EMPLOYMENT TRIBUNALS

Claimant: Mrs M Rucci

Respondent: National Maritime Museum

Heard at: Croydon/London South (via CVP) **On:** 14/2/2024

Before: Employment Judge Wright

Representation
Claimant: Mr P Rucci (claimant's brother)
Respondent: Ms A Fadipe - counsel

JUDGMENT having been given to the parties on 14/2/2024 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claims of unlawful discrimination contrary to the Equality Act 2010, for discrimination for performing Trade Union duties and for detriments for making protected disclosures contrary to the Employment Rights Act 1996 were presented out of time. The Tribunal was not persuaded to exercise its discretion to extend the time limit. The claim of constructive unfair dismissal was presented within the primary time limit and that claim proceeds.

1. This hearing was listed on 11/5/2023 to consider whether the claims had been presented within the applicable time limits. This hearing was discussed at the case management discussion on 6/10/2023. This was further to the respondent taking the time limit point in its response to the claim dated 12/8/2022.
2. The claimant submitted that the issue of strike out had previously been determined. That was true in respect of the respondent's application to strike out the claim as no Acas early conciliation certificate had been

provided in the claim form. That deficit was rectified by the claimant and was accepted by Employment Judge Corrigan on 30/9/2022.

3. This application was a new and distinct application to strike the claim out based upon the claims being out of time.

4. The respondent did not address the Tribunal in respect of the test for extending time under the Employment Rights Act 1996 (ERA), however that test is more stringent than under the Equality Act 2010 (EQA). If the claimant is not able to persuade the Tribunal to exercise its discretion under the EQA, then she will not be able to do so under a more stringent test.

5. The claimant's employment commenced on 29/6/2012.

6. She engaged in Acas early conciliation between 25/11/2021 and 5/1/2022 (a period of 41 days).

7. She resigned on 17/2/2022 giving one month's notice and her employment terminated on 17/3/2022. The claimant said that she spent her notice period on garden leave. She does not complain of any allegation of discrimination during her notice period. Logically, the claimant cannot have accepted any breach of her contract of employment which post-dated her resignation.

8. She presented her claim to the Tribunal on 11/6/2022.

9. The respondent states the earliest date any act could be in time, is 12/3/2022. The Tribunal does not necessarily agree, as that does not factor in the time spent engaged in Acas early conciliation, however, the claimant does not plead any act of discrimination after March 2021 in her original claim form. The Tribunal believes that any act prior to the 30/1/2022 is out of time if the time spent in early conciliation is accounted for. The claimant's pleaded allegations are historic and cover a period from March 2019 to March 2021.

10. In the original pleading, the claimant does refer to suffering a stroke on 13/2/2022, however that is not an allegation of discrimination. That is a physical reaction to the circumstances.

11. The claimant has stated that she has raised several grievances during her employment. She has also said that she was a Trade Union representative and was active in the Trade Union. Those are matters which point to her having knowledge of the strict time limits in the Tribunal. Furthermore, when a claimant engages in Acas early conciliation, after the certificate is issued, Acas draw the claimant's attention to the time limits.

12. The time limits in the Tribunal are strict and short and Ms Fadipe said; exercising discretion to extend the time limit is the exception rather than the rule.

13. Section 111 Employment Rights Act 1996 provides:

> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (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—
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> > (a) before the end of the period of three months beginning with the effective date of termination, or
> >
> > (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.

14. In Cygnet Behavioural Health Ltd v Britton EA-2020-000972-OO:

> 'The employment judge … reminded himself that the onus of proving that the presentation of the claim in time was not reasonably practicable rests with the claimant.'
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> 'A person who is considering bringing a claim for unfair dismissal is expected to apprise themselves of the time limits that apply; it is their responsibility to do so.'
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> 'Notwithstanding his dyslexia and mental health problems the claimant had been able to do the following things in the relevant period:
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> [There was then a list of ten matters which the claimant had dealt with.]
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> 'Even though during this period he was depressed and had dyslexia, this did not mean that he was incapacitated and it did not mean that it was not reasonably practicable for him to find out the time limits.'

15. The events which the claimant had conducted included contacting Acas to complete the formalities of early conciliation.

