



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

5

Judgment of the Employment Tribunal in Case No: 8000617/2023 issued following Open Preliminary Hearing Held on the Cloud Based Video Platform, at Edinburgh, on the 16th of April 2024

10

Employment Judge J G d'Inverno

15

Mr Nawaz Mohammed

**Claimant
Represented by:
Ms Sarah Lundy,
HR Consultant**

20

The Chief Constable of the Police Service of Scotland

**Respondent
Represented by:
Ms Kirsti Nelson,**

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

35

(First) Upon their withdrawal in the course of the Hearing by the claimant's representative and in the presence of the claimant, that the claimant's complaints of Discrimination because of the protected characteristic of Race are dismissed.

(**Second**) Upon their withdrawal in the course of the Hearing, by the claimant's representative in the presence of the claimant, that the claimant's complaints of Discrimination because of the protected characteristic of Age are dismissed.

5

(**Third**) That the Tribunal lacks Jurisdiction, by reason of Time Bar, to consider the claimant's complaints of Discrimination because of the protected characteristic of Disability in terms of section 126(1)(a) of the Equality Act 2010.

10

(**Fourth**) It not being just and equitable, in the circumstances presented, to extend time in terms of section 123(1)(b) of the Equality Act 2010, the complaints of Discrimination because of the protected characteristic of Disability are dismissed.

15

Employment Judge: J d'Inverno
Date of Judgment: 29 April 2024
Entered in register: 29 April 2024
and copied to parties

I confirm that this is my Judgment in the case of Mohammed v The Chief Constable of Scotland and that I have signed the Judgment by electronic signature.

30

NOTE

1. This case called for Open Preliminary Hearing at Edinburgh on the Cloud Based Video Platform, on 16th April 2024. The claimant was in attendance and was represented by Ms Lundy, HR Consultant. The respondent was represented by Ms Nelson, Solicitor.

35

Withdrawal and Dismissal of the Complaints of Discrimination because of the Protected Characteristic of Race and of the Protected Characteristic of Age

- 5 2. At the outset of the Hearing the claimant's representative withdrew the complaints of Race Discrimination and Age Discrimination, which withdrawals the Tribunal confirmed with the claimant. On the respondent's representative's Application, made at the bar, the claims of Race Discrimination and Age Discrimination were thereafter dismissed.

10

The Preliminary Issue of Jurisdiction

3. The Preliminary Issue for Determination at Open Preliminary Hearing was:-

15

Whether, in terms of section 123(1)(a) and or section 123(1)(b) of the Equality Act 2010, the claimant lacked Title to Present, and the Tribunal Jurisdiction to Consider, his complaints of Discrimination because of the protected characteristic of Disability, first presented to the Employment Tribunal (Scotland) on the 24th November 2023.

20

4. The claimant gave evidence on oath and answered questions in cross examination and questions put by the Tribunal.
5. There was before the Tribunal a Joint Hearing Bundle extending to 25 313 pages, to which both claimant and respondent's representatives added additional documents at the outset of the Hearing, and to some of which reference was made in the course of evidence and submissions.

Findings in Fact

30

6. On the documentary and oral evidence presented the Tribunal made the following essential Findings in Fact, restricted to those relevant and necessary to the Determination of the Preliminary Issue.

7. Prior to his early retirement on 24th August 2023 the claimant was a Police Officer with service in excess of 22 years.
8. The claimant suffers from a diagnosed medical condition of “Allodynia” which is a type of neuropathic pain, in the claimant’s case resulting from nerve damage through Fibromyalgia resulting from a back spasm suffered by him in early 2017.
9. At the material time for the purposes of his complaints, that is in the month of August 2023 and in particular the 3rd and the 10th of August 2023, the impact of his condition on his ability to carry out day to day activities included the following:-
- When walking his foot could randomly hit off the floor
 - His left calf muscle had shrunk and moved into his knee
 - Lower back pain, present every day, affected his left leg resulting in his walking with a limp
 - Sudden movement on his part triggered sciatica pain
 - His memory could be impacted from time to time
 - Although some elements, such as back pain were and continue to be constant, the impact of the claimant’s condition upon his ability to carry out normal day to day activities varied from time to time and from day to day
10. Following a diagnosis in August of 2022, the claimant returned to work on modified duties facilitated by the respondent by way of reasonable adjustments.

