Case Number: 1804904/2023

EMPLOYMENT TRIBUNALS

Claimant			**Respondent**
Mr Stephen Cheetham	v	(1)	Sheffield City Council
		(2)	Unite the Union

Heard at: Sheffield (by video link – Kinly Cloud) **On**: Wednesday 27 March 2024

Before: Employment Judge James

Representation

For the Claimant: Mr J Ashford, lay representative

For the First Respondent: Mr L Williams, solicitor

For the second Respondent: Ms van den Berg, counsel

JUDGMENT

(1) The claims against both respondents were not submitted in time (s.123 Equality Act 2010). The tribunal does not therefore have jurisdiction to deal with them and they are dismissed.

REASONS

The issues

1. The agreed issue which the tribunal had to determine is whether the claims were submitted within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

   1.1. Was Acas Early Conciliation commenced within three months of the act to which the complaint relates?

   1.2. If applicable, was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.3. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.3.1. Why were the complaints not made to the Tribunal/Acas Early Conciliation commenced within three months?

1.3.2. In any event, is it just and equitable in all the circumstances to extend time?

The proceedings

2. Acas Early Conciliation took place between 22 June and 3 August 2023. The claim form was issued on 21 August 2023. The claimant makes claims for unfair dismissal and disability discrimination. It is common ground that given the date that Acas Early Conciliation was commenced, anything that occurred before 23 March 2023 is potentially out of time.

3. A preliminary hearing for case management purposes took place on 5 February 2024. The issues were identified. This hearing was arranged to consider the question of time limits. Related case management orders were made.

4. Amongst the orders, was a direction to the claimant and Mr Ashford to send any witness statements from either of them, in relation to the time limit issue that they wanted to rely on at this hearing; and to confirm by 19 February 2024 whether there was any application to amend the claim. It was confirmed in an email sent on that date that the claimant did not intend to proceed with an application to amend his claim.

5. The order regarding witness evidence states:

> *If Mr Cheetham and Mr Ashford want to give evidence at the next hearing about why the claims were not presented to the Tribunal sooner, they should prepare written witness statements. Mr Ashford can help Mr Cheetham prepare a statement but the statement must contain Mr Cheetham's evidence, in his own words. If they do prepare witness statements, they must send them to the Council and the Union no later than 14 days before the preliminary hearing.*

In the event, a witness statement was provided by Mr Cheetham.

6. The legal and factual issues arising from the claim form which were identified by Employment Judge Davies at the last hearing, against the first respondent, can be summarised as follows: alleged failures to make reasonable adjustments between June and December 2022; claims of direct discrimination and/or unfavourable treatment contrary to section 15 Equality Act 2010 in early June 2022; and an act of victimisation on 13 June 2022.

7. In relation to the second respondent, the claim is for an alleged failure to make reasonable adjustments between June and August 2022, and claims of direct, alternatively section 15 unfavourable treatment, in relation to an incident in June 2022.

The hearing

8. The hearing took place over a day. There was an agreed hearing bundle of 170 pages and an authorities bundle containing five legal cases were submitted for the tribunal to consider.

9. Live evidence was heard from the claimant and he presented a witness statement. The respondent's representatives asked questions of the claimant, and Mr Ashford then asked him a series of questions ('re-examination'). The respondent's representatives then made their submissions, followed by Mr Ashford. A brief reply was made by Mr Williams. The tribunal then adjourned to make a decision. Judgment was delivered orally at the conclusion of the hearing. Written reasons were requested by Mr Ashford at the conclusion of the hearing.

10. Proposed adjustments were set out in the report of Lead Clinical Psychologist Dr Suzanne Beart. They are set out below and all were implemented during the hearing, which took place by video link as suggested. The claimant was able to answer questions clearly and articulately. Regular breaks were provided.

    10.1. Asking questions in a clear way that avoids abstract language. E.g. "Tell me why you feel you were not treated fairly/what felt unfair?" as opposed to "Why have you brought this litigation".

    10.2. SC needs some processing time. So, after asking a question, pause and give him the few seconds he needs to answer. Be prepared to re-phrase the question if needed.

    10.3. SC can become caught up in the detail of his answers. He may need gentle re-direction to the original question.

    10.4. SC can feel "het up" - the process of being questioned is understandably stressful. SC says John recognises the early signs of this. If SC can be allowed to have a minute to calm, then he will find it easier to answer questions. Anxiety impacts on executive functioning and therefore on attention and processing speed.

    10.5. It would help if SC can take regular breaks just so he does not feel overwhelmed by all the visual and verbal stimulation he will be experiencing. It will give him time to process.

