Case Number: 2200397/2023

EMPLOYMENT TRIBUNALS

Claimant		Respondents
Z	v	Network Rail Infrastructure Limited

OPEN PRELIMINARY HEARING

Heard at: **London Central**

On: **9 October 2023**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **In Person**
For the Respondents: **Ms C Jamieson, Solicitor**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. **It was not reasonably practicable for the Claimant to have brought his complaints of unfair dismissal and wrongful dismissal in time. He brought those complaints within a reasonable time thereafter. Time is extended for the presentation of those complaints and the Tribunal has jurisdiction to consider them.**
2. **It is just and equitable to extend time for the Claimant's complaints of failures to make reasonable adjustments. The Tribunal has jurisdiction to consider them.**

REASONS

1. This Public Preliminary Hearing ("PH") was listed to consider whether the claim was brought in time and, if it was not, whether time should be extended for it.

2. It was agreed that all the Claimant's allegations in the claim were, prima facie, presented out of time.

3. I heard evidence from the Claimant and from his mother. There was a bundle of documents and an authorities bundle. Both parties made closing submissions and the Respondent presented a written skeleton argument.

Background

4. By a claim form presented on 20 January 2023, the Claimant brought complaints of unfair dismissal, wrongful dismissal and disability discrimination against the Respondent, his former employer.

5. The Claimant had notified ACAS of a dispute with the Respondent on 31 October 2022 and obtained an Early Conciliation certificate on 6 December 2022. Setting aside the EC extension, to be in time, the Claim Form should have been presented by 30 November 2022, being three months less one day from the effective date of termination on 1 September 2022. The EC extension would have extended time by a further 5 weeks and 1 day, to 5 January 2023.

6. The Respondent has conceded that the Claimant has been a disabled person since September 2005 by reason of his HIV condition. It also concedes that the Claimant is disabled by reason of his anxiety and depressive disorders and psychosis. It acknowledges that he was diagnosed with mixed anxiety and depressive disorders in January 2001, and again in November 2020 and with a psychotic disorder on 30 May 2021.

Findings of Fact Relevant to Time Limits and Extension of Time

7. The Claimant was employed as a Train Delay Attributor from 1 December 2019 until the termination of his employment on 1 September 2022. He had 2 years and 9 months' service.

8. The final list of issues had not been agreed. However, the Claimant agreed that, regarding dates: as he was dismissed on 1 September 2022, the last day upon which the Respondent failed to make an adjustment was also 1 September 2022.

9. I heard evidence from the Claimant and read his medical records for the period September 2022 – January 2023. I also read a letter from Colly Fitzpatrick, Clinical Nurse Specialist at the Lawson Unit for HIV care at the Royal Sussex County Hospital.

10. ln late May 2021, the Claimant was sectioned for two months under the Mental Health Act. While in hospital, he was diagnosed with psychosis and prescribed antipsychotic medication. He was discharged after 2 months, to the care of his mother.

11. After the Claimant was dismissed, his mental health declined. He heard voices in his head and found it very difficult to concentrate and take in new information.

12. On 8 September 2022 Doncaster Talking Therapies assessed him and he reported feeling the following symptoms nearly every day: Little interest or pleasure in doing things; Feeling down, depressed, or hopeless; Feeling tired or having little energy; Being so fidgety or restless that he had been moving around a lot more than usual; Feeling Nervous, anxious or on edge; Not being able to stop or control worrying and; Being so restless that it was hard to sit still, amongst other symptoms. He reported having pains in his head when very stressed, as well as shaking. He said that he would become spaced out, have distorted cognition and could not

concentrate, or explain himself. He reported that he felt he could not think about everything anymore, that worrying about everything every day was exhausting; that he spent all his time worrying and this made him miserable so he didn't want to do anything, p76.

13. It was recommended that he start counselling.

14. On 9 September 2022 he consulted his GP who diagnosed a mixed anxiety and depressive disorder. The Claimant reported low mood and loss of interest in day to day things. His medication, which had been 20mg citalopram, was increased to 30mg daily, p77.