11. The adjustments put in place included:-

- The removal of the claimant from front line policing into a back office role or front counter role and

5

- The removal of the claimant from roles or duties which required the wearing of body armour or other protective gear, the wearing of which resulted in his suffering considerable pain due to his medical condition.

10

12. It is a matter of concession on the part of the respondents, for the purposes of the claimant's complaints, that he was, at the material time, a person possessing the protected characteristic of Disability in terms of section 6 of the Equality Act 2010.

15

13. The claimant described that variation in impact as his having "good days" and "bad days". On bad days he could be substantially impacted by his condition, albeit still able to carry out his modified duties notwithstanding the pain which he was suffering. On good days the claimant might find himself relatively pain free with the assistance of medication and able to move relatively freely.

20

14. That pattern of good and bad days was being experienced by him following his return to work in or about April 2022 and continued up to and including the time at which he first made his request to retire, at or about the time of his 55th birthday.

25

15. That same pattern of good days and bad days continued throughout the intervening year and up to the date of his retirement on the 24th of August 2023 and thereafter in the intervening period between that date and the date of first presentation of his initiating Application ET1 on the 24th of November 2023.

30

16. Prior to his making his retirement request, in April of 2023, the claimant's assessment was that he was able to perform his reasonably adjusted duties

without difficulty. His understanding was that the respondents had no issue with his ability to continue to serve in the adjusted role.

- 5 17. At the time of making his application for early retirement, the claimant was told by Police Sergeant Kate Blundell, in the course of conversation with her, that an application for early retirement could be withdrawn at any point up to the retirement date.
- 10 18. Following his making application, in April of 2023, for early retirement, the claimant's application was duly approved and his retirement date fixed for the 24th of August 2023.
- 15 19. In or about the latter part of July 2023, the claimant thought better of his decision to retire early and asked that he be allowed to withdraw from early retirement. He believed that the stress which he was experiencing as a result of his health had affected his judgment at the time of making his application.
- 20 20. The respondents considered the claimant's application to withdraw from early retirement and refused it. The reason communicated to the claimant being that it was already at too advanced a stage.
- 25 21. Police Inspector Brendan McMann communicated the respondent's decision not to allow the claimant to rescind his request to retire from Police Scotland on 24th August, to the claimant on the 3rd of August 2023 (see page 84 of the Bundle).
- 30 22. The claimant believed that in so refusing his request, the respondents discriminated against him because of his protected characteristic of Disability by failing to make a reasonable adjustment to their policy such as to allow him to rescind his request for early retirement.
23. The claimant was informed by Police Inspector McMann on the 10th of August 2023 that his subsequent appeal against the decision refusing to allow him to rescind his request to retire early had been refused.

24. It is against that decision, communicated to him on the 3rd of August 2023, and against the subsequent refusal of his appeal against that decision, communicated to him on the 10th of August 2023 (page 85 of the Bundle),
5 that the claimant directs his complaints of Discrimination because of the protected characteristic of Disability.
25. The periods of time (subject to extension in terms of the Early Conciliation Provisions where appropriate) of 3 months minus 1 day during which the
10 claimant was entitled to present a complaint, about the alleged discriminatory nature of those decisions, to the Employment Tribunal, in terms of section 123(1)(a) of the Equality Act 2010 (EqA), began to run respectively on the 3rd and on the 10th of August 2023.
- 15 26. On 15th of August 2023, the claimant made verbal contact with ACAS seeking advice from them. He explained to them the circumstances in which the refusal to allow him to rescind his decision to retire early had been made on the 3rd of August and the circumstances of the refusal of his appeal against that decision communicated on the 10th of August, and further that he
20 considered that he had no alternative but to raise proceedings in the Employment Tribunal asserting Discrimination on the grounds of his disability.
27. In the conversation of the 15th of August the ACAS Officer advised the
25 claimant that the time limit applying to his right to make complaints was 3 months minus a day.
28. In the conversation of the 15th of August the claimant advised the ACAS
30 Officer that he was due to retire on the 24th of August, that was in some 9 days time and he did not wish to commence proceedings while he was still in employment.
29. In the course of the conversation of the 15th August the ACAS Officer advised the claimant that he could raise his proceedings after he retired on 24th of August 2023.

