



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000238/2023

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Held in Edinburgh on 10 November 2023

Employment Judge Sangster

10 **Mr M Cherrie**

**Claimant
In person**

Partner Retail Services Limited

**Respondent
Represented by
Ms T Ahari
Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Tribunal is that the Tribunal has jurisdiction to consider the claimant's complaints of disability discrimination and harassment.

REASONS

Introduction

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1. The claimant brings complaints of disability discrimination, namely direct discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment. His complaints of discrimination relate to the period from 5 August 2022 to 12 February 2023, when his employment
35 terminated.

E.T. Z4 (WR)

2. A preliminary hearing took place on 10 November 2023 to determine whether the claimant had presented his claim within three months of the date of the acts to which the claim relates, or such other period as the Tribunal thinks just and equitable, in accordance with 123 of the Equality Act 2010. The Tribunal heard
5 evidence from the claimant only.

Findings in fact

3. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

4. The claimant has bi-polar depression.

5. From mid-2022, the claimant's mental health declined significantly to the point of crisis. He was suspended from his employment with the respondent on 21
15 September 2022. By the end of September 2022, he was experiencing a plethora of depressive symptoms, including dark thoughts and suicidal ideation. He was referred to the Intensive Home Treatment Team, as an alternative to hospital admission. At a medical review on 20 November 2022, his mood was described as crushingly low. His sleep and appetite were poor and he had
20 periods of intense anxiety and panic attacks. He continued to have suicidal thoughts. The dosage of his prescribed medication was increased in November 2022 and then again in December 2022.

6. On 27 November 2022, the claimant contacted Acas to seek some guidance
25 from them given the pending disciplinary hearing, which was scheduled to take place on 8 December 2022. Whilst he was able to have a conversation with them that day by telephone, he found it incredibly difficult to discuss matters with them and was extremely emotional doing so. All future contact with them was by email as a result. Acas started the process of early conciliation that day.
30 They did not mention timescales for presenting a claim to the Employment Tribunal to the claimant. On 30 November 2022, following his discussion with

Acas, the claimant raised a grievance, asserting that he had been discriminated against, and informed the respondent that he had commenced early conciliation.

- 5 7. Acas were unable to make any contact with the respondent and issued an early conciliation certificate on 8 January 2023.
8. The claimant resigned on/around 12 January 2023, giving a month's notice. He remained suspended at that point.
- 10 9. The claimant secured alternative employment towards the end of January 2023, working in a shop, but was made redundant after a few months.
10. The claimant tried to keep busy, focus on the good things in his life and not think about his former employer, or the way he felt he had been treated by them, to aid his recovery. Any time he did think about his former employer, he
15 became extremely anxious and this hindered his recovery. In February 2023, he found that he could not even enter the St James Centre, where he used to work. He became very upset at the prospect of doing so.
11. By May 2023 however, the claimant had started to be able to speak to friends
20 about his experiences with the respondent. He realised as a result that he felt he had been significantly wronged and, in order to move forward, he would require to take action to address the issue, rather than avoiding it, by raising a claim.
12. On 18 May 2023, he felt mentally strong enough to prepare his claim form. He lodged it later that day. He was unaware of time limits at the time he submitted
25 his claim to the Employment Tribunal.

Submissions

13. The respondent submitted, in summary, that:

- (a) The claimant's mental health was not a complete barrier or obstacle to him lodging his claim before he did;

- (b) The claimant's asserted ignorance of time limits was not reasonable in the circumstances; and
- (c) The respondent is prejudiced by the delay in the claimant presenting his claim.

5 14. The claimant submitted, in summary, that:

- (a) He was unable to mentally address matters, so that that he was in a position to present his claim, prior to him doing so; and
- (b) He was entirely unaware of time limits and only became aware of this in October 2023, when the respondent sought to have time bar considered as a preliminary matter.

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Relevant Law

15. Section 123(1) of the Equality Act 2010 (**EqA**) states that 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 Tribunal thinks just and equitable.