15. On 26 October 2022 his medication was increased to 40mg daily, for depression, p82.

16. The Claimant had been in receipt of benefits before his dismissal because he had been on sick leave from work for a very long period. His mother told the Tribunal, and I accepted that, after the Claimant was dismissed, he had received a termination payment, but that this was taken by the benefits agency and his benefits were stopped for 6 weeks while he was reassessed. During this time, he had no money and was living on free sandwiches. He was emaciated and would not dress or eat. His mother had to start caring for him again. She described the Claimant as being like a child or toddler at this time.

17. I also accepted the Claimant's mother's evidence that the Claimant could not finish a conversation and would forget what he was saying, at the time. It was she who took him to the Citizens Advice Bureau ("CAB") for advice on his employment rights.

18. The Claimant was advised and assisted by the CAB to commence Early Conciliation through ACAS on 31 October 2022. The CAB also advised him to seek help from his union, the RMT.

19. On 10 November 2022 the Claimant was assessed again by Doncaster Talking Therapies. He continued to report having trouble concentrating on things, such as reading the newspaper or watching television, and feeling down, depressed and hopeless nearly every day, p83.

20. The Claimant made a DSAR request to the Respondent on 22 November 2022 p96. The Respondent replied that day, asking him to refine his request, but he did not reply further until 9 March 2023.

21. On 2 December 2022 his GP continued his prescription for 40mg citalopram daily, p86.

22. The Claimant received some assistance from his Union, the RMT. His ACAS certificate was issued on 6 December 2022. The next day, 7 December, Craig Stewart, RMT union regional administrative manager emailed him, telling him that his ACAS EC certificate had been issued. He said, "You have satisfied a legal requirement to seek conciliation so it's a case of awaiting your legal advice now." P107.

23. It was unclear to which legal advice Mr Stewart was referring.

24. The Claimant's memory of the events of September 2022 – early January 2023 was very vague. I accepted that he genuinely could not recall if, or when, he had been advised about time limits for presenting a claim to the Employment Tribunal.

25. In the light of his medical records, and his and his mother's evidence about his health from September to December 2022, I found that the Claimant was unable to concentrate, or remember things, to the point of being unable to finish a conversation, and was dependent on assistance from others to commence the ACAS EC conciliation process and to commence a claim.

26. The Claimant told the Tribunal - and was not challenged in evidence - that he understood that he should be waiting for legal advice from his union before submitting his claim. By mid January 2023 he was beginning to feel better, but had not heard further from his union. He contacted Craig Stewart on 18 January 2023. The Claimant was shocked when Mr Stewart replied on 20 January 2023 to inform him that his claim was now out of time. Mr Stewart said that the Claimant had been advised of the time limits for bringing a claim, but the Claimant had no recollection of this.

27. The Claimant submitted his claim on 20 January 2023.

Time Limits

28. By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of

    a) the period of three 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.

29. The Court of Appeal made clear in *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, CA at [23]: "If the claim is out of time, there is no jurisdiction to consider it unless the Tribunal considers that it is just and equitable in the circumstances to do so".

30. The power to extend time for the consideration of a complaint have been held to give Tribunals 'a wide discretion to do what it thinks is just and equitable in the circumstances ... they entitle the [employment] tribunal to take into account anything which it judges to be relevant', *Hutchison v Westward Television Ltd* [1977] IRLR 69, [1977] ICR 279, EAT. The discretion is broader than that given to tribunals under the 'not reasonably practicable' formula: *British Coal Corpn v Keeble* [1997] IRLR 336; *DPP v Marshall* [1998] ICR 518, EAT. Factors which can be taken into account include the prejudice each party would suffer as a result of the decision reached and all the circumstances of the case, including the length of and reasons for the delay; the extent to which the cogency of 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 once he 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.

31. However, notwithstanding the breadth of the discretion, there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion. The onus

is always on the Claimant to convince the tribunal that it is just and equitable to extend time, *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434, at para 25, per Auld LJ.

32. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 11943 the Court of Appeal considered that: "…factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (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)."

33. "There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time..." per HHJ Auerbach in *Wells Cathedral School Ltd v Souter*, EA-2020-000801-JOJ at [32].

34. Regarding prejudice to the Respondent, prejudice faced by a Respondent, in *Miller and Others v The Ministry of Justice and Others* UKEAT/0003/15/LA at §§12-13 Laing J said:

"12. … There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses...