    10.6. If possible, SC would find using a video link less stressful than face to face questioning.

Findings of fact

11. The claimant started work for the respondent in March 1999. He was employed in the role of Kitchen Unit Assembly Technician. His employment ended on 31 March 2023 as a result of him taking voluntary redundancy. There is no complaint arising from the termination of employment.

12. The claimant joined the second respondent trade union on 1 September 2017.

13. On 14 March 2022, Mr Ashford, who is the claimant's cousin, emailed Mr Glen Houghton. He says in the email:

    I have spoken to my employment specialist this afternoon and they have advised that due to Stephen's learning issues and difficulties in recounting what is actually said in any meetings that my request to have Stephen represented at all meetings should be considered as a reasonable adjustment.

14. In an email sent on 16 June 2022 to Mr Houghton, Mr Ashford states:

I shall seek legal advice as what permissions you legally require for me to continue to pursue Stephen's best interests and I will now also consider what implications, if any, should follow for your breach of data protection rules in the past.

15. In an email dated 9 August 2022 from Mr Ashford to Joanne Smeaton, of Unite the Union and other union officials, Mr Ashford asserts:

I have to say I have been totally surprised and disgusted by the complete lack of interest your union has showed in trying to help my cousin with learning difficulties with his employers. I was under the impression that was the whole reason for your existence. How wrong could I be.

I have now succeeded in getting him back to work on light duties through my own efforts and now resent the thought of him paying any more money to Unite who didn't lift a finger to help him. He would be better offer saving the money to engage a legal employment specialist in future if needs be so after a discussion with him that's what he will do.

I have therefore asked the council payroll department to stop his Union subscription and would ask that you cancel his membership from your end also.

16. Since that request came from a third party, on 11 August 2022 a letter was sent to the claimant by Unite, asking the claimant to confirm that he would like to cancel his membership. A slip was attached for the claimant to complete and return, if that was his intention. The claimant signed and returned the slip and the claimant's membership of Unite ended on 18 August 2022.

17. In an email sent on 15 December 2022 by Mr Ashford to Mark Freeth, Head of Repairs and Maintenance for the Council, Mr Ashford says:

I've just spent the morning talking to ACAS, the Information Commissioner's Office and the Equality Advisory and Support Service regarding Stephen, his learning difficulties and his need for representation and oversight in his final few months …before he finishes his employment'.

18. In an email sent by Mr Ashford to Mark Freeth on 16 December 2022, he says:

I see. That's the way you want to play it. In that case I read this as the council failing to accept mine and Stephen's informal request, yet again, to make reasonable adjustments to accommodate Stephen's learning difficulties. It will now be made formal.

19. Mr Ashford also sent an email to the Council's Chief Executive on 21 December 2022 in which he says:

I would like your views on this matter as the last appeal to reason before making the decision whether to launch a formal grievance procedure and possible discrimination case against the Council.

If I get no response from you, or your colleagues, within 7 days I will assume you too are refusing to engage with me and act accordingly.

20. In an email sent by Mr Ashford to Tom Smith, Director of Direct Services, on 23 December 2022 he states:

I anticipated your intransigence and have taken legal advice from several sources. After exhausting attempts to resolve this matter amicably I will now therefore proceed with a formal grievance procedure and a formal complaint of discrimination. My legal advisors think the emails I have together with failure to comply with reasonable adjustment requests and Stephen's medical reports make a very strong case.

All the cost, effort and wasted scarce resources that will be required at your end to deal with this matter seems totally disproportionate to comply with a simple request to be provided with a copy of information freely given to Stephen - the bulk of which will get to me one way or another. I can't … foresee Stephen co operating with any other advocate but you will discover this in due course. The case will cost me nothing but my time which I have in abundance.

Merry Christmas.

21. On 23 December 2022, in an email to Dawn Froggatt, Social Worker, Mr Ashford says he will '*delay initiating any proceedings as you requested until the New Year'*. It appears to be common ground between the parties that the reason for the suggested delay by Ms Froggatt was a concern for the claimant's well-being, which Ms Froggatt thought might be adversely affected by the stress of legal proceedings.

22. Mr Ashford subsequently sent an email on 9 January 2023 to Ms Froggatt, stating:

I suggest that if I have not had a response by Friday that I just proceed with the above and let an independent body decide on whether they have been reasonable or not. I'm convinced I have the documentation to show his employers have broken both the spirit and the wording of their own procedures as well as falling foul of the discrimination laws.

Relevant law

23. The relevant parts of section 123 EA 2010 provide:

(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.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

24. Therefore, where a claim is presented outside the primary limitation period, i.e. the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable.