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16. Section 123(3) EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

20 17. The burden of proof is on the claimant to establish that it is just and equitable to extend time, as explained in **Robertson v Bexley Community Centre** [2003] IRLR 434, in which the Court of Appeal said, at para 25:

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“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.”

18. This does not however mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The only requirement is that the extension of time should be just and equitable
- 5 19. In **British Coal Corporation v Keeble** [1997] IRLR 336 the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act 1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised.
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20. In **London Borough of Southwark v Afolabi** [2003] IRLR 220 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA ('such other period as the Employment Tribunal thinks just and equitable') that Parliament chose to give Employment Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.
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- 20 21. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, the Court of Appeal approved the approach set out in Afolabi and Morgan and, at paragraph 37, Underhill LJ confirmed, that
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- '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. 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,*
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well and good; but I would not recommend taking it as the framework for its thinking.'

Discussion & Decision

5 22. The Tribunal firstly considered the relevant time limits and whether the claim was brought within that time limit.

23. The Tribunal noted that, even if the complaint were considered as a continuing act (and the Tribunal accepted that the claimant had demonstrated a prima facie case to that effect) the last date on which it occurred was 12 February 2023. The three month time limit accordingly expired, at the latest,
10 on 11 May 2023. The claimant lodged his claim 7 days later, on 18 May 2023.

24. The Tribunal accordingly determined that the claim was not brought within the period of three months from the act complained of.

Just and Equitable Extension

15 25. The Tribunal then considered whether the claim was brought within such other period as was just and equitable, noting that the onus was on the claimant to demonstrate this.

26. As stated above, the claimant's claim was presented at least 7 days after the expiry of the relevant time limit. The claimant attributed the delay in raising this complaint to two factors, as follows:

- 20 (a) His mental health; and
(b) Ignorance of the time limits.

27. The Tribunal considered each of these. The Tribunal's findings in relation to the claimant's mental health are set out above. The Tribunal accepted that the claimant's mental health declined significantly from the middle to the end
25 of 2022. Whilst he started to improve in 2023, he was only able to do so by keeping busy, focusing on the good things in his life and not thinking about his former employer, or the way he felt he had been treated by them. The

5 Tribunal accepted that, whenever he thought about his former employer, the claimant became extremely anxious and this hindered his recovery. The Tribunal also accepted that the claimant was unaware of the time limits for presenting a claim to the Employment Tribunal, and only became aware of these after he had presented his claim. The Tribunal concluded, taking into account the fact that the claimant was focusing on recovering from significant mental health issues, was unable to discuss matters on the telephone with Acas after the first call (which was in itself difficult) and has no legal background or knowledge, the claimant's ignorance of time limits was, in the 10 circumstances, reasonable.

28. The Tribunal then considered the balance of prejudice between the parties, if the claim were to proceed.

29. The Tribunal is aware that the respondent will be prejudiced if discretion is exercised as they will require to defend the claim, and the earliest complaints 15 date back to August 2022. There was however no suggestion that witnesses are unavailable and the respondent has been aware, since 30 November 2022, when the claimant raised a grievance and informed the respondent he had commenced early conciliation, that he was asserting that he had been discriminated against. Full details were provided in his ET1, presented in May 20 2023. It is unlikely, in these circumstances, that the cogency of the evidence would be particularly adversely impacted by the delay.

30. If discretion is not exercised in his favour, the claimant will be unable to pursue his claim, despite the fact that there was, as the Tribunal has found, a valid reason for the delay in presenting the claim and the delay was for a relatively 25 short period. The prejudice to him would be significant.

31. Given these findings, the Tribunal concluded that the balance of prejudice falls in favour of the claimant.

32. For these reasons the Tribunal concluded that the claimant's claim was brought within such other period as was just and equitable and is persuaded

by the claimant that it would be just and equitable to extend time in his favour.
The Tribunal accordingly has jurisdiction to hear the claimant's claim.

Employment Judge: M Sangster
Date of Judgment: 16 November 2023
Entered in register: 17 November 2023
and copied to parties