30. Following his telephone conversation of 15th August 23, ACAS sent to the claimant an ACAS “Early Conciliation Service Confirmation Code” with instructions that he should enter the code in the ACAS Early Conciliation Form (the prescribed manner) to confirm his email address. He was advised that the Code would expire in 30 minutes and if it did so expire he should request a new Code through submission of the Early Conciliation Form.
31. The claimant did not submit the Early Conciliation Form on the 15th of August and did not commence early conciliation on that date.
32. The claimant subsequently submitted the Form on the 22nd of November 2023 which, on the Early Conciliation Certificate subsequently issued to the claimant and produced at page 1 of the Bundle, is shown as date A, “the date of receipt by ACAS of the early conciliation notification”. The date of issue by ACAS of the Early Conciliation Certificate, (date B) for the purpose of the provisions, is likewise shown on the Certificate as the 22nd of November 2023.
33. Date A, 22nd November 2023, was a date which occurred after the expiry of the periods of 3 months minus 1 day measured from the 3rd and the 10th of August respectively, that is after the 2nd and the 9th of November 2023 respectively.
34. The early conciliation provisions did not operate to extend the periods of time during which, of right, the claimant could have raised a complaint of Discrimination in relation to the respondent’s decisions communicated to the claimant on 3rd and 10th of August 2023.
35. The period of time during which the claimant was entitled to raise proceedings in respect of the 3rd August 2023 decision of the respondent expired, in terms of section 123(1)(a) of the ERA, on the 2nd of November 2023.

36. The period of time during which the claimant was entitled to raise a complaint of Discrimination about the respondent's decision to uphold the appeal communicated to him on 10th August 2023, expired, in terms of section 123(1)(a), on the 9th of November 2023.
- 5
37. The claimant first presented his complaint to the Employment Tribunal on the 24th of November 2023 (page 10 of the Bundle).
38. As at the 24th of November 2023 the claimant lacked Title to Present and the Tribunal lacked Jurisdiction to Consider his complaints of Discrimination in terms of section 123(1)(a) of the EqA.
- 10
39. The impression which the claimant gained from his telephone conversation when he first made contact with ACAS to tell them about his situation on 15th August 2023, was that he would have a period of 3 months from the date of his retirement to raise his discrimination complaints in the Tribunal.
- 15
40. As at the 15th of August 2023 the claimant knew of his right to complain to the Employment Tribunal about what he believed to have been the discriminatory nature of the respondent's decision of 3rd August 23 to refuse to allow him to rescind his decision to retire early and of the internal Appeal Officer's decision of 10th August 2023 to uphold the decision of 3rd August. He was aware of his cause of action. He was aware of the name and address of the party against whom he was to raise such a claim. He was aware of the mechanisms (ACAS Early Conciliation Form and Employment Tribunal Form ET1), and means by which his claim should be raised.
- 20
- 25
41. As at the 15th of August 2023 the claimant had available to him all the information necessary to raise his claim.
- 30
42. The claimant, for the reasons which he explained, did not wish to raise his complaint with the Employment Tribunal until after the date of his retiral on 24th August 2023.

43. As at 25th August 2023, the day after his retirement, the claimant had available to him all of the information necessary to enable him to raise his claim.
- 5 44. As at the 15th, 24th August and throughout the intervening period of the applicable time limit, that is throughout the periods ending respectively on the 2nd and on the 9th of November 2023, the claimant was a former Police Officer of 22 years experience. He had access to the internet and knew how to and could have accessed both the website of ACAS with whom he had
10 already spoken and of the Employment Tribunal (Scotland), on both of which the true position regarding the date or dates upon which the time limits for raising his claims, of 3 months minus a day, began to run, is clearly set out.
- 15 45. Had the claimant made such enquiry he would have been aware of the actual expiry dates for the raising of his claim.
46. On his own evidence, he would have raised his claim timeously had he been so aware.
- 20 47. The claimant could have made such enquiry and ought reasonably to have done so in the circumstances. There was nothing which prevented him from doing so.
- 25 48. The claimant stated in evidence that there was no reason why he chose to leave the raising of his claims to what he mistakenly believed to be the last day upon which they could be raised namely the 24th of November.
49. There was nothing which prevented the claimant from raising his claims prior to the expiry of the applicable time limit under section 123(1)(a).

30

Summary of Submissions

50. For the claimant, Ms Lundy submitted that the Tribunal should accept as genuine the claimant's belief following his telephone conversation with a

member of ACAS staff that he had a period of 3 months from the date of his retirement within which to present his complaints of Discrimination to the Employment Tribunal. The claimant had retired on the 24th of August 2023 and had presented his complaints 3 calendar months thereafter on the 24th of November 2023. That was, she submitted, reflective of the genuineness of his belief that he had until then to do so.