13. … DCA v Jones also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET..." .

35. Where the reason for delay is said to be the Claimant's alleged ignorance of their rights/ time limits, that ignorance must be reasonable, Lady Smith in Perth and *Kinross Council v Townsley* UKEATS/0010/10/BI at [39]-[41]. In *Hunwicks v Royal Mail Group Plc* UKEAT/0003/07 the EAT said at [9]: "The fact that a claimant may have been unaware of relevant time limits does not necessarily make it just and equitable to extend them, particularly where, as here, the claimant is a person of some intelligence and some education with access to legal advice. It will frequently be fair to hold claimants bound by time limits which they could, had they taken reasonable steps, have discovered."

36. The Tribunal may form the view that a Claimant should not be disadvantaged because of the fault of their advisers, see *Chohan v Derby Law Centre* [2004] IRLR 685, EAT.

37. S111 Employment Rights Act 1996 provides: "

"(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination,

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

38. In Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470: the Court of Appeal said that, when deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard was to be had to what, if anything, the employee knew of the right to make a complaint and the time limit and what the employee should have known, had she acted reasonably in all the circumstances; that the vital question of fact was whether the employee could reasonably have been expected to be aware that there was a time limit for making a complaint to the tribunal.

39. The test of reasonable practicability applies also to wrongful dismissal claims.

Discussion and Decision

40. On the facts, I found that the Claimant was ill with depression and anxiety after his dismissal in September 2022. His condition was such that he found it difficult to concentrate on anything such as reading or watching a television programme. He lost interest in eating and became very thin. He was unable to maintain a conversation.

41. I accepted that, because of his illness, he was dependant on the advice and assistance of others. He was able, with the assistance of the CAB, or his Union, to start early conciliation. However, he was unable to concentrate and unable to remember advice that he was given about time limits for claims.

42. He submitted a DSAR request but then failed to follow it up for several months.

43. He did not have the assistance of his union or the CAB in actually submitting his claim.

44. I accepted that he was too ill with depression and anxiety from September – December 2022 to present his claim himself.

45. I accepted that, because of his illness, he was unaware that until 20 January 2023 that the time limit for presenting his claim was expiring, or had expired.

46. He presented his claim on 20 January 2023, when he was advised by his union that the time had expired.

47. On that facts, I decided that it was not reasonably practicable for the Claimant to present his unfair dismissal, or wrongful dismissal, claims in time. He was too ill to be able to do so himself during the primary limitation period, as extended by the ACAS EC period.

48. He presented his claim within a reasonable period thereafter, when his condition improved and that he contacted his union, only to discover time had expired. He

presented his claim that day. There was therefore a reasonably short delay in bringing his claim, of less than 2 months, which was entirely explained by his illness.

49. Likewise, I decided that it just and equitable to extend time for the Claimant's reasonable adjustment complaints. I reminded myself that time limits are to be strictly applied and extension of time is the exception, rather than the rule.

50. However, I concluded considered that the delay after the expiry of the primary limitation period was relatively short – less than 2 months. It was also entirely explained by the Claimant's illness and his inability to take legal steps without the assistance of others. On the other hand, there was little evidence that the delay had prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). Indeed, because the Claimant had been assisted in commencing ACAS Early Conciliation, the Respondent had been made aware of the potential dispute within the primary limitation period. It was not suggested that the passage of time had impaired memories, or that the Respondent's witnesses were no longer available.

51. I acknowledged that the Respondent was prejudiced by having to defend a claim which would otherwise be out of time. Nevertheless, given that the Claimant was not at fault in failing to present his claim earlier than he and, on the other hand, there was little prejudice to the Respondent caused by the delay, the balance of prejudice favoured granting an extension of time.

52. Time is extended for all the Claimant's complaints.

Anonymity Order

53. I made an anonymity order, that the Claimant be referred to as Z in these proceedings.

Relevant Law

54. The Tribunal has power to make Restricted Reporting and anonymisation orders under *r50 ET Rules of Procedure 2013*. This (relevantly) provides that an ET:

'(1) … may at any stage of the proceedings on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include –

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or

in any documents entered on the Register or otherwise forming part of the public record;

(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order …"

55. Article 8(1) ECHR provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. Article 8(2) permits interference with these rights where it is justified, in the sense of it being necessary and proportionate, for one of a number of specified reasons that include 'for the protection of the rights and freedoms of others'.

