix) *Secretary of State for Justice v Johnson* [2022] EAT 1

36. Mr Ratledge submitted several extracts from Harvey on Industrial Relations and Employment Law, to which he referred me in his closing submissions.

37. There were two witnesses, Mr Rugg for the claimant and Mr Gill for the respondents. Both gave sworn evidence and were cross-examined. Their evidence followed by closing oral submissions. I decided to reserve my judgment.

*Is the first claim a "nullity"?*

38. At the start of the hearing, Mr Young confirmed that the claimant conceded that her first claim was a nullity in law by reason of being presented before she was formally appointed as the Administrator of Mr Fabry's estate. Mr Young said that this was because on the authorities of *Ingall v Moran* and *Fox v British Airways* the claimant had no standing to issue the proceedings as a personal representative of Mr Fabry, and the granting of the Letter of Administration on 27 November 2019 did not have the effect of validating the claim retrospectively.

39. Mr Young said that the claimant did not resist the first claim being struck out on that basis. I observe here that if the first claim is indeed a nullity, in the sense ascribed to that term in *Ingall v Morgan*, i.e., that it never, in the eyes of the law, existed, there is nothing for me to strike out. I, therefore, make no such order.

40. While this admission by the claimant disposes with the need for me to decide the first issue, I shall allow myself to comment, purely as *obiter* remarks, that it seems to me that the claimant's concession on this issue is somewhat precipitous.

41. I say that for the following reasons:

*(i)* I do not read the judgment of Langstaff J (President, as he then was) in *Fox v British Airways* at [48]-[50] as creating a universal rule on presenting all types of complaints judiciable in employment tribunals where an employee has died. On my reading, he deals with the specific issue of interpreting s.206 of the Employment Rights Act 1996 ("**ERA**"), which is not relevant for the purposes of complaints under the Equality Act 2010. He says at [48] (*my underlining*):
*"If there is no entitlement to institute proceedings, then any proceedings instituted must be a nullity, subject only to any*

*appointment having retrospective effect. Nothing in section 206 provides for any such retrospectivity."*

*(ii)* In contrast, the Equality Act does not have any provisions similar to s.206 ERA. In EqA s.39 EqA states that "*An employer (A) must not discriminate against a person (B)*". S.120(1) states that "*An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to— (a) a contravention of Part 5 (work);* [..]". It does not say that such jurisdiction is limited if a complaint has been brought by "B" or his/her personal representative. The first claim was brought by the claimant as Mr Fabry's "next of kin". I do not read *Fox v British Airways* as stating that a claim brought by a next of kin under the Equality Act is a nullity. It does not appear that this issue was before the EAT in *Fox* to decide.

*(iii)* The claimant's concession also overlooks the provisions of s.7(2) of the Employment Tribunals Act 1996 and the Employment Tribunals Rules of Procedure 2013 (as amended by the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2014 SI 2014/271), in particular:

*i.* The definitions of "claim", "claimant" and "complaint" in Rule 1,

*ii.* Rule 2 – in particular – 2 (c) "*avoiding unnecessary formality and seeking flexibility in the proceedings*",

*iii. Rule 6 – Irregularities and non-compliance,*

*iv. Rule 8, Rule 10 and Rule 12, dealing with presenting the claims and grounds for rejection,*

*v. Rule 34 - addition, substitution and removal of parties, and the relation back principle established in Cocking v Sandhurst (Stationers) Ltd and anor 1974 ICR 650, NIRC, and*

*vi. Rule 37 – striking out.*

(iv) It also overlooks the recent Court of Appeal decision in *Sainsbury's Supermarkets Limited v Maria Clark and others* [2023] EWCA Civ 386, in particular dicta by LJ Bean at [37]-[43]. The combined legal effect of these provisions, in my view, is that if the claim has not been rejected by the Tribunal under Rule 10 or Rule 12 (and the first claim was accepted see paragraph 27 above) the proceedings are properly instituted, subject to any statutory provision to the contrary (such as s.206 ERA), whether or not the person bringing the claim has the right to sue the respondent. The claim might still be liable to be struck out, including on the basis that it has no reasonable prospect of success, because the claimant has no legal standing to bring such a claim against the respondent. This, however, is different to saying that any such claim is a nullity *ab initio*.

