EMPLOYMENT TRIBUNALS

Heard at: London South (by CVP) **On:** 19 April 2024

Claimant: Mr S Kidd

Respondents: (1) Wandle Housing Association, (3) Mr C Marcus

Before: Employment Judge Ramsden

Representation:

Claimant	In person
First Respondent	Ms L Redman, Counsel
Third Respondent	Non-attending

JUDGMENT ON A PRELIMINARY ISSUE

1. It is not just and equitable to extend time for submitting the Claimant's complaint of victimisation until 10 July 2023, so the Tribunal does not have jurisdiction to hear that complaint.
2. The Claimant's claim is accordingly dismissed, and the hearing listed to commence on **27 August 2024** is vacated.

REASONS

3. These written reasons are provided at the request of the Claimant following oral reasons given today.

Facts

4. These facts were agreed by the parties unless otherwise identified.
5. The Claimant is a carpenter and was engaged as a contractor by the First Respondent for the period 24 October 2022 until 9 or 10 March 2023 (the Respondents say that assignment ended on 9 March, the Claimant says on 10 March).

6. Prior to working for the First Respondent the Claimant worked for London & Quadrant Housing (**L&QH**), where the Third Respondent also worked as a supervisor. During his employment with L&QH the Claimant raised a grievance alleging race and age discrimination, and he named the Third Respondent as one of the perpetrators. He has since brought Employment Tribunal proceedings in relation to that matter, and the Third Respondent is a witness in those proceedings.

7. The Third Respondent began working for the First Respondent in January/February of 2023.

8. The Claimant's assignment with the First Respondent ended on 9 or 10 March 2023. The Claimant avers (and the Respondents dispute) that the Third Respondent negatively influenced the First Respondent and so brought about the termination of that engagement (the First and Third Respondents deny this).

9. The claim against the Second Respondent was withdrawn by the Claimant on 11 March 2024. A judgment dismissing that claim upon its withdrawal has been issued by the Tribunal today.

10. As regards the claim brought against the First and Third Respondents:

    a) The Claimant filed an ET1 Claim Form on 23 March 2023 (the **First ET1**), however the ACAS early conciliation certificate number he included in that First ET1 was not correct, and the Tribunal informed him of that the next day.

    b) Early conciliation between the Claimant and the First Respondent commenced on 27 March 2023 and concluded on 29 March 2023 (the **R1 EC Certificate**).

    c) On 25 April 2023 the Tribunal rejected the First ET1 because of incorrect ACAS early conciliation certificate numbers.

    d) On 9 May 2023 the Claimant applied for a reconsideration of the Tribunal's decision to reject the First ET1, supplying the R1 EC Certificate.

    e) On 24 May 2023 ACAS early conciliation began and ended between the Claimant and the Third Respondent.

    f) The Claimant telephoned the Tribunal on 3 July 2023 to enquire about the status of his application for the decision to reject the First ET1 to be reconsidered, and he was told he would have to submit another claim form.

    g) The Claimant did submit another ET1 Claim Form on 4 July 2023 (the **Second ET1**), but it contained incomplete ACAS early conciliation certificate numbers.

    h) The Claimant filed a third Claim Form on 10 July 2023 (the **Third ET1**). The claim set out in the Third ET1 is what commenced this case.

The matter which is to be determined in this hearing

11. In their Response to the Third ET1 the First and Third Respondents submitted that the Tribunal does not have jurisdiction to hear the Claimant's complaint in the Third ET1 because it was filed out of time. This hearing was listed to determine that question.

12. In addition, the First Respondent avers that the Third ET1 should be struck-out for having "no reasonable prospect of success" pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 on the basis that the First Respondent was not aware of any alleged protected act raised with the Claimant's former employer until receiving notice of this claim.

The hearing

13. The First Respondent was represented in the hearing by Ms Redman, and the Claimant represented himself. The Third Respondent did not attend.

14. A hearing bundle had been agreed by the Claimant and the First Respondent, running to 102 paginated pages.

15. The Claimant gave evidence in support of his case that his claim is "in time", and that it has reasonable prospects of success.

Law

<u>Time limits – victimisation discrimination under section 27 of the 2010 Act</u>

16. Claims of victimisation pursuant to section 27 of the 2010 Act are subject to a time limit stipulated in section 123(1) of that Act, namely that such a claim:

"*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."

