Case No: 2200693/2023

EMPLOYMENT TRIBUNALS

Claimant	**and**	**Respondent**
M (anonymity order)		The Walt Disney Company Limited

PRELIMINARY HEARING – WRITTEN REASONS

Background

1. This hearing, which took place on 29 November 2023, followed a case management hearing before Employment Judge Plowright on 13 July 2023 when he ordered a public preliminary hearing (PH) on jurisdictional issues raised by the Respondent, specifically the question of whether time should be extended so that the Tribunal has the power to hear the claim.

2. Judge Plowright made a direction at that time for the Claimant, or rather her representative (her litigation friend and mother, referred to in this decision as MB) to comply with. There was a deadline of 28 October 2023, although I gather time was later extended for compliance. The direction was for MB to prepare a witness statement explaining why the claim form was not submitted until 25 January 2023, along with any supporting documentation. It was supposed to set out the relevant events in chronological order with dates and contain all the evidence which she wanted to give. It was to contain only evidence relevant to the preliminary issues and was to be signed and dated. The Respondent was then to produce a bundle.

3. Suffice to say that by the date of the PH, a witness statement had been produced, as had a bundle, and I had them both in front of me. I also had the Respondent's written submissions prepared by Mr Sellwood in support of the application to strike out the claim because (it is argued)) the tribunal lacks jurisdiction.

4. In the intervening period, MB had also made an application to add other complaints, a total of nine further allegations that had not been part of the original claim. At the PH, therefore, I explained that the first thing that would need to be done would be to decide whether the claim could proceed at all by reference to the time point and if it could, then to discuss with the parties the position on the amendment application and finally, if all or any part of the claim proceeded, to list it for a full hearing and to make directions to progress to that point.

Issue at the PH

5. The parties agree that the claim was brought out of time. The events with which we are concerned are said to have taken place while the Claimant was engaged by the Respondent. That engagement was between 23 June and 19 November 2021. The Claimant was 11 years old when her engagement with the Respondent ended. ACAS Early Conciliation ("EC") was entered between 7 January and 11 February 2022. The claim form was received by the Employment Tribunal on 25 January 2023.

6. It was agreed that the period with which we are concerned was between the last date for submission within the time limit – at the PH, taken as 28 March 2022 - and the date on which it was submitted, 25 January 2023.

PH and events thereafter

7. We heard evidence from MB. The witness statement had not addressed the time point as fully as it could have done and so by agreement with both parties, I first asked MB some questions about the timing and reasons why the claim was presented out of time and then she was briefly cross-examined by Mr Sellwood. We took a break, following which we had representations from Mr Sellwood and from MB on behalf of the Claimant.

8. I gave oral judgment on the day of the PH and a written judgment was sent to the parties later that day. On 1 May 2024, I was informed for the first time that the Claimant had appealed the decision and that written reasons had been requested. I asked the Tribunal administration to apologise for and advise the EAT and the parties of the delay in notifying me of the appeal and of the request. Regrettably, I was not able to produce these reasons for ten further days due to other professional commitments.

9. On revisiting the claim to produce these reasons however, I noted that the last date for lodging the claim was not 28 March 2022 but Friday 25 March 2022. In his written submissions Mr Sellwood had accurately set out the chronology of the matter and that the time spent in EC meant that the deadline was extended by 35 days. However, it appears that he then counted 35 days from 21 February 2022 rather than 35 days from the date the primary time limit expired i.e. 18 February 2022. This makes no material difference to the outcome of the PH though it is relevant to MB's actions on 28 March 2022 since by then the claim was already out of time.

Explanation for the delay

10. The explanation for the delay in the claim form was that MB could not submit the form online in March 2022 due to the system not accepting claimants under the age of 18. Before Judge Plowright the same explanation was given. He has recorded that MB said she was unable to submit the claim form owing to the Claimant's age. She kept trying, and then one day, in January 2023, it worked.

11. MB essentially repeated this information in two paragraphs of her witness statement, the remainder of the 14 pages being taken up with the application to amend. MB said she was unable to input her daughter's date of birth on the online claim form and progress it, due to the Claimant being under 18. As soon as she realised the GOV.UK website would accept this

information she rushed to submit the claim form. It was done with very limited information and as a matter of urgency.

12. A little more detail was given by MB in her oral evidence. She said she knew there was a time limit with ACAS and for bringing a claim in the Employment Tribunal. She had googled all the information she needed and all the time limits were on the ACAS website. She knew that there was a three-month time limit and that there was an extension through ACAS.