51. Ms Lundy stopped short of inviting the Tribunal to find in fact that the unidentified ACAS member of staff had expressly told the claimant that a time limit of 3 months in respect of his discrimination claims would begin to run on the date of his retirement recognising, perhaps, that the evidence before the Tribunal fell short of what would be required to support such a finding.

52. Ms Lundy's primary submission was that the Tribunal should regard the 15th of August, the date of the claimant's initial telephone conversation with ACAS, as "date A" for the purposes of the early conciliation provisions, that is to say as the date upon which ACAS received early conciliation notification from the claimant. While accepting that the section 123(1)(a) time limits of 3 months minus 1 day began to run in respect of the alleged discriminatory acts complained of on 3rd and 10th August respectively, the claimant's representative Ms Lundy thus submitted that the intervening period of 3 months and 8 days between that date and the 22nd of November the date of issue by ACAS of the Early Conciliation Certificate, be regarded as a period during which early conciliation was taking place and the "clock had stopped on the running of the relevant time limits", with the effect that the date of expiry of the time limits was extended to 10th February and 17th February 2024 respectively. On the above basis she submitted that the claims fell to be regarded as having been presented timeously within the terms of section 123(1)(a) of the Equality Act 2010.

30

53. In the alternative, let it be assumed date A and date B fell to be regarded as the dates set out by ACAS on the Early Conciliation Certificate (page 1 of the Bundle) namely both 22nd November 2023 and thus date A fell on a date after the expiry of the initial section 123(1)(a) time limit with the result that the early

conciliation provisions did not operate to extend the time limits, she accepted that the ET1 would fall to be seen as presented some 14 days late.

5 54. On behalf of the claimant Ms Lundy submitted that that was a “narrow
window” (a relatively short period) of lateness. She urged the Tribunal to
consider that the claimant’s judgment may have been clouded due to the
constant pain which he was experiencing in March of 2023, at the time at
which he decided to make a request for early retirement, and, since a delay
of 14 days could not be said to result in it not being possible to have a fair
10 trial and as allowing the claim to proceed late therefore would not result in
prejudice to the respondent, she urged the Tribunal to conclude that it would
be just and equitable in the circumstances to extend time and to allow the
claims to be considered in terms of section 123(1)(b) of the EqA,
notwithstanding their late submission.

15

Submission for the Respondent

20 55. For the respondent Ms Nelson submitted that the following dates were not in
dispute between the parties namely that the claimant had made a request on
the 25th of July 2023 that he be allowed to withdraw his application,
previously made in March of that year for early retirement. That on the 3rd of
August 23 he had been advised that the respondent had declined to allow
him to do so. That he appealed against that decision and was advised on the
10th of August 2023 that the appeal had been refused (pages 312-313).

25

30 56. Under reference to page 1 of the Bundle (the ACAS Conciliation Certificate)
she submitted that the date of receipt by ACAS of early conciliation
notification from the claimant was 22nd November 2023 and that the date of
issue by ACAS of the Conciliation Certificate was the same date,
22nd November 2023. That thus dates A and B for the purposes of the early
conciliation provisions were each 22nd November 23, that being a date which
fell after the expiry of the initial 3 month less a day time limits. In those
circumstances, she submitted the early conciliation provisions did not operate
to extend the time limits.

57. Under reference to the correspondence dated 11th April 2024 from the assigned Conciliator, she invited the Tribunal to find that those dates of 22nd November 23 were indeed the correct dates.

5

58. The respondent's representative thus submitted that the time limits for submission of complaints to the Employment Tribunal regarding the alleged discriminatory acts of the respondent of 3rd and 10th August 23 expired respectively on the 2nd and on the 9th of November 2024. She submitted that the claims fell to be regarded as having been submitted outwith the time limit which prescribed the Tribunal's Jurisdiction to hear claims in terms of section 123(1)(a) of the EqA.