17. The three month period in section 123(1)(a) – which might be referred to as the "primary lookback period" - is extended by the period of early conciliation pursuant to section 140B of the 2010 Act to facilitate early conciliation between the parties. In this case, where early conciliation started on 9 March and ended on 20 April, both of 2023, with the Claim Form filed on 22 May 2023, the effect of section 207B is to extend the primary lookback period to 12 January 2023.

18. Time limits for filing discrimination complaints are set by Parliament in the legislation, and the starting point is that those time limits should be observed. However, the Court of Appeal in *Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576, [2003] IRLR 434 made it clear that the Employment Tribunal has a wide discretion to extend time on just and equitable

grounds (as recently emphasised by HHJ Tayler in the EAT decision of *Jones v Secretary of State for Health & Social Care* [2024] EAT 2).

19. As observed by Leggatt LJ (as he then was) in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194:

"*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*".

20. As HHJ Auerbach noted in *Owen v Network Rail Infrastructure Limited* [2023] EAT 106:

"*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*".

21. In order to exercise its discretion to extend the primary time period on "*just and equitable*" grounds, the Tribunal must have material on which to properly exercise that discretion (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327). The onus is on the applicant to convince the Tribunal that it is just and equitable to extend time. However, this does not mean that it is only in exceptional circumstances that the applicant will succeed (*Pathan v South London Islamic Centre* EAT 0312/13).

22. There is no prescriptive list of factors specified in the legislation that should be considered by the Employment Tribunal in any given case. The matters of relevance to whether any additional the period, beyond the primary lookback period, is "*just and equitable*" for the claim to be brought will depend on the facts and circumstances of the case, but: "*factors which it is 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)*" (*Morgan*).

23. That "prejudice" could be:

    a) The general prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence; and /or

    b) The forensic prejudice that a respondent may suffer if the limitation period is extended by many months or years, which is caused by things such as fading memories, loss of documents, and losing touch with witnesses

    (*Miller and ors v Ministry of Justice and ors* EAT 0003/15).

24. If there is forensic prejudice, that will be "*crucially relevant*" in the exercise of the discretion, and may well be decisive (*Miller*).

25. Other factors may include:

a) The extent to which the other party has cooperated with any requests for information from the applicant;

b) The promptness with which the applicant acted once they knew of the facts giving rise to the cause of action; and

c) The steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action

(taken from section 33 of the Limitation Act 1980);

d) If the claimant is ignorant of their rights;

e) Whether the claimant felt able to complain about the incident to someone within the respondent organisation (an example of where this approach was taken is the Employment Tribunal case of *Keenan v Benugo Ltd* ET Case No.2203590/12);

f) The reaction the claimant received to raising the matter internally (*Burden v Chief Constable of Hampshire Constabulary* ET Case No.3100659/14);

g) The claimant's state of health (*Burden*), though this must be evidenced (*Thompson v Ark Schools* [2019] ICR 292); and

h) The strength of the claim (e.g., *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132).

26. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other (*Pathan*).

Strike-out

27. Rule 37 of the ET Rules provides:

"*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

28. The effect of a strike-out is to terminate the claim or the part of the claim. It is a draconian jurisdiction, and the relevant case authorities underlie its exceptional

nature. This is particularly so where the substantive case features allegations of unlawful discrimination, as it is "*a matter of high public interest*" that such cases are heard (as per Lord Steyn in *Anyanwu v South Bank Students' Union* [2001] IRLR 305).

29. If the Tribunal finds it has jurisdiction to hear the Claimant's claim (i.e., if it is "*just and equitable*" to extend the primary time period to include it), the First Respondent applies under Rule 37(1)(a), based on third category in that rule, for the Claimant's claim to be struck-out on the basis that it "*has no reasonable prospect of success*".

30. Plainly, on the wording of the Rule, the threshold for the First Respondent to persuade the Tribunal that the claim "*has no reasonable prospect of success*" is a high one – if there is a "*more than fanciful*" prospect of the Claimant succeeding in his claim, the First Respondent's application will fail (*A v B* [2011] ICR D9).

31. The cases of *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 and *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755 mean that it would be wrong to make a strike-out order where there is a dispute on the facts that needs to be determined at trial, save in exceptional circumstances.

