EMPLOYMENT TRIBUNALS

BETWEEN

LIAM NICHOLS

Claimant

AND

NATIONAL HIGHWAYS LIMITED

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD at Southampton (by CVP) **ON** 5 October 2023

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: In person
For the Respondent: Elizabeth Hodgetts, counsel

WRITTEN REASONS AT THE REQUEST OF THE CLAIMANT

JUDGMENT

The judgment of the Tribunal is as follows:

1. **The claim for breach of contract was not presented within the applicable time limit. It was reasonably practicable to do so. The claim for breach of contract is therefore dismissed.**
2. **The claims for discrimination on the grounds of age (being claims for direct discrimination, indirect discrimination and harassment) were**

not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claims are therefore dismissed.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time. The claimant has asked for written reasons in relation to the determination that the claims for discrimination on grounds of age were not presented within the applicable time limit.

2. I have heard from the claimant, and I have heard from Ms Hodgetts on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.

Facts

3. The claimant commenced employment with the respondent as a traffic officer, pursuant to a probationary contract.

4. The claimant was required to undergo driver training. In January 2022, various concerns in relation to the claimant's driving standards were raised with him by his driving coach. Further issues were raised following a driving assessment on 23 February 2022.

5. On 23 March 2022 the claimant achieved his live lane accreditation but concerns about his driving standards continued. On 9 May 2022 a fact finding meeting was held with a colleague, Michael Harrison, about these concerns and on 11 May 2022 he was stood down from operational duties due to safety concerns.

6. These concerns led to the claimant being dismissed on 23 June 2022 following a probationary review meeting on 10 June 2022. The claimant appealed against his dismissal, with the appeal being dismissed on 29 June 2022.

7. I find that the concerns with the claimant's driving were well known at the respondent, as the claimant has acknowledged.

8. The claimant has contended that a number of comments were made evidencing age discrimination between December 2021 and May 2022. No specific dates were provided and it is not possible to make any more precise findings of fact on these comments or whether they were indeed made.

9. The claimant alleges that the comments made and the person making them were as follows:

    a. “Oh you are crewed with Liam, you better get your crash helmet on” – Brett Taylor
    b. “You better not crash the car” – Brett Taylor
    c. “You’re young enough to be Paul Yates’ grandson” – Brett Taylor
    d. “Make sure you bring the vehicle back in one piece” – Martin Williams
    e. “Was it appropriate to give Liam a new TOV?” – Martin Williams
    f. “You drive like a boy racer” – Martin Williams
    g. “You drive like a boy racer” – Steve Adams
    h. “Have you crashed the car today?” – Steve Adams
    i. “You better go and see your grandad” – Steve Adams

10. I find that the comments at a, b, d, e and h were not connected to the claimant’s age but instead references to his driving style. The remaining comments had an age element to them.

11. The latest date that the comments could have been made, on the claimant’s evidence, is the end of May 2022.

12. No complaints were made by the claimant at the time in relation to any of the comments.

13. The claimant was advised and represented by his union during the dismissal process. He told the tribunal that the union expected his appeal to succeed. The complaints in relation to the alleged age comments were not raised by him until his appeal process and then in relation to the dismissal, not as a separate complaint. The claimant told the tribunal that he had raised the comments with the union after he had been stood down from operational duty on 9 May and their advice was simply to include the comments in his subsequent appeal against dismissal. The claimant argued that the complaints were not raised before because he did not have the evidence in order to raise them, the first evidence was contained in the appeal outcome report. I find that this is implausible given that he will have heard the comments when made and had raised them with the union. In addition, I find that the complaints in relation to the comments were only made to enhance the chance of his appeal succeeding, on the advice of the union, not because he felt he had been the victim of age discrimination.

14. The claimant issued proceedings for unfair dismissal, breach of contract and discrimination on the grounds of age. The claim was issued on 18 November 2022, having undertaken early conciliation with ACAS between 8 and 17 November 2022.

15. The claim for unfair dismissal was dismissed as the claimant had insufficient qualifying service and the claims for breach of contract and discrimination were dismissed at the preliminary hearing on 5 October 2023.

Law

16. Having established the above facts, I now apply the law.

17. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination, indirect discrimination and harassment. The protected characteristic relied upon is age, as set out in section 4 of the EqA.

18. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

19. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

20. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a

time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

21. I have been referred to and have considered the following cases, namely: British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23;

22. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that:

    a. He did not have the evidence to raise the complaints until the appeal against his dismissal was under way.
    b. His union did not advise him to bring the claim earlier, his focus was on the appeal, not bringing a claim.

23. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.

24. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: “The best approach for a tribunal in considering the exercise of the discretion under section 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 … “The length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.”

25. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: “[18] … It is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would

be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, 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)."

26. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

27. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

28. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

Conclusion

29. The last date that any of the comments could have been made, on the claimant's evidence, was the end of May 2022. The three months' period therefore expired on 31 August 2022. As he did not begin the early conciliation process until 8 November 2022, his claim was over two months after the three month time period for bringing a claim.

30. The question is therefore whether the claim was brought within such period as is just and equitable.

31. Both parties have made much of the claimant's driving style and the issues around this. This certainly goes to the reason for his dismissal and would appear to lie at the heart of most of the comments he has complained about. However, the quality of his driving is not the issue here, it is how quickly a complaint for age discrimination should be brought and whether it is just and equitable to allow a claim made so far out of time.

32. In this regard, following Robertson v Bexley Community Service referred to above there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard. His justification is that there was not the evidence to bring the claim until he received the appeal outcome report. This is not accepted, given that he had not raised any meaningful complaints about the comments before. By his own admission, his focus was on protecting his job. Waiting for evidence is not a sufficient reason not to raise a complaint. In practice, he was aware of the comments and raised no meaningful complaint about them for a long period.

33. The role of the union is important here. They were made aware of the complaints and would have been experienced in dealing with workplace complaints. Their advice was simply to use it as a tool to enhance the chances of the appeal against dismissal being successful. They would have been aware of the time limits but choose not to advise the pursuit of a claim. The fact that the claimant had the benefit of union support and followed their advice to use the complaints as a tool in the appeal rather than pursuing a timely complaint mitigates against any extension of time to bring that claim.

34. A decision on whether the claim was brought within such period as is just and equitable should not turn on the merits of the case. However, it is clear that many of the complaints raised by the claimant were patently not age related but to do with his driving. The claim would appear in reality to have little prospect of success, mitigating against allowing extended periods of time to bring the claim.

35. The converse is also true – this case would not come to trial until two years or so after the alleged comments were made. There is already doubt as to what was said and when and this delay will make it harder to establish the facts and ensure a fair trial, causing potential prejudice to the respondent.

36. Considering this in the round, and taking account of the various factors here, there has been no proper explanation as to why the claim was not brought within time or plausible argument as to a just and equitable extension. The claimant has not convinced me that it is just and equitable to extend time for what was simply an attempt to enhance the chances of an appeal against dismissal succeeding. As such, I must conclude that the tribunal has no jurisdiction to hear the claims for discrimination and so dismiss the claim.

37. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 15; a concise identification of the relevant law is at paragraphs 16 to 28; how that law has been applied to those findings in order to decide the issues is at paragraphs 29 to 36.

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Employment Judge H Lumby
Dated: 31 October 2023

Reasons sent to Parties on 23 November 2023

For the Tribunal Office