10

59. Turning to the question of whether in those circumstances the Tribunal should consider it just and equitable to extend time, the respondent's representative submitted that the claimant's evidence fell to be regarded as lacking in credibility and reliability on the issue of the reasons for his delaying up until what he erroneously considered to be the last day of the time period before submitting his application. There was no medical evidence before the Tribunal that went to identify that he would have been medically incapable of submitting his claim throughout the entirety of the actual applicable time period. On his evidence he continued to have good days and bad days throughout that period. He had been able to speak with ACAS on the 15th of August 2023 at the beginning of the 3 month period and the only impediment identified by him for delaying, namely that he wanted to wait until his period of employment with the respondents was over had been removed on the 24th of August when he retired. No reason was given for the delay thereafter. When asked by the Tribunal the claimant had indicated that he couldn't really explain it. There might have been a reason but he couldn't remember what it was. In the respondent's representative's submission while it may be the case that the claimant had formed the view, following his telephone discussion with ACAS on the 15th of August that the time limit which was applicable was one of 3 months (rather than 3 months minus a day) and further that it began to run from the date of his retiral, the respondent's

15

20

25

30

representative submitted that the evidence before the Tribunal was insufficient to support a Finding in Fact that the ACAS representative had expressly given the claimant any such advice. Such advice would have been patently wrong and, in her submission, it was highly unlikely that an ACAS trained Officer would ever give such erroneous advice. On the balance of probabilities the Tribunal should not find that such advice was given expressly to the claimant and thus the error if there truly was one was an error of his own creation. He had already made contact with ACAS and, at page 86 of the Bundle, he had received a responding text communication from ACAS telling him how to initiate early conciliation in the prescribed manner and providing him with the information and links necessary to enable him to do so. Had he done so he would have been fully aware of the actual time limit and, on his own evidence, had he been so aware he could have and would have submitted his claims timeously.

15

60. Separately, the claimant had the ability and the means to carry out reasonable research on his own behalf. Had he accessed the ACAS website and or the Employment Tribunal website, the true position regarding the dates upon which time would begin to run on his applications would have been apparent to him. He could have and should have made such reasonable enquiries on his own behalf. It was not reasonable in the circumstances that he should rely solely upon his mistaken impression gained from one telephone conversation with the ACAS representative and thereafter allow a period in excess of 2½ months during which he could, of right, have timeously presented his application, to expire without taking any action to do so. As at the 15th of August 2023 he had within his possession all of the information which he needed to present his claims together with the means to do so. Following his retirement on the 24th of August 23 the one event which he had identified in his conversation with ACAS on 15th August 23 as his wishing to have occurred before raising his claim, namely his retirement, had occurred.

20

25

30

61. There was no presumption in favour of extension of time. *Per contra*, it fell to be regarded, on the authorities, as the exception rather than the rule albeit

that the Tribunal had wide discretion to extend time where it considered it just and equitable to do so.

5 62. The respondent was entitled to the benefit of finality of litigation and where Parliament had prescribed a time period during which parties must present their complaints at first instance. Where that time limit had expired without any sufficient explanation on the part of the claimant as to why he had not submitted his applications within the time limit, including his erroneous belief that the time period began to run from a later date, that error/ignorance of the
10 actual time limit was neither reasonable nor justified in circumstances where the claimant, an experienced police officer could have and ought reasonable to have made his own inquiry. She invited the Tribunal to conclude that it was not just and equitable to extend time in terms of section 123(1)(b) of the EqA and thus to dismiss the claims for want of Jurisdiction.

15

Applicable Law, Discussion and Disposal

63. The Tribunal's Jurisdiction to Consider complaints under the Equality Act 2010 is prescribed by the terms of section 123 of the Act which provides as
20 follows:-

“123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120
25 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

30 (b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

5 (b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

10 (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.

15

(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

20

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

25 64. As the Tribunal has found in fact the claimant first presented his complaints to the Employment Tribunal outwith the initial time period provided for in terms of section 123(1)(a), that is outwith the period 3 months less 1 day commencing with the date of the alleged discriminatory act/acts complained of. The Tribunal did not accept the claimant’s representative’s primary submission that the complaints be regarded as presented in time on the basis
30 that it should regard early conciliation as having commenced on 15th of August 2024 (as date A for the purposes of the early conciliation provisions) and thus that the period of 3 months and 7 days which elapsed between that date and the date of issue of the Early Conciliation Certificate on 22nd November 2024 as a period during which the “clock had stopped”. Nor did it

accept the submission that the applicable time limits had been extended to dates in February 2024.

