EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105842/2022

Reconsideration Hearing Held in Glasgow by Cloud Video Platform (CVP) on 15 June 2023 of judgment and reasons dated 28 February 2023

Employment Judge R Bradley

Ms L Mackenzie	**Claimant** **Represented by:** **Mr J Lawson – Solicitor**
The Chief Constable of the Police	**Respondent** **Represented by:** **Ms N Moscardini – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that: -

1. The original decision (that the claim was presented within such time as was just and equitable and the Tribunal has jurisdiction to hear the claim) is confirmed.

2. The reasons from that original decision are varied as follows:-

    a. In paragraph 40 after the sentence ending *"…on the subject."* delete the rest and substitute for it, *"In or about November 2021 she discussed the circumstances of the withdrawal of the respondent's offer with her lecturer. Their suggestion was to obtain legal advice and to contact the Citizen's Advice Bureau and ACAS. At or about that time the claimant contacted both organisations. Both advised her to lodge a claim herself."*

REASONS

Introduction

1. On 1 March 2023 my judgement and reasons on the single preliminary issue of time bar was copied to the parties. It followed a hearing on 6 February. Paragraph 6 of my reasons recorded parties' agreement that the issue for that hearing was whether the claimant's claims (all of discrimination (disability)) had been brought within a period which the Tribunal thought was just and equitable, having been brought outwith the period of three months from the date of the act to which they relate. My judgement was that the claims had indeed been presented within such time as was just and equitable. I directed that there should then be a case management preliminary hearing with a view to appointing the case to a further preliminary hearing on the disputed question of disability.

2. By email dated 14 March the respondent applied for reconsideration of that judgment. It set out four reasons. Each reason was supplemented with written argument within the email. On 31 March and as per Rule 72 of the Employment Tribunals Rules of Procedure 2013 that application was not refused on initial consideration. By email dated 14 April the claimant opposed the application. It contained her answers to the four reasons. On 25 April I directed that a half day reconsideration hearing should be listed. On 5 May Notice of this hearing was emailed to the parties.

3. I am grateful to the parties' solicitors for producing a joint list of authorities which was ready in good time for this hearing. This judgment and reasons should be read in conjunction with those issued on 1 March.

Issues

4. The primary issue for this hearing raised by the respondent was; is it necessary in the interests of justice to revoke the judgment and dismiss the claim as time-barred? The respondent's alternative and secondary issue was; if not revoked, is it nonetheless necessary in the interests of justice to vary

the reasons so as to make findings in fact as regards the claimant's contact with ACAS in about November 2021?

Submissions

5. Ms Moscardini's oral submission was essentially a repetition of her email of 14 March. Elaboration of it was in answer to questions from me. I deal with her four reasons and our discussion on those questions below.

6. Mr Lawson referred to his email of 14 April. He supplemented it responding to points arising from my discussion with Ms Moscardini. To the extent necessary and relevant I refer to that oral submission below.

The law

7. Rule 70 provides that "*a Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again*."

8. Albeit not referred to in the joint list of authorities I took account of what was said by His Honour Judge Hand QC in *Serco Ltd v Wells* [2016] I.C.R. 768 at paragraph 43(d) "*The draftsmen of the current Employment Tribunal Rules have used the expression "necessary in the interests of justice"; …….. variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sound much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ put it these will be "rare … [and]... out of the ordinary*".

Discussion and decision

9. On her four reasons Ms Moscardini's primary position was that any of them individually could justify a revocation of the judgment. If I did not agree, her alternative position was that their cumulative effect brought about the same result.