25. In *British Coal Corporation v Keeble 1997 IRLR 336* the EAT said that the discretion to extend time requires the tribunal to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to:

- *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 party sued had cooperated with any requests for information;*
- *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
- *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*

Subsequent cases have emphasised however that these factors do not have to be applied in each and every case – see *Abertawe* and *Adedeji* below.

26. The fact that a respondent will not suffer prejudice obtaining or preserving relevant evidence, does not mean that it is just and equitable to extend time. It is merely a factor to consider – see *Harvey, PI.1.G(3)(e)(iii).*

27. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. The onus is on a claimant to show to the tribunal that his is a case in which the time limit should, be disapplied - see *Robertson v Bexley Community Centre [2003] IRLR 434*, at para 25:

> *It 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.*

28. This case is often quoted by those arguing against time being extended. Noting that practice, HHJ Judge Tayler stated in *Jones v Secretary of State for Health and Social Care [2023] EAT*:

> *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 …
>
> 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 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 by HHJ Tayler]

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.
>
> 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 by HHJ Tayler]

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.
>
> 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.
>
> 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).

29. In *Polystar Plastics Limited v Liepa [2023] EAT 100*, HHJ Eady held at paragraph 44:

> *44. To the extent that the ET's reasoning demonstrates any attempt to weigh the reasonableness of the claimant's belief prior to 12 May 2022, it is unhelpfully couched in terms of what the respondent was not able to disprove ("His understanding … has not been disproved …" ET, paragraph 36; "I do not find that it has been proven on the balance of probability that the Claimant has acted unreasonably …" ET, paragraph 54 a.). As it was the claimant's case that he held a reasonable belief that the respondent had already contacted ACAS, it was for him to establish that matter; although there is no formal burden of proof in assessing questions of justice and equity under section 123(1) EqA (per HHJ Shanks in Morgan,*

supra), it is for a party asserting a positive case to establish the matter in issue (Robins); it was an error for the ET to suggest that the respondent bore a burden of proof (to the civil standard) to disprove the claimant's case in this regard.

30. In *Leeds and Yorkshire Housing Association Limited v Fothergill [2021] UKEAT/0211/20*, the Honourable Mrs Justice Ellenbogen held:

> *31. Notwithstanding the Tribunal's references to its need to be satisfied of both the fact of the Claimant's ignorance of his legal rights and the reasonableness of that ignorance, nowhere in the Judgment is the latter issue addressed. Furthermore, that lacuna has not been filled by the response provide to the Barklem Order, in which connection Ms Moss is right to emphasise the absence of the evidence for which that order had called. Whilst the grounds of appeal as amended do not challenge the finding of genuine ignorance, per se, the reasonableness of that ignorance had to be addressed throughout the substantial period in question. As Ms Moss contended, properly analysed it might well be that ignorance which was reasonable at one stage ceased to be reasonable as time progressed and circumstances changed. There is simply no analysis of that issue by the Tribunal, and, moreover, an express and unexplained statement (Judgment, paragraph 5.2) that it was not concerned with the period running from 3 May to 27 June 2019.*
>
> *32. On the evidence recorded by the Tribunal, the following questions, at least, arose:*
>
> > *(1) Given that the Claimant had had some knowledge of discrimination laws in this country, why had he not made enquiries; undertaken any research; and/or sought advice, at least from February 2018 onwards?*
> >
> > *(2) As part of the above question, following his conversation in early to mid-May 2019 with a friend who had had experience of employment discrimination, and subsequent internet searches, why had he not sought legal advice until June 2019, or presented his claim until 27 June 2019?*

31. The Court of Appeal, in *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*, 15 January 2021, commented that a rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad discretion. Instead, LJ Underhill suggests:

> *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 (as Holland J notes) "the length of, and the reasons for, the delay".*

Other factors usually relevant are prejudice and the potential merits.

Conclusions

32. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above.

Length of and reasons for the delay

33. Noting the advice in *Adedeji*, not to apply the *Keeble* factors in a mechanistic way, I consider that the most relevant factors in this case are the length of and reason for the delay, the promptness with which the claimant/Mr Ashford acted once they knew of the facts giving rise to a possible claim, and the steps taken to obtain appropriate professional advice once the claimant/Mr Ashford knew of the possibility of taking legal action.

34. The length of the delay, over and above the usual three month time limit, in relation to the first respondent, is approximately three months. The last act complained of dates from December 2022, about six months before Acas early conciliation was commenced. The length of delay in relation to the second respondent, over and above the usual three month time limit is seven months, the last act dating from August 2022.