16. S. 123 EQA provides:

> (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
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> > (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.
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> …
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> (3) For the purposes of this section—
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> > (a) conduct extending over a period is to be treated as done at the end of the period;

17. In respect of time limits, the EAT has recently reviewed the position in Jones v Secretary of State for Health and Social Care [2024] EAT 2:

> 'The Law
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> 27. Section 123 of the Equality Act 2010 ("EQA") provides that:
> 123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 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.

28. Section 140B EQA permits an extension of time where ACAS early conciliation is undertaken in certain circumstances not relevant to this appeal.

29. Strictly speaking, section 123 EQA does not set out a primary time limit that may be extended but a time limit of three months or "such other period as the employment tribunal thinks just and
equitable". Where the Employment Tribunal decides that a period other than three months is just and equitable that is the time limit. Nonetheless, the use of the term "primary time limit" for the three
months period (with an extension for ACAS early conciliation where appropriate) is a useful shorthand.

30. It remains a common practice for those who assert that the primary time limit should not be extended to rely on the comments of Auld LJ at paragraph 25 of Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576, [2003] IRLR 434, that time limits in the Employment Tribunal are "exercised strictly" in employment cases and that a decision to extend time is the "exception rather than the rule" as if they were principles of law. Where these comments are referred to out of context, this practice should cease. Paragraph 25 must be seen in the context of
paragraphs 23 and 24:

> 23. I turn now to the second issue. The decision by the employment tribunal not to exercise its discretion to consider the claim on just and equitable grounds. There are a number of basic propositions of law to which Miss Outhwaite has referred us which govern the way in which this exercise has to be undertaken. 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. That is essentially a question of fact and judgment for the tribunal to determine, as it did here, having reconvened for the purpose of hearing argument on it.
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> 24 The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in Daniel v Homerton Hospital Trust (unreported, 9 July 1999, CA) in the judgment of Gibson LJ at p.3, where he said:
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> 'The discretion of the tribunal under s.68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong.'
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> 25 It is also of importance to note that the 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. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have

> formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

31. The propositions of law for which Robertson is authority are that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere. The comments of Auld LJ relate to the employment law context in which time limits are relatively short and makes the uncontroversial point that time limits should be complied with. But that is in the context of the wide discretion permitting an extension of time on just and equitable grounds.

32. In Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2009] IRLR 327 Wall LJ stated:

> 24 Mr Rose placed much reliance on paragraph 25 of Auld LJ's judgment …
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> This paragraph has, in turn, been latched onto by commentators as offering 'guidance' as to how the judgment under the "just and equitable" provisions of the Race Relations Act and DDA fall to be exercised. In my judgment, however, it is, in essence, an elegant repetition of well established principles relating to the exercise of a judicial discretion. **What the case does, in my judgment, is to emphasise the wide discretion which the Judgment approved by the court for a hand down Jones v Secretary of State for Health & Social Care ET has** – see the dictum of Gibson LJ cited above – and articulate the **limited basis upon which the EAT and the court can interfere**. [emphasis added]

33. Sedley LJ stated:

> 30. I agree with Mr Justice Underhill and Lord Justice Wall that the EJ's decision, while it could have been (and, had it been reserved, no doubt would have been) a great deal better expressed, was not vitiated by any error of law.
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> 31 **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. That 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 limitation is not at large**: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. [emphasis added]

34. Longmore LJ agreed, and added, pithily:

> I agree and would only reiterate the importance that should be attached to the EJ's discretion. Appeals to the EAT should be rare; appeals to this court from a refusal to set aside the decision of the EJ should be rarer. Allowing such appeals should be rarer still.

35. Without meaning any disrespect to Auld LJ, there might be much to be said for Employment Tribunals focusing rather less on the comments in Robertson that time limits in the Employment
Tribunal are "exercised strictly" and an extension of time is the "exception rather than the rule"; and rather more on some of the other Court of Appeal authorities, such as the concise summary by Leggatt LJ in Abertawe Bro Morgannwg

University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] ICR 1194 at paragraph 17-19:

> 17 The board's other grounds of appeal all seek to challenge the decisions of the employment tribunal that it was just and equitable to extend the time for bringing (a) the claim based on a failure to make adjustments and (b) the claim alleging harassment by Ms Keighan. Before turning to those grounds, the following points may be noted about the power of a tribunal to allow proceedings to be brought within such period as it thinks just and equitable pursuant to section 123 of the Equality Act 2010.
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> 18 First, 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 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in
> exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corpn v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2009] 1 WLR 728, paras 30–32, 43, 48 and Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] 2 AC 72, para 75.
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> 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).