5 65. Such a construction is incompatible with the terms of the early conciliation provisions. It is separately a position which was unfounded in fact, “date A” being clearly stated on the Early Conciliation Certificate as 22nd November 2024 and the ACAS correspondence of 11th April 23, at page 304 of the Bundle, not being supportive of any proposition that the dates on the Certificate were incorrect. In addition, the email communication from ACAS
10 produced and founded upon by the claimant at page 86 when taken together with the claimant’s own evidence indicate that whereas, on the 15th of August 2023 the claimant was provided by ACAS with a Confirmation Code and a link to the Conciliation Form by which means he could provide the prescribed information to ACAS in the prescribed manner and thus seek to commence
15 early conciliation, the claimant did not take that process forward at that time. He did not complete and submit the Form, a blank copy of which is set out at pages 293 to 303 of the Bundle, until the 22nd of November 2024.

20 66. On the available evidence, the Tribunal has found in fact that the claims were presented late and thus can only be considered in terms of section 123(1)(b) in circumstances in which the Tribunal is persuaded that it would be just and equitable to extend time.

25 67. The Higher Courts have provided significant guidance to Tribunals at first instance on the approach to be taken to the application of the provisions of section 123(1)(b) of the 2010 Act, in a number of decisions to some of which the respondent’s representative referred the Tribunal in submission.

30 68. In **Robertson v Bexley Community Centre** [2003] EWCA Civ 576 Auld LJ, at paragraph 25 stated:-

“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.”

5

In **Olufunso Adedeji v University Hospitals Birmingham NHS Foundation Trust** Underhill LJ, gave advice on the best approach to be adopted to section 123(1)(b) by Tribunals at first instance namely, that they should assess all of the factors which are relevant including in particular the length of and reasons for the delay.

10

69. It is for the Tribunal to decide on the facts of any case which are the potentially relevant factors. Prejudice to a respondent to losing a limitation defence is customarily relevant to the exercise of that discretion. Forensic prejudice can be crucial and may be decisive but the converse does not follow. In other words the absence of forensic prejudice does not automatically result in an extension of time.

15

70. In the instant case, the respondent’s representative had submitted that Police inspector McMann, the claimant’s second Line Manager who was involved in communications with him in relation to his request had retired and might not be available to give evidence, that Alison Beresford the internal HR Advisor may have limited availability. Those issues of potential prejudice were however speculative at this stage and I did not consider that this was a case in which forensic prejudice to the respondent would result were time to be extended.

20

25

71. Other leading cases on this question include **Chief Constable of Lincolnshire Police v Caston** [2009] EWCA Civ 1298 and **Afolabi v Southwark London Borough Council** [2003] ICR 800 at paragraph 33.

30

72. In **Mr G F Bowden v The Ministry of Justice and another** UKEAT/001/17/LA HHJ Richardson gave guidance on the approach; viz,

5 “32. The process of asking a Judge to decide that it is just and equitable to hear a complaint out of time is almost always described by Judges and practitioners as making an application to extend time; and acceding to that application is frequently described as granting an extension of time. That is not quite how the legislation puts it; but the effect of the decision is to grant an extension of time and no harm is done by the common form of description.

10 33. The decision is often described as an exercise of discretion; strictly it is better described as an evaluation or assessment, but there is little practical difference. In either case the Judge must apply them all correctly, taking into account that which is essential to take into account and leaving out of account that which is irrelevant. If the Judge takes a decision in that way, and reaches a conclusion which is not perverse, the Employment Appeal
15 Tribunal, which is empowered to hear appeals only on a question of law, must not interfere.”

20 73. In the instant case, the claimant was fully aware of his right to complain about what he perceived to be the discriminatory decisions taken by the respondents, respectively on the 3rd and 10th of August 2023, not to allow him to rescind his application, made in March of that year, that he retire early. He was so aware from the 15th of August 2023, at the latest, that being the date upon which he had an initial telephone discussion with ACAS in which he explained the circumstances in which he found himself including his belief
25 that in so deciding on the 3rd and the 10th of August 23 to refuse to allow him to rescind his application for early retirement the respondents were discriminating against him because of his protected characteristic of Disability and that he considered that he had no alternative but to raise a complaint with the Employment Tribunal.