35. The reason given the for delay is ignorance of time limits. I note in passing that reference has been made in the submissions of Mr Ashford to the claimant 'keeping his head down' during the last few months of his employment. That was not however the claimant's evidence before this Tribunal. There was, in any event, nothing to stop the claimant commencing the Acas Early Conciliation process after his employment ended at the end of March - but it was not commenced until late June. That delay cannot be explained by the suggestion (not backed up by evidence) that the claimant was just 'keeping his head down'. Hence in this decision, I have concentrated on the question of whether or not ignorance was a valid excuse in the circumstances of this case.

36. Were this a case where the claimant were representing himself, and did not have access to any advice or support, the situation may well have been very different. That is not however this case. On the contrary, Mr Ashford has acted in a representative capacity in relation to the claimant since at least March 2022.

37. Mr Ashford has asserted that he was not advised at any stage of the relevant time limit. The tribunal notes that although specific reference was made to both the claimant and Mr Ashford potentially giving witness evidence in the order of Employment Judge Davies (see The Proceedings section above), the only witness evidence before the tribunal is from the claimant.

38. The tribunal therefore cannot be satisfied what Mr Ashford did or did not know about time limits, prior to Acas Early Conciliation being formally commenced. It is not enough for ongoing ignorance to simply be asserted. The tribunal is not convinced, on the balance of probabilities, that given the number of organisations/individuals that were approached by Mr Ashford for advice, according to the emails quoted above, at no stage were time limits mentioned, bearing in mind that time limits in Employment Tribunal claims are relatively strict; generally, only three months from the date of the act complained of.

39. The opportunities were there for Mr Ashford to take advice from a friend of a friend with employment law knowledge, from Acas, or from the Equality and Advisory Service, amongst others. This advice could have been taken at any time from March 2022, when knowledge of the duty to make reasonable adjustments was first mentioned. In any event, the threat of legal

proceedings was clearly in Mr Ashford's mind by December 2022, when he makes reference to a possible discrimination case.

40. Mr Ashford also asserted in an email to the Council in December that he had 'an abundance of time'. He was not working at that stage. Even if Mr Ashford was ignorant of time limits, all it would have taken was one telephone call to one of the organisations mentioned (or others such as the CAB), and for the question to be asked about the time limits applicable to Employment Tribunal claims.

41. Further, Mr Ashford is clearly an articulate, intelligent man, who is computer literate. Again, one simple internet search on Employment Tribunal time limits would have been all that was required to alert Mr Ashford and hence the clamant, to the time limits applying to such claims.

42. Mr Ashford also asserts on the claimant's behalf that the respondents failed to advise the claimant of time limits. As for the first respondent, there is no duty on an employer to advise one of its workers about relevant time limits. As for the second respondent, whilst it would be expected that if employment tribunal claims were being considered, members of trade unions would be advised about time limits, there is simply no evidence before the employment tribunal as to what claims were considered at the relevant time, if any. In any event, the claimant's membership with the union ceased in August 2022. Yet further, at no time prior to Acas early conciliation being commenced, were any claims asserted against the second respondent by the claimant or Mr Ashford. Even if they had been, there would be no duty on the second respondent to advise the claimant about the time limits applying to a claim against the trade union.

43. In deciding to refuse to exercise my discretion to extend time on a just and equitable basis, I consider the most important factor to consider in this case is the length of and reason for the delay. Given the significant extent to which the claims are out of time, and the failure to provide a reasonable explanation in relation to that, I have concluded, subject to any other relevant factors, that it would not be just and equitable to extend time.

Other factors

44. Although the issue of cogency of evidence (and therefore, prejudice) has been mentioned, it is noted in relation to the first respondent that Mr Freeth has not yet retired so there is the possibility of taking witness evidence from him before he does, and ensuring that the Council has contact details for him following termination of his employment. Regardless of this issue however, I still conclude that it is not just and equitable to extend the usual three months time limit in this case.

45. Prejudice is more of a material factor in relation to Unite the Union, given that Mr Pearce has been on long-term absence since well before the claim was commenced. The factor of prejudice only reinforces my initial decision regarding the second respondent.

46. As for the potential merits of the claim, there was little detail before the tribunal in relation to the merits, save that, as already noted above, no claim was intimated against the second respondent, until Acas Early conciliation was commenced. This factor is not therefore significant in relation to the first

respondent; and again, only reinforces my initial conclusion in relation to the second respondent.

47. For all of these reasons, the discrimination/victimisation claims have not been submitted in time, and therefore the tribunal does not have jurisdiction to deal with them. The claims are therefore dismissed.

Employment Judge James
North East Region

Dated 12 April 2024