56. The right to freedom of expression guaranteed by art 10 ECHR. Article 10 follows a similar structure to art 8; interferences with the right are permitted, but only in the circumstances provided for in art 10(2) and where necessary and proportionate.

57. Art 6(1) ECHR provides that: 'Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of …' and then a series of reasons are listed, including: 'the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice'.

58. In *X v Y* [2020] IRLR 762 the Claimant had not attended an the employment tribunal hearing because of ill-health, but his father had attended on his behalf. The claim had been presented out of time and a preliminary issue was whether there were good reasons why it should have proceeded. The father explained the background and reasons for the delay. He said that the claimant was born female but had transitioned to being male, after surgery for breast removal which had medical complications. He also described the claimant's mental health issues. The tribunal found that any or all of those medical issues meant that it was not reasonably practicable for him to have filed his claim on time. It went on to allow the claims of unpaid wages/holiday pay. The judgment was sent to the parties. The claimant was aghast when he saw that it made reference to his status as a transsexual man and his mental health. He emailed the tribunal asking for the relevant material to be deleted, but the employment judge declined to do so.

59. On appeal in *X v Y* at para [20], the EAT referred to British Broadcasting Corporation v Roden [2015] IRLR 627 and said, ".. the principle of open justice is paramount and that there have to be clear, cogent, and proportionate grounds before an Employment Tribunal can take any steps which conflict with the principle of open justice."

60. At paragraph [23], the EAT said that the test for whether the art 8 right to privacy has been engaged is that set out by the House of Lords in *Campbell v MGN* [2004] UKHL 22, [2004] 2 All ER995, [2004] 2 AC 457 and approved by the Supreme Court in *Khuja* at para [21], namely that the right is in principle engaged if in respect of the disclosed facts the person in question had a reasonable expectation of privacy. The test is whether, if a reasonable person of ordinary sensibilities, placed in the same situation, was the subject of the disclosure rather than the recipient, that reasonable person would find the disclosure offensive.

61. In *X v Y* the EAT also held that the Claimant's application for anonymisation should have been granted: the EAT said that it was consistent with the claimant's art 8

rights to do so. There were strong reasons to grant anonymisation. The appellate courts had recognised the sensitivities around gender transitioning and there were good reasons to keep the claimant's identity confidential if the judgment dealt with highly sensitive matters relating to his mental health. On the other hand, there were not strong countervailing reasons why the identity of the claimant needed to be disclosed. It was not a case in which he was accused of any form of wrongdoing, let alone any wrongdoing connected with his status or mental health. The issues relating to transgender status and mental health arose in the context of an absolutely standard issue about the extension of time limits. The claimant's art 8 rights to privacy far outweighed the very limited impact upon the art 6 principal of open justice arising from anonymisation. Moreover, it was not a case in which art 10 rights of freedom of expression were significantly engaged.

Decision

62. In the present case, I decided to make an anonymity order in respect of the Claimant, which will last until the outcome of the liability hearing in this case. The Tribunal at the liability hearing can decide whether the order should continue.

63. It is consistent with the Claimant's art 8 rights to do so. There are potential sensitivities around an HIV diagnosis and there are good reasons to keep the Claimant's identity confidential, given that this judgment deals with highly sensitive matters relating to his mental health. On the other hand, there are not strong countervailing reasons why the identity of the claimant needs to be disclosed before the. It is not a case in which he is accused of wrongdoing. He does bring a claim arising out of his disability, but his claim is for reasonable adjustments. The public will not be prevented from understanding the claim if the Claimant’s identity is protected.

64. I considered that the Claimant's art 8 rights to privacy in relation to his health conditions outweigh the limited impact upon the art 6 principal of open justice arising from anonymisation.

65. I decided that the principle of open justice and art 10 rights of freedom of expression are appropriately balanced with the Claimant’s right to privacy by making an order which will continue until the outcome of the liability hearing, when it can be reviewed.

EMPLOYMENT JUDGE BROWN
On: 9 October 2023

SENT TO THE PARTIES ON

10/10/2023

FOR SECRETARY OF THE TRIBUNALS