(v) Furthermore, *Ingall v Morgan* deals with a common law tort claim brought in a civil court, not a statutory claim within the exclusive

jurisdiction of employment tribunals. Whilst certain parallels between common law tort claims and discrimination claims may be properly drawn, this does not, in my view, necessarily mean that *Ingall* is the direct authority to oust the tribunal's jurisdiction with respect to a statutory discrimination claim brought by a next of kin.

(vi) Finally, *Ingall* (and indeed s.206 ERA) recognise that an executor of a deceased employee acquires the title to sue from the moment of the employee's death. The question then arises whether the claimant, who, as I understand, lives in Budapest, Hungary, under the Hungarian law as Mr Fabry's next of kin (assuming Mr Fabry died intestate) upon his death has acquired the right to sue, and if she has, whether that right ought to be recognised in the domestic English law as equivalent to that of an executor.

42. However, as the claimant has conceded the point, which she is perfectly entitled to do, I do not need to decide these issues. I, therefore, shall proceed to deal with the second issue, namely whether in the circumstances it is just and equitable to extend time for the second claim, on the basis that the first claim is a nullity in law.

**The Law on Just and Equitable extension**

43. Both Counsel made detailed submissions on the points of law referring me to specific passages in the judgments in the authorities bundle and extracts from Harvey, all of which I have duly considered. By way of a summary, the following principles appear to me as being of most relevance for the present purposes.

44. Under s. 123(1) EqA discrimination complaints "*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*".

45. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA, the Court of Appeal held that when employment tribunals consider exercising the discretion under S.123(1)(b) EqA: "*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 the discretion is the exception rather than the rule.*"

46. The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable — *Pathan v South London Islamic Centre* EAT 0312/13.

47. In *Adedeji v University Hospitals Birmingham NHS Foundation* [2021] EWCA Civ 23, the Court of Appeal said at [37]: "*The best approach for a tribunal in considering the exercise of the discretion under s 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay*"". Whilst the list of factors in section 33 of the Limitation Act 1980 might be helpful as a reference point to the exercise of the just and equitable discretion, "*rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language*[1]".

48. In *Southwark London Borough v Afolabi* [2003] EWCA Civ 15, [2003] IRLR 220 at [33], Peter Gibson LJ, said that there was no legal requirement on a tribunal to go through such a list in every case, "*provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion*".

49. In *Abertawe Bro Morgannwg Health Board v Morgan* [2018] ICR 1194 (at [25]) Leggatt LJ said that: "*the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it thinks just and equitable is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard*".

50. The so-called *Dedman*[2] principle does not apply to the exercise of the just and equitable discretion to extend time, that is to say that if it is the claimant's solicitor who is at fault in presenting the claim late, then such fault cannot be visited upon the claimant. The fact that the solicitor was negligent, and the claimant may have a potential claim against the solicitor is not sufficient to justify the refusal of an extension of time (see *Virdi v Commissioner of Police of the Metropolis* [2007] IRLR 24, EAT.

51. In considering the length of the delay, the tribunal must consider the entire period of the delay in weighing relative prejudice to the parties, not just the period of the delay for which the claimant is responsible – see *Secretary of State for Justice v Mr Alan Johnson* [2022] EAT 1 at [23].

## Submissions and Conclusion

[1] British Coal Corpn v Keeble [1997] IRLR 336, where at [8] Holland J said that s 33 factors might illuminate the exercise of the just and equitable discretion.

[2] Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA.

52. In his closing oral submissions Mr Young highlighted the point that this case on its facts was very different to the facts of the cases cited above. The claimant did not delay issuing the claim, she issued the claim in time, but not knowing that she needed to wait to receive the Letter of Administration. The nullity issue, Mr Young argued, is far from being obvious, many employment lawyers would not have picked up on it if they had not dealt with a similar issue in the past. In any event, any fault of Ms Lucas to draw this requirement to Mr Rugg's attention cannot be visited upon the claimant.

53. Mr Young also pointed out that the respondents themselves did not flag this procedural flaw in their response. That, he said, showed that the point was indeed far from being obvious even to a trained lawyer, and was also a factor in the delay in the claimant issuing the second claim.

54. Mr Young argued that Mr Rugg relied on advice from Ms Lucas and that her advice "superseded" advice he had received from Mind, which, in any event, Mr Rugg did not recall receiving. Mr Rugg did not pass the Mind email to the claimant, and therefore the claimant herself was clearly unaware of that procedural requirement. It follows, Mr Young argued, that there was a good reason why the first claim was not presented validly.