36. As noted recently by HHJ Auerbach in Owen v Network Rail Infrastructure Limited [2023] EAT 106 Leggatt LJ went on to state at paragraph 25:

> As discussed above, 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.

37. In our turn, judges of the EAT will be assisted by what Leggatt LJ said at paragraph 20:

> 20 The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should

> only disturb the tribunal's decision if the tribunal has erred in principle—for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant—or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434, para 24.

38. A factor that may be of importance in considering an extension of time on just and equitable grounds where there is a potential comparator is when the claimant knew the race of the comparator.
In Barnes v Metropolitan Police Commissioner and another UKEAT/0474/05 HHJ Richardson held:

> 18. In Mr Barnes' case, there was no doubt that the acts complained of were more than three months before proceedings had commenced. His case was concerned with the second stage: s 68(6). Knowledge of the existence of a comparator at that stage may be relevant to the discretion to extend time. In Clarke v Hampshire Electroplating [1991] UKEAT 605/89/2409, the Appeal Tribunal said:
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> > "Under section 68(6) the approach of the tribunal should be to consider whether it was reasonable for the Applicant not to realise he had the cause of action or, although realising it, to think that it was unlikely that he would succeed in establishing a sufficient prima facie case without evidence of comparison."
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> 19. It follows that a tribunal will be entitled to ask questions about a Claimant's prior knowledge: when did he first know or suspect that he had a valid claim for race discrimination? Was it reasonable for him not to know or suspect it earlier? If he did know or suspect that he had a valid claim for race discrimination prior to the time he presented his complaint, why did he not present his complaint earlier and was he acting reasonably in delaying? These, of course, are far from being the only questions which the tribunal may ask in order to decide whether it was just and equitable to consider the complaint. The tribunal has to consider all the circumstances.
> We single out these questions because this appeal turns on the tribunal's finding about Mr Barnes' state of mind.'

18. In Concentrix CVG Intelligent Contact Ltd v Obi 2023 ICR 1 the EAT referred to Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194 CA and the principle that the absence of an explanation does not, as a matter of law, mean that a just and equitable extension must automatically be refused. Failure to consider the length of and reasons for, the delay would be an error of law, but that is not the same as saying that if, upon consideration, no reason is apparent at all from the evidence, then in every case the extension must, as a matter of law, be refused.

Conclusions

19. In this case, the respondent had accepted the claimant was disabled as she was diagnosed with cancer in 2015 and that she suffered from depression from August 2021; having a medical condition does not of itself mean the claimant was prevented from presenting her claim in time. The claimant contacted Acas and went through the early conciliation process prior to her employment terminating.

20. The time limits are deliberately short in the Employment Tribunal. This is so that claims are presented promptly and are considered whilst matters are still fresh in the parties' minds. If there is, as is currently the case, delay due to an oversubscribed system, the fact a claim has been presented promptly means that evidence can be preserved if the hearing is not going to take place for some time. Personnel move on and can be difficult to trace. Employment Tribunal time limits are not aspirational, they are deadlines. A lack of legal knowledge does not excuse, particularly when a simple internet search will reveal the time limits within approximately three clicks. There are numerous, well-known sources of information, such as Acas, CAB, the GOV.UK website etc.

21. The claimant does not accept that on the face of it, her claims are out of time; she says they are in time. In any explanation for delay, she did refer to health issues, however, there was no independent medical evidence of this. There was therefore nothing persuasive provided by the claimant to persuade the Tribunal to exercise its discretion. There was nothing in the claimant's circumstances which warranted the Tribunal exercising its discretion to extend the time limit on a just and equitable basis.

22. There was no explanation for the delay as the claimant did not accept her claim was presented out of time. The claimant could have put her case in the alternative ('if however, my claim is deemed to be out of time…'). The delay is lengthy, when considering the primary time limit (10 months or in the alternative 12 months).

23. The delay has caused prejudice to the respondent in that it was not made aware of the claimant's allegations until a significant period of time has passed. There is on balance, greater prejudice to the respondent if it now has to defend claims which are significantly out of time. It is not just and equitable to extend the time limit.

24. The only claim therefore which was in time, was the claim of constructive unfair dismissal.

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Employment Judge Wright

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Date **14/2/2024**

REASONS SENT TO THE PARTIES ON
11/3/2024

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FOR THE TRIBUNAL OFFICE