13. MB said that she initially started a claim on 17 March 2022. A claim submitted that day would have been in time. Notwithstanding date of birth is not a required field, MB said the online platform would not allow her to proceed without giving the Claimant's date of birth. There is an email in the bundle dated 17 March which confirms that the claim was begun. There is nothing else in the bundle before the deadline for submitting the claim.

14. The next chronological piece of evidence is an email of 28 March 2022 from MB to London Central Employment Tribunal saying that because the Claimant is under 16, the form would not accept her date of birth. MB said in the email that she had contacted law offices, spoken with advisers from ACAS and also spoken to Tribunal offices "on numerous occasions" and no one could point her in the right direction. Within one minute of sending her email, MB received an automated response from the Tribunal confirming receipt.

15. Again in her oral evidence, MB said she had tried "probably five or six times" to submit the claim and that she had called the conciliator at ACAS. He told her that it was not for him to offer advice and that he could not do so. MB said she also rang the Tribunal and they said they had no idea why the claim form would not be accepted. She then said that the information they gave her was that the postal form would be "processed in the same way as the online form".

16. I explored this evidence further. MB then said she was told by the Contact Centre that the postal form would be processed in the exact same way as the online form and that if there was an issue when it was processed online it would be similarly flagged if she sent it in by post and therefore it would not go through. She said that this was what she was told on 17 March.

17. While there is supporting evidence in the bundle for communications between MB and the Contact Centre on 28 March there is none for 17 March 2022. The evidence shows that at 14.17 on 28 March 2022, MB started a second claim on behalf of the Claimant. MB said this met with the same result as the first claim. An email from the Contact Centre timed at 14.23 thanks MB for her call and says, "As requested, please find the link below". However, MB says this was the same link that she had already tried without success to use.

18. At that point, MB says, she gave up. "Every so often" she would go online and try to submit the claim form again and it did not work. However on 25 January 2023 (MB speculates as a result of an IT system update), it went through.

19. MB said that she had printed the form off and filled it in but did not bother sending it because she believed that it would be processed in the same way in person and so it would be pointless and a waste of time to do so. She thought it would get to the Tribunal to be processed and not be accepted. She did not consider the detail of whether "date of birth" was a required field. She had not noticed that at the very top of page one, before the questions start, it says "You must complete all questions marked with an "*"" or that "Date of birth" is not so marked.

20. In answer to my further questions, MB said that she was not sure if there is Equity (the actor's union) for young actors but even if there is, the Claimant is not a member. MB said she had contacted "a few firms of solicitors" but nobody had got back to her until "a few months down the line". She confirmed that this was after the deadline but before the platform accepted the claim online. She said that the lawyers were similarly unsure what to do and did not offer her any advice about sending the form in by post.

21. In cross-examination, MB conceded that she had not mentioned until the PH anything about using a postal form or the advice that she says she was given by the Employment Tribunal Contact Centre or contacting lawyers. She agreed there are no further emails between her and the Employment Tribunal or ACAS in the relevant 10-month period and that the only action that she had taken other than occasionally phoning ACAS and the Employment Tribunal in that 10-month period was occasionally to login and try to send the claim.

<u>Law - Time Limits</u>

22. S.123 Equality Act 2010 ("EqA") requires discrimination claims to be lodged with the Tribunal (in practical terms, for a prospective claimant to enter EC) within "the period of three months starting with the date of the act to which the complaint relates" or, where there has been continuing discriminatory conduct, within three months of that conduct ceasing. That three-month period is sometimes known as the "primary time limit".

23. If time has expired by the date a claim is lodged, it may be extended pursuant to s.123(2)(b) EqA on the grounds that the Tribunal thinks it "just and equitable" to do so. Authorities confirm that there is no presumption that a Tribunal should extend time; the onus is on claimants to convince the Tribunal that it would be just and equitable to do so - described as a burden of "persuasion" rather than a burden of proof or evidence as such (*Abertawe Bro Morgannwg University Local Health Board v Morgan*).