10. A summary of her first reason was that there was a failure to make a material finding in fact (at paragraph 40) to the effect that the Claimant was advised by her lecturer in or around November 2021 to not only contact the Citizens' Advice Bureau but also the Advisory Conciliation and Arbitration Service (ACAS). The Claimant contacted Citizens' Advice Bureau in or around November 2021 who also told her to contact ACAS and lodge a claim herself. The Claimant also stated that she contacted ACAS after she was advised to do so. The alleged failures (as can be seen by comparing paragraph 40) were in relation to; the month in which the lecturer's advice was given; that that advice included ACAS (not just the CAB); that she contacted both (not just the CAB); and that the CAB's advice was also to contact ACAS. Reasons one and two are related. The second also criticised paragraph 40. It focussed on my finding on the question of why the claimant had not lodged a claim at that time (about November 2021). The focus of those reasons was my decision on the reasonableness of the claimant's ignorance of the time limit for presenting her claims. Ms Moscardini agreed that (as per her email) both reasons depended on her assertion that it is within judicial knowledge that (i) had the Claimant contacted ACAS she would have been informed of the Early Conciliation process without which no claim can be lodged and that (ii) ACAS would have referred to Tribunal time limits. In answer to my question, she referred to passages of the claimant's evidence (chief and cross examination). Mr Lawson disputed (as his email had done) that there was any evidence to support the findings now sought. In his email of 14 April he said, "*The Respondent also had the opportunity to put this point to the Claimant in cross-examination and failed to do so. It is not for the Respondent to now have a second chance to bring alleged facts into evidence which were not put to the Claimant nor made during submissions at the original hearing*." I reviewed my hand notes from the hearing on 6 February. They reflect reference to ACAS in cross examination only. The claimant's evidence was that "probably in

November 2021" she spoke with her lecturer. In answer to a question from Ms Moscardini she agreed that she had contacted ACAS. In answer to the next question, she said that "*it said something about lodging a claim yourself*." Ms Moscardini's next question to the claimant was, "*why wait until November 2022 before lodging it?*" There were no questions (and thus no evidence) about information from ACAS concerning the early conciliation process or about time limits for an application. The respondent had no reference (authority or otherwise) to support its assertion as to judicial knowledge of the two proposed findings. I agree that the findings at paragraph 40 should be varied. The extent of that variation is set out in the judgment above. The basis of doing so is the claimant's evidence in cross examination referred to here. My notes of evidence in chief do not record any reference to ACAS. It hardly needs to be recorded that the respondent's reliance on judicial knowledge to support its first two grounds is necessary because there was no evidence to support the findings now contended for. The single issue for the preliminary hearing was whether the claims had been brought within a period which the Tribunal thought was just and equitable, obviously outwith the three month period. In my view and in light of the evidence which the respondent had elicited, it was open to Ms Moscardini to ask the claimant what specific information had been given to her by ACAS. In particular it was open to ask her if ACAS had referred to the early conciliation process and/or the time limits within which a claim required to be presented. On the respondent's own case, these questions were not asked. I agree with Mr Lawson's position to the extent that it is not for the respondent now to have a "*second chance*" to seek findings in fact where there is no evidence and where there could have been that evidence had the questions been asked. For the avoidance of doubt, I do not accept that it is within judicial knowledge that if a party contacts ACAS they would necessarily have been advised of the early conciliation process or of the time limits for presenting claims. In my view that would be to speculate. I therefore reject grounds one and two as bases to revoke my earlier judgment.

11. A summary of ground three is that taking account of paragraphs 64, 65 and 41 and my finding that the CAB had advised the claimant to lodge a claim this

must have been because the CAB were of the view that there may be grounds for pursuing such a claim (in late 2021) which undermined my decision that one of the two reasons for the passage of time until November 2022 was the claimant's reluctance to progress it without the confidence from an adviser to say that the claim had some merit. In other words, it was open to me to conclude that the advice from the CAB had provided sufficient advice for the claimant to have the confidence that her claims did indeed have merit. I do not agree. The respondent's argument depends on a degree of speculation.

12. The focus of ground four is paragraph 64 of the reasons. I summarise the respondent's argument this way; the reasons record that a relevant issue is whether there is a triable issue on the merits of the case; that issue requires a consideration of the respondent's policy the operation of which resulted in the withdrawal of the offer of the role of probationer police officer; but disability is a further prior preliminary issue; that status is not conceded; the reasons do not appear to reflect that that preliminary issue requires to be decided, and in this case it is a factor that would arguably weigh in favour of the respondent were it to be considered; and under reference to the case of ***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** [2022] EAT 132 my reasons have not specified the identifiable factors that were apparent at the preliminary hearing on which I weighed up my assessment of the merits. Miss Moscardini when asked agreed that the passage from Kumari on which she relied was at paragraph 63. It says, "*The tribunal is therefore not necessarily always obliged, when considering just and equitable extension of time, to abjure any consideration of the merits at all, and effectively to place the onus on the respondent, if time is extended, thereafter to apply for strike-out or deposit orders if it so wishes. It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in*

to a complex analysis which it is not equipped to perform." Two points occur to me as relevant on this ground. First (and without repeating their content) paragraphs 18, 21, 31 and 61 are relevant for what is then said in paragraph 68 of my reasons. From them the triable issue on the merits is readily identifiable. Second, Ms Moscardini agreed that, albeit disputed, the question of disability was also a triable issue. Her position was, however, that given the nature of the role of probationer police officer it was likely that that the question of disability would be decided in the respondent's favour. That might be so but does not detract from (and arguably supports) my conclusion that it is at least a triable issue.