32. As HHJ Eady put it in *Mbuisa v Cygnet Healthcare Ltd EAT 0119/18* at [20]: "*Such an exceptional case might arise where it is* ***instantly demonstrable that the central facts in the claim are untrue*** *or* ***there is no real substance in the factual assertions being made****, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see* Ukegheson v London Borough of Haringey *[2015] ICR 1285 at para 21 per Langstaff J at para 4*" (my emphasis).

33. Mr Justice Mitting summarised the law in *Mechkarov v Citibank NA* UKEAT/0041/16, [2016] ICR 1121 as follows at [14]:

"*(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.*"

34. A further example of this is the decision in *Romanowska v Aspirations Care Ltd* EAT 0015/14, where the EAT observed that "*where the reason for dismissal is the central dispute between the parties, it will be very rare indeed that that dispute can be resolved without hearing from the parties who actually made the decision*".

35. However, taking the claimant's case its highest does not mean that there is no burden on the claimant at this stage – Lord Justice Underhill in the Court of Appeal case of *Ahir v British Airways* [2017] EWCA Civ 1392 at [19] observed

that "*where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.*"

Application to the claims here

How out of time is the Claimant's claim?

36. The Claimant's claim against the First Respondent, in light of the date it was filed and the ACAS early conciliation period, was filed 29 days later than the final day in the primary limitation period.

Is it "just and equitable" for time to extend by 29 days?

37. The case law emphasises the importance of taking into account the reason for the late bringing of the claim. The Claimant has given five reasons for the delay in filing his claim:

    a) That he was waiting on the outcome of internal appeal in the First Respondent organisation against the decision to terminate his assignment;

    b) That he was a litigant-in-person, and was seeking support from external sources, and it took him more than a month to get legal aid;

    c) That he was overwhelmed with dealing with this claim and his ongoing litigation with L&QH;

    d) That the matters relating to this claim, together with the matters relating to his claim against L&QH, took a big toll on his mental health and livelihood, rendering him very stressed and closed; and

    e) That the Tribunal staff did not reply to his email of 9 May 2023 seeking reconsideration of the rejection of the First ET1.

38. As noted above, the onus is on the Claimant here to satisfy the Tribunal that it is "*just and equitable*" for time to be extended, and there need not be exceptional circumstances for the Claimant to succeed in doing that (*Pathan*), and nor does the Tribunal need to be satisfied that there was "*good reason*" for the delay (*Owen*).

39. As regards the first reason given by the Claimant why the Third ET1 was filed out of time – that he was waiting on the outcome of the internal appeal he lodged with the First Respondent concerning the decision to terminate his assignment – that internal appeal came to a conclusion, according to the Claimant's evidence, at the end of May 2023. The Claimant therefore still had a couple of weeks before the 11 June 2023 deadline for claim to be filed in time. In light of

the fact that the only thing he needed to do to the First ET1 was to correct the ACAS early conciliation certificate numbers, the fact that he awaited the outcome of his appeal does not mean that any extension would be just and equitable. The time remaining in the primary limitation period when he had the outcome of his appeal was sufficient, and so this does not weigh in favour of an exercise of the discretion to extend time.

40. The second reason given by the Claimant – that he was a litigant-in-person for part of the time period within which he had to file his claim – his evidence today was that he obtained legal assistance in the end of May. That still left around two weeks for him to file a Claim Form where the only change to the one he had already submitted in March would have been the addition of the correct ACAS early conciliation certificate numbers – that is not a task that would require either legal assistance or two weeks' time. This is not a matter which weighs in favour of exercising the discretion to extend time.

41. The third reason given by the Claimant – that he was overwhelmed by these proceedings running alongside his existing claim against L&QH – this in principle *could* make it just and equitable to extend time. Employment Tribunal proceedings can be extremely demanding, especially for litigants in person, and the Claimant was a litigant in person in relation to this matter for some of the limitation period. However, all he had to do here was to resubmit a claim form he had already filed in this matter with the correct ACAS EC certificate number(s). Given he would have had an appreciation of the significance of time limits given his prior claims and given his interaction with ACAS and the Tribunal in relation to the Respondents in this case, this factor does not weigh in favour of extending time.

42. The fourth reason given by the Claimant – that the matters relating to this claim, together with the matters relating to his claim against L&QH, took a big toll on his mental health and livelihood, rendering him very stressed and closed – again could be a reason which would weigh in favour of the exercise of the discretion to extend time – it could be just and equitable to do so on this basis. However, again, all the Claimant had to do here was resubmit the Claim Form he had submitted in March 2023 with the correct ACAS EC certificate number, and he had legal assistance to do that from the end of May. This is not therefore, on the facts of this case, a factor that weighs in favour of exercising the discretion.