55. Further, Mr Young submitted, although the Tribunal must look at the entire period of the delay, considering the procedural history of the matter, the claim would have still come for the first preliminary hearing no earlier than 30 March 2023, and therefore the respondents would have been in the same position regardless of the delay in submitting the second claim.

56. As far as the balance of prejudice is concerned, Mr Young argued that the second claim merely puts "legal labels" on the pleaded facts. The respondents sought further and better particulars with respect to the first claim, including to identify specific causes of action, and that what the second claim gave them. The respondents had the opportunity to investigate the allegations and preserve the evidence. Mr Young pointed out that on Mr Gill's own evidence at paragraph 24 of his witness statement the respondents "*had retained sufficient information to deal with the First Claim*". Therefore, there was no material prejudice to the respondents, unlike significant and clear prejudice to the claimant if her claim was not allowed to proceed.

57. Mr Ratledge in his submissions emphasised that the burden was on the claimant and there is no presumption that time should be extended. He said that the delay was "*very very long – over 3.5 years*". He pointed out that Mr Rugg was advised by Mind to wait for the Letter of Administration but did not follow that advice. Mr Rugg also had the benefit of an employment solicitor, Ms Lucas, advising him on how to present the claim, and therefore the claimant might have a claim against Ms Lucas if she was negligent in not explaining that procedural requirement to him. He said there were other avenues open to the claimant outside employment tribunals to seek a redress.

58. Mr Ratledge argued that because Mr Rugg was not acting on "unequivocal" advice of Ms Lucas (that is to say, that her advice was not that the claimant did not need to wait for the Letter of Administration before presenting the claim or that the Letter of Administration was required) the exception to the *Dedman* principle (see paragraph 50 above) did not apply to her.

59. Further, Mr Ratledge submitted that the claimant had failed to update the Tribunal on 30 January 2020, as ordered, and that what caused the delay in progressing the claim. In any event, he argued, given advice from Mind, it would not be just and equitable to extend time beyond the date when the Letter of Administration was received.

60. Finally, Mr Ratledge argued that "forensic" prejudice to the respondents was substantial because of this "huge" delay, and that is because although the factual allegations remained the same, the second claim specified additional matters, such as the alleged PCP, "something arising in consequence" of Mr Fabry's disability, and suggested reasonable adjustments, all of which required further investigation by the respondents to respond, and it would be very difficult to "think back 4 years". Mr Ratledge also criticised the merits of some of the complaints advanced by the claimant.

61. I prefer Mr Young's submissions. Whilst "optically" the delay might appear significant, this is not a situation where no claim (whether instituted validly or not) has been presented until 3.5 years after the expiry of the primary limitation period. The claim was presented in time (subject to the point at paragraph 19 above). It was responded to by the respondents. The respondents understood what was being alleged against them. They comprehensively responded to all the allegations.

62. Furthermore, the respondents knew all along that the proceedings against them were on foot. Mr Gill's evidence to the Tribunal was that there were periods of time when the respondents thought the claimant might not pursue her claim further. This, however, is different to thinking that there was no pending claim against the respondents.

63. I also find that until the second claim was submitted, the respondents were not aware that there was a procedural deficiency with the first claim and did not operate on the basis that the first claim was a nullity. I do not accept Mr Ratledge's argument that the general denial of all the allegations at paragraph 1 of the respondents' Grounds of Resistance is to be read as the respondents challenging the validity of the institution of the first claim. Despite providing comprehensive rebuttals of all possible complaints at paragraphs 1 – 14 and going as far pleading the denial of the failure to provide an auxiliary aid, and at paragraph 15 - the statutory defence under s.109(4) EqA, the respondents do not say that the claimant has no legal standing to sue them, nor do they raise the time limit point.

64. Furthermore, as stated above, I accept Mr Rugg's evidence that he could not remember receiving advice in the email from Mind of 1 August 2019, and that he did not pass that or any other emails on this matter to the claimant. I also accept his evidence that Ms Lucas did not tell him that the claimant had to wait for the Letter of Administration before submitting the claim, or that she would need to submit her second claim as soon as administration has been granted.

65. I do not accept Mr Ratledge's submission that a valid distinction can be drawn between "unequivocal" advice that the Letter of Administration was needed, and "equivocal" advice on how to submit a tribunal claim, which advice simply did not mention this issue, whereby the exception to the Dedman principle applies in the former, but not in the latter case. I see no logical reason to draw any distinction between deficient legal advice, where a solicitor gives incorrect information on a matter and deficient legal advice where no information is given on the same matter, which information a competent solicitor ought to have known and given to his or her client.