13. On this ground Ms Moscardini also referred to the decision of the Court of Appeal in ***Department of Constitutional Affairs v Jones*** [2008] IRLR 128 albeit the joint list referred to its citation at [2007] EWCA Civ 894. Her email said that the Court "*highlighted the fact that in disability discrimination cases there is an additional factor to be taken into account when considering an application to extend the time limit and that is the disability itself*." She did not direct me to a particular passage from the report. It was an appeal by the employer/respondent against a decision of the EAT which had dismissed its appeal from a decision of an employment tribunal. The judgment of the ET was: (1) an amendment presented on 5 July and a discrimination disability complaint presented on 15 July 2005 were presented out of time; (2) to extend for the hearing of the substantive disability discrimination complaint; (3) the claimant had a disability as defined in respect of that complaint. The Court of Appeal dismissed the employer's appeal. I noted that at paragraph 52 Lord Justice Pill noted, "*The particular facts must, however, be considered. In my judgment, the chairman was justified in reaching the decision he did in the present situation with the combination of circumstances present*." In that case the claimant was a solicitor, as was his wife. He had consulted solicitors prior to seeking to amend in a claim of disability discrimination. In January 2005 (so 6 months before he sought to amend in his claim) his union had written for him that if he was "*dismissed in light of the disciplinary hearing he will have clear and substantial claims for unfair dismissal, disability discrimination, breach of contract, redundancy payments, statutory and contractual, and loss*

of pension rights." The ET's central conclusion was that the cause of the delay in bringing the claim had been the claimant's inability to admit to himself or to others that he was a disabled person within the meaning of the 1995 Act. The employer's general submission (paragraph 17) was that "*if a person who is mentally capable makes a decision not to bring a claim within time, he is bound by it. If he ignores advice given to him, then he must take the consequences of delay. It would, it is submitted, be to drive a coach and horses through the protection to which employers are legitimately entitled if a person who is advised that he is disabled but nevertheless fails to bring a claim within three months were permitted to do so subsequently*." At paragraph 53 of the report Lord Justice Pill said, "*First, there is of course an additional factor in disability discrimination not present when some of the other discretions come to be exercised, and it is that the disability, to come within s.1, must be a 12-month disability as defined in the Act. The 12 month period involved did not expire until after the claim was brought, having regard to the date at which medical evidence first became available of ill health. Any person with a mental condition has therefore to predict whether he is likely to come within the definition. Of course, he can be expected to have regard to medical advice. But this was a respondent of mature years, with a very responsible job, who had expressed in his written statement, which the chairman cited, the reasons why he did not want to admit to himself or to anyone else that he was disabled within the meaning of the Act. Having given very careful consideration to the evidence, the chairman concluded that that unwillingness on his part was the true reason for the delay which occurred*." The context (as can be seen from paragraphs 45 onwards) was the various factors set out in ***British Coal Corporation v Keeble*** [1997] IRLR 336 a case to which I referred in my earlier reasons. In the overall context of the facts in ***Jones*** I do not take issue with the proposition that in disability discrimination cases there is an additional factor to be taken into account when considering an application to extend the time limit and that is the disability itself. The disability in that case was clearly a factor which impacted the claimant's decision about whether or not to make a claim. But as a general proposition applied here, my

view is that it does not advance the respondent's argument. In my view the question of disability is in issue and is a triable one.

14. My answer to the primary issue is that it is not necessary in the interests of justice on any of the four grounds individually or by them cumulatively to revoke the judgment and dismiss the claim as time barred. On the subsidiary issue, I agree that is it nonetheless necessary in the interests of justice to vary the reasons so as to make findings as recorded in this judgment. This is because to do so more comprehensively reflects the evidence which I heard.

15. My earlier reasons directed that a short case management preliminary hearing should be fixed with a view to appointing the case to a further preliminary hearing on the question of disability. That course of action should now follow.

Employment Judge: **R Bradley**
Date of Judgment: **03 July 2023**
Entered in register: **05 July 2023**
and copied to parties