24. There is also no principle of law dictating how generously or sparingly the discretion should be exercised. However, in *Morgan*, it was noted that a litigant can hardly hope to satisfy the burden unless they provide an answer to two questions: why the primary time-limit has not been met and, insofar as it is distinct, the reason why after the expiry of the primary time-limit, the claim was not brought sooner than it was. In other words, the Tribunal should try to identify the cause of the Claimant's failure to bring a claim in time. It is entitled to consider any material before it which will enable it to form a proper conclusion, including an explanation for the failure, and such

material may include statements in pleadings or correspondence, medical records or certificates or inferences to be drawn from undisputed facts or contemporary documents.

25. It is also often suggested that the Tribunal should consider the factors under section 33 Limitation Act 1980, as confirmed in the case of *British Coal Corporation v Keeble and others*. It has been held that these factors form a useful checklist although there is no legal requirement for the Tribunal to go through the list in each case, save that no significant factor should be left out of account. These factors are:

    a) the length of and reasons for the delay;
    b) the extent to which the cogency of the evidence is likely to be affected by the delay;
    c) the extent to which the party sued had cooperated with any requests for information;
    d) the promptness with which the Claimant acted once they knew of the facts giving rise to the cause of action and
    e) the steps taken by the Claimant to obtain professional advice once they knew of the possibility of taking action.

26. The Respondent accepts that the test for discrimination is not as strict as the "not reasonably practicable" test but submits that nonetheless it is a statutory test and is the exception rather than the rule. Mr Sellwood observed that the period by which the Tribunal is being asked to extend time in this case is more than three times the length of the original time-limit.

27. For claims of unfair dismissal, the time limit is the same but the test for extending time is different. Ss.111(2)(a) Employment Rights Act 1996 requires the claim to be brought "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". The onus of proving the presentation in time was not reasonably practicable again rests on the Claimant.

<u>Findings</u>

28. I explained to the parties that I have some experience myself when acting as a representative of trying to fill in the forms online, both for lodging a claim and presenting a response. I am aware that if the platform is set up so that a date is required, a would-be litigant cannot proceed without supplying that date. For example, when submitting an online response, if a respondent disagrees with one of the dates of the claimant's employment, but agrees with the other, it must nonetheless complete both on form ET3. This can inevitably cause difficulties, for example in a discrimination claim where the respondent disagrees with the start date given by a claimant who remains employed. Although there is no "end date" in such a case, one must be given, otherwise the representative for the respondent cannot move on to the next section of the form.

29. I have no reason to doubt MB's evidence that in March 2022, the online

platform was set up so that the Claimant's date of birth was a required field when completing form ET1. This is despite the fact that it is not marked with an asterisk, which is used to denote the compulsory fields such as name and address. Thus, whether it is required by the rules or not (and it is not) if the platform was set up in a particular way, the claim could not have been submitted online without completing it.

30. Similarly, there is no restriction on a person under a certain age submitting a claim as EJ Plowright noted in his case management summary. I have also heard claims from young people that have clearly been accepted by the system; but if the platform has at some stage been configured to reject dates of birth that fall after a certain date, I accept that it would be impossible to submit the form online.

31. That said, online submission is not the only way of lodging a Tribunal claim. It is clear that MB was aware of this and indeed her evidence was that she went as far as printing off and filling in the form, though she did not send it. On that form, the date of birth could have been completed by hand, or it could have been left blank since it is not a compulsory field.

32. I accept MB's evidence that she contacted the Contact Centre. I find on balance of probabilities based on the evidence before me that she did so not on 17 March but on 28 March 2022[1] and I accept that she was told that the claim would be "processed" in exactly the same way if she sent the claim form in by post as if she did it by using the online platform.

33. What MB was told is correct in that the claim would have been "processed", i.e. vetted and accepted, if the claim had been submitted in time. If it had been submitted out of time, it would still have been vetted and accepted for administrative purposes only, which is what eventually happened in this case. I find it likely that the Contact Centre was seeking to reassure MB that she could send the claim in by post and it would be dealt with in exactly the same way as if she had submitted it online.

34. The claim would not have been rejected just because there was no date of birth for the Claimant in the relevant section or because the Claimant was under 16, and I do not accept that the Contact Centre said that it would, whether specifically or inferentially. It seemed to me that this was a gloss that MB was putting on a conversation which had taken place just over 18 months earlier.

35. It does not make sense that MB would make repeated attempts over the ensuing ten months to submit the form online, knowing that the Claimant was not barred from bringing a claim and believing that the online system was faulty, but not to send in a paper claim instead. There is no supporting evidence for her belated assertion that she did try to make such attempts. In the circumstances, I find that she did not try again until 25 January 2023.