43. The fifth reason given by the Claimant - that the Tribunal staff did not reply to his email of 9 May 2023 seeking reconsideration of the rejection of the First ET1 – it is the Claimant's responsibility to submit his Claim on time, not the Tribunal's. He was in receipt of legal advice from the end of May onwards, and according to the Claimant's own evidence, ACAS was also telling him to submit the Claim Form. The Claimant had no reason to wait for a response from the Tribunal, and indeed, he did not do so from July onwards. This does not weigh in favour of an exercise of the discretion to extend time.

44. Consequently, none of the reasons given by the Claimant for why he delayed in filing the Third ET1 weigh in favour of exercising the discretion to extend time.

45. However, that is not the answer to the question. As the case of *Owen* makes clear, the Claimant does not need to establish that there was a good reason for the delay – but in order for the discretion to exercised the Tribunal does need some material on which to exercise it (*Caston*).

46. The other factors which I consider relevant to the question of what justice and equity require in this situation are:

    a) *Any prejudice suffered by the First Respondent*. It became clear from further discussions with Ms Redman that that prejudice is confined to "memory fade", that in fact, the relevant personnel at the First Respondent who would be involved in resisting the Claimant's claim remain employed by the First Respondent. Given that the Claimant was only 29 days late in filing his Claim Form, I do not consider "memory fade" to weigh against the exercise of the discretion.

    b) *The steps taken by the Claimant to obtain appropriate advice*. The Claimant took some steps in this regard, and he obtained advice well-within the primary time limit for filing his claim. Consideration of this factor therefore is neutral as to whether it is just and equitable to extend time.

    c) *The strength of the claim*. While the First Respondent has argued that the strength of the claim is patently weak, I cannot agree. There is a genuine issue of factual dispute between the parties, and the strength of the Claimant's contention cannot be understood without evidence being heard. Equally, the Claimant's claim is not clearly meritorious either – it would rely on his being able to shift the burden of proof that he was victimised, and on the First Respondent being unable to discharge that burden. There is a very real possibility that the First Respondent could successfully resist this claim at either stage, and that the Claimant could succeed in both stages – it would all depend on the evidence. This factor therefore is neutral as to whether justice and equity means time should be extended.

47. Overall, therefore, the Claimant's reasons for the delay in filing do not provide me with material on which I can properly conclude that justice and equity mean that time should be extended. Consideration of the three other factors cited to me or which I consider to be relevant are also neutral. Therefore, as per *Caston*, I find that there is no basis for me to conclude that justice and equity require an extension of time. The Claimant was perfectly able to file his claim "in time", and did not do so, and the balance of prejudice, the steps taken by the Claimant to take appropriate advice, and the strength of the claim are not factors which, in my assessment, mean that it would be just and equitable to extend time.

48. Consequently, the Tribunal does not have jurisdiction to hear the Claimant's claim and it is therefore dismissed.

Strike-out

49. This means that it is not necessary for me to consider the First Respondent's strike-out application.

50. However, if it had fallen to me to consider this, I would not have struck the Claimant's claim out on that basis. There is a core issue of fact in dispute here - namely the reason why the Claimant's engagement by the First Respondent was terminated (the Claimant says it was because of the Third Respondent bad-mouthing him to the First Respondent, the First Respondent denies this). The Claimant's contention is plausible, and there has been no evidence cited by the First or Third Respondent that would show this to be untrue. His prospect of succeeding in this claim is "*more than fanciful*" (*A v B*). This is properly a matter for determination at a hearing where evidence going to that core factual dispute can be heard and examined, and is not appropriate for strike-out (*Reilly*, *Mbuisa*, *Mechkarov* cases are examples of authorities for this proposition). The First Respondent's contention that the Claimant's claim has "no reasonable prospect of success" is not accepted by the Tribunal, and its application for strike-out would be basis is refused.

Conclusions

51. The Tribunal does not have jurisdiction to hear the Claimant's claim, and it is accordingly dismissed.

Employment Judge Ramsden
Date **19 April 2024**

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 April 2024

FOR THE TRIBUNAL OFFICE

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