66. Therefore, to the extent Ms Lucas was under any legal or professional duty to Mr Rugg or the claimant and if she was negligent in discharging that duty by not telling Mr Rugg that the claimant needed to have the Letter of Administration to sue on behalf of Mr Fabry's estate, this cannot be a valid reason for me not to exercise my just and equitable jurisdiction.

67. I want to be clear that I make no findings whatsoever as to the duties (if any) owed by Ms Lucas to Mr Rugg or the claimant, and the quality of her advice to Mr Rugg. I did not hear sufficient evidence on this issue, nor do I need to deal with it to decide the issue before me.

68. More importantly, I find that the balance of prejudice lies firmly in favour of granting the extension. If the claimant's second claim is not allowed to proceed, she would be deprived of the opportunity to have the complaints heard and determined despite making every effort to present the claim in time. Essentially, her access to justice will be denied by a bizarre combination of an obscure and highly technical legal issue, inefficiencies in the Tribunal administrative processes exacerbated by the Covid-19 pandemic, and the health & safety emergency that befell on London Central Employment Tribunal in December 2020. None of that can be justly laid at the door of the claimant.

69. On the other hand, I see little, if any, prejudice to the respondents. I do not accept that there is, what Mr Ratledge called "forensic prejudice" to the respondents. The facts of the claim are the same as before, to which facts the respondents pleaded their defence. The facts are relatively simple and focus on the respondents' decision to dismiss the claimant. It is not a claim that goes back many years and involves numerous episodes of alleged discriminatory treatment at the hands of multiple actors.

70. The respondents' evidence is that they had preserved sufficient materials to deal with the factual allegations. Their defence is that the reason for Mr Fabry's dismissal was lack of work, hence a redundancy situation, and in any event the partners who made the decision to dismiss him for that reason did not know that he had a disability at the time of making that decision. The respondents do not say that these people are no longer available to give reliable evidence on these two discreet issues.

71. I also do not accept that the second claim, in which causes of actions are spelled out in greater detail, create any "forensic prejudice" to the respondents. The issue of the alleged PCP of giving one month's notice to employees is very unlikely to require any material investigation. In any event, Mr Ratledge argued that the first respondent did not have that PCP. Therefore, it appears that the first respondent has all the necessary information to deal with this issue.

72. As far as "something arising" (para 23(b) of the Statement of Case), this goes to the question of the reason for dismissal, which the respondents have already pleaded to. Equally, whether the respondents explored alternative roles for Mr Fabry before dismissing him, would be within knowledge of the same people who made the decision to dismiss him. The respondents say they have sufficient information to deal with the first claim, which necessarily means to deal with the issue of why Mr Fabry was dismissed and how the relevant decision makers came to that decision. Therefore, I do not see how the question of whether in that process the possibility of an alternative role was considered or not could be said to create significant prejudice to the respondents.

73. Furthermore, in their response the respondents sought further and better particulars, including on the types of discrimination complaints advanced. These were provided to them by way of the second claim on 22 March 2023, which otherwise most likely would not have been provided before the hearing on 30 March 2023, at the earliest.

74. Even if the respondents will need to expend some further efforts and incur additional costs in dealing with these additional specific issues arising from the second claim, I find all that falls far short of outweighing prejudice to the claimant in not extending time.

75. For all these reasons I find that it is just and equitable to extend time and allow the claimant's second claim to proceed.

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**Case Management Orders issued pursuant to Rule 29 of the Employment Tribunals Rules of Procedure 2013**

76. The respondents are granted leave to amend their response, if so advised, to respond to the claimant's second claim. Any amended response must be sent to the Tribunal and the claimant by 5 June 2023.

77. A further case management preliminary hearing will be listed by the Tribunal on the first available date after 5 June 2023. Time estimate – 2 hours.

78. The parties must liaise to prepare a joint agenda for the hearing, a draft list of issues and suggested directions. To assist the parties in preparing for the next hearing, I am told that currently London Central lists 5-days' final hearing from 7 September 2023, starting on Wednesdays or Thursdays. If the parties are interested in judicial mediation, the earliest available date is 20 June 2023.

**Employment Judge Klimov**

14 May 2023

Sent to the parties on:

15/05/2023

For the Tribunals Office

**Notes:**

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.