36. Using MB's logic, the worst that could have happened if she had posted the form would have been that it would also have been rejected; but in such

[1] By which date, calculated correctly, the deadline for submitting the claim had passed

circumstances, she would certainly have been in no worse a position than not having submitted it at all and indeed she would have been able to show that she had lodged the claim in time (or shortly thereafter). I can see no reason why MB would have printed the form and filled it in, as she said she did, if she believed it was pointless to do so. I find that having printed the form off and completed it, she then failed to post it. No satisfactory explanation has been given for that failure. I find it was reasonably practicable for her to post it before the deadline expired or shortly thereafter.

37. As Mr Sellwood observed, there is also no evidence of MB making any further contact after 28 March 2022 with someone who might have been able to help her such as a lawyer, Citizens Advice or ACAS, the Employment Tribunal itself or the Contact Centre again. There is only the inadequately explained gap of ten months before the claim was received online.

Conclusions

38. As I have found, the Claimant was prevented by the system from submitting her claim online on Thursday 17 March 2022, but she could reasonably be expected to have posted it that day or in the following seven days, at the latest (by guaranteed next-day delivery) by 24 March 2022, and it would have been received in time. It was therefore reasonably practicable for the Claimant to file her claim within the time limit and accordingly the unfair dismissal and breach of contract claims cannot proceed because the Tribunal does not have jurisdiction to hear them.

39. So far as the discrimination claims are concerned, I apply the *British Coal* factors as a starting point. Despite being given the opportunity to give a full account of the delay, all MB said in terms was that she was unable to submit the form online in March 2022 but inexplicably able to do so in January 2023. There has been no evidence about the intervening period, other than what was said in oral evidence at the PH.

40. I have rejected MB's assertion that she was told it would be "no different" and that the claim would still be rejected if she posted the form. That does not give any plausible explanation for the delay. Had she posted the form on 17 March, it would have been received in time. Even if she had posted it on 28 March, the length of delay would have been minimal – likely some four or five days. The Tribunal might well have been persuaded to exercise its just and equitable discretion for such a delay.

41. On this central aspect however, it is impossible to refute Mr Sellwood's observation, and in fairness MB did not try to do so, that had the claim not been accepted on 25 January 2023, presumably MB would argue that discretion should be exercised to allow her to continue trying to submit it until it was. That would give her a potentially open-ended period that could last years. As it is, the delay was already very long, at ten months and there is no good reason for it. The evidence does not support reasonable – or any – efforts being made to lodge the claim between 28 March 2022 (when it was already out of time) and 25 January 2023. That is a factor to which I give considerable weight.

42. Turning to the cogency of the evidence, the events in this case are said to have occurred between June and November 2021. By the time the case came to trial, the period since the events complained of would be at least three years, if not more. It seems highly likely that the memories of those involved – not least the Claimant herself - will have dimmed in that time. Relevant witnesses would have had no reason to preserve evidence or to commit facts to memory. This factor also weighs against the Claimant.

43. The question of cooperation by the party to be sued also does not weigh in the Claimant's favour. I do not take it to be irrelevant but it is a potential source of assistance that is not available to the Claimant in this case because on the face of it, the Respondent had no responsibility for the delay in lodging the claim.

44. Finally, in consideration of the balance of prejudice, if the extension is not granted, the Claimant will lose the possibility of a claim against the Respondent. If the claim would have succeeded, she has lost a potential remedy. If it would have failed, she has lost nothing. The Respondent benefits if the extension is not granted in being relieved of the defence of a potentially difficult and complex claim. If the extension is granted it may have lost a case where it would be found liable, or it might successfully defend the case but nonetheless incur management and legal costs. I have formed no view of the merits and it is not necessary to do so in relation to the discrimination claims before the Tribunal on the material presently available. I find the balance of prejudice is a neutral factor here.

45. Weighing all the factors together, I conclude that it would not be just and equitable for time to be extended by ten months to consider the discrimination claims and they are therefore struck out.

46. In the circumstances I do not go on to consider whether to make the amendment since the claim was already substantially out of time and the new allegations even more so. There is no prospect of the Tribunal allowing new complaints to be added after an already very lengthy delay in submitting the original claim.

____

Employment Judge Norris
Date: 11 May 2024
REASONS SENT TO THE PARTIES ON

29 May 2024
....

....
FOR THE TRIBUNAL OFFICE