30

74. As at that date, 15th August 2023, the claimant also had available to him all of the information which he required to raise the complaint and further, the means and mechanism by which he required to engage with the early conciliation process and the means and mechanism by which he could

present his complaints to the Employment Tribunal. He had access to both the ACAS and EAT websites. As at the 15th of August 2023, the only factor which he considered constrained him from making his application immediately on that date was the fact that he continued to be employed by the respondents and his preference was to raise his complaint with the Tribunal after the date of his retiral. The claimant retired some 9 days later on the 24th of August 2024. He opted however not to take any steps to formally engage with the early conciliation process or to raise his complaint in the Employment Tribunal until the 22nd of November 2023, that is 2 days prior to what he mistakenly believed was the expiry of the applicable time limit. He formally engaged with early conciliation on the 22nd November and received an Early Conciliation Certificate issued by ACAS on the same day. He first sent an application to the Employment Tribunal on the 24th of November. While in the intervening period the claimant continued to live with the impact of his medical condition upon his health and his abilities to carry out day to day activities, there was no medical evidence before the Tribunal that went to support the proposition that his disability was the cause of his not presenting his application within the time period. In this regard I considered the claimant to have given frank and credible evidence confirming, as he did that throughout that period the pattern which he had typically been living with, of having good days and bad days continued. On the good days he was at times pain free with the help of medication and able to function without particular difficulty. He had been capable of engaging with ACAS by telephone on the 15th of August and in terms of the email correspondence which he received from ACAS following that telephone discussion appears to have been ready to make his application but wished to delay doing so only until after his retirement date on the 24th of August, some 9 days later.

75. The sole reason advanced by the claimant in answer to the question why he had delayed until the last day of what he erroneously believed to be the time limit, was that following his discussion with an ACAS Officer on the 15th his belief was that the time limit for the making of his applications would begin to run on the date of his retiral and would last for a period of 3 months from that date. It is a tribute to the claimant's honesty in seeking to give evidence in

accordance with his oath that he could not say that the ACAS Officer had expressly told him that that was the position. Rather, his evidence, taken at its highest, was that he had disclosed his circumstances to the ACAS Officer including the fact that he did not wish to raise his claims until after the impending date of his retirement, that the ACAS Officer had confirmed, what he already understood to be the position, namely that he had a period of 3 months within which to raise his claim and, standing his desire not to raise the claim while he remained in employment that he should do so following his retirement on the 24th of August 23.

76. It was the claimant to put these pieces of information together to conclude that the 3 month period would only begin to run on or after the date of his retirement. The evidence before the Tribunal was insufficient to support a Finding in Fact that the ACAS Officer had told him that that was the case. Quite separately, on the balance of probabilities, it would be unlikely that a trained ACAS Officer would make such an incorrect statement to a party seeking advice from him. While I accepted the genuineness of the claimant's assertion that that was the impression he had gained that is not the end of the matter. It is necessary to consider whether the claimant's error (ignorance of the correct time limit and starting date for the running of the time period) was justifiable in the circumstances. That is to say to ask the question was the claimant reasonably ignorant of the correct position. As the Tribunal has found in fact the claimant had ready access to the internet including in particular the websites of both ACAS and the Employment Tribunal. Had he chosen at any point after the 24th of August, the date of his retirement, to access and look at the information displayed on those websites he would have been aware of the true position. On his own evidence had he been so aware he could have and would have presented his complaint to the Employment Tribunal within time. In the circumstances he could have and ought reasonably to have made those enquiries. Throughout the applicable time limit he was fully aware of his right to make a complaint and of how to exercise that right. In the circumstances the claimant's ignorance was not reasonable and in the absence of any other reason his delay, until after the

expiry of the applicable time limits, in taking steps to progress and present his complaint was an unreasonable delay.

5 77. Part of the purpose of the imposition of statutory time limits by Parliament is the prevention of unreasonable delay in the bringing of claims and the disapplication of the time limit in such a case would deprive the respondent of a significant part of the benefit of the time limit. While I accepted the claimant's representative's submission that the delay in this case of some 14 days was not such as to create a significant forensic prejudice to the
10 respondent nor to preclude the possibility of the conducting of a fair hearing, where the delay was unreasonable and in the absence of any other reason for it, in balancing the relative injustice and prejudice, associated with extending time or declining to do so, I conclude that the balance, in the particular circumstances presented and on the facts found in this case, lies in
15 favour of declining to do so.

78. The Tribunal not thinking, in the circumstances, that the period of time within which the claimant presented his complaint was just and equitable for the purposes of section 123(2)(b) of the Equality Act 2010, the claimant's
20 complaints are dismissed for want of Jurisdiction.

Employment Judge: J d'Inverno
Date of Judgment: 29 April 2024
Entered in register: 29 April 2024
and copied to parties

I confirm that this is my Judgment in the case of Mohammed v The Chief Constable of Scotland and that I have signed the Judgment by electronic signature.