



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103968/2024 (V)

Held at Aberdeen on 5 August 2024

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Employment Judge N M Hosie

Mr Mark Lees

**Claimant
In Person**

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20 **BP Exploration Operating Company Ltd**

**Respondent
Represented by,
Ms H Hogben,
Counsel
Instructed by,
Ms F Howlett,
In-House Senior
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35 The Judgment of the Tribunal is that:-

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1. the Tribunal has jurisdiction to consider the claimant's disability discrimination claim; and
2. the case should proceed to a Preliminary Hearing.

E.T. Z4 (WR)

REASONS

Introduction

5 1. The claimant, Mark Lees, presented his ET1 claim form to the Tribunal on 3
March 2024. He intimated complaints of disability discrimination under the
Equality Act 2010. The claim is denied in its entirety by the respondent. The
respondent’s solicitor took a number of preliminary points including that the
claim was time-barred. The case called before me by way of a Preliminary
10 Hearing to consider the time-bar point and other preliminary issues.

The evidence

2. I heard evidence from Mr Lees and his wife, Mrs Nicola Lees. A Joint Bundle
of documentary productions was submitted (“P”), along with Mr Lees’ G.P.
15 records.

3. After hearing the evidence, Counsel for the respondent spoke to written
submissions and I heard oral submissions by and on behalf of Mr Lees.

Relevant law

20 4. The provisions relating to the time limit for bringing a claim to the Employment
Tribunal under the Equality Act 2010 (“the 2010 Act”) are set out in s.123-

25 “(1) *Subject to section 140B* [a reference to the provision extending time for
ACAS Early Conciliation] *proceedings on a complaint within section 120* [the
section giving power to the Tribunal to hear claims under the Act] *may not be
brought after the end of -*

30 (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.....”*

5. The Tribunal has a broad discretion to hear a claim out of time under
s.123(1)(b) of the 2010 Act. In *British Coal Corporation v. Keeble* [1997]
IRLR 336, it was confirmed that this involved a consideration of the prejudice

each side would suffer, taking account of all the relevant circumstances of the case.

6. **Keeble** also suggested that the factors set out below are ones which the Tribunal should take into account in exercising its discretion. However, in subsequent decisions, it was made clear that the Tribunal has been given a very wide discretion under the 2010 Act and it should not treat these factors as a “check-list” (**Adedeji v. University Hospital Birmingham NHS Foundation Trust** [2021] ICR D5]) but, rather, take into account all relevant factors with no one factor being determinative.
7. The length and reason for any delay as well as the question of any prejudice to the respondent arising from the delay have been said to always be relevant factors (**Abertawe Bro Morgannwg University Local Health Board v. Morgan** [2018] IRLR 1050) although it has to be borne in mind that no one factor is determinative.
8. The factors which may be relevant to the exercise of the Tribunal’s discretion are:-
- (i) the length and reasons for the delay;
 - (ii) the extent to which the cogency of the evidence is likely to be affected by the delay;
 - (iii) the extent to which the party sued had co-operated with any request for information;
 - (iv) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
 - (v) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.
9. Other factors which may be relevant to the exercise of the discretion are:-
- (i) the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);

- (ii) the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;
- (iii) the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim.

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10. The burden of proof in the exercise of the discretion falls on the claimant and past cases have made it clear that it should be the exception not the rule, with no expectation that the Tribunal would automatically extend time *{Robertson v. Bexley Community Centre* [2003] IRLR 434). However, this does not mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains of what the Tribunal considers to be just and equitable *{Pathan v. South London Islamic Centre* UKEAT/0312/13).

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15 Discussion and Decision

11. It was common ground between the parties that the effective date of termination of Mr Lees' employment was 21 August 2023 and that his ET1 claim form was presented on 3 March 2024.

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12. S.140B of the 2010 Act provides for an extension of the three-month time limit to facilitate conciliation before institution of proceedings. However, a claimant is required to notify ACAS within three months from the date of the last act complained of and the claimant did not do so in the present case. He only notified ACAS on 2 February 2024 which was more than three months after the effective date of termination.

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13. Dismissal was the last act complained of. Accordingly, the time limit in the present case expired on 20 November 2023 and the claim which was presented on 3 March 2024 was over three months late.

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14. The issue for me, therefore, was whether I should exercise my discretion, extend the time limit on the basis that it was “just and equitable” to do so and allow the case to proceed.
- 5 15. It was significant, so far as my decision was concerned, that the evidence I heard from Mr and Mrs Lees about Mr Lees’ medical condition immediately after his dismissal and the impact on him was consistent, corroborative to a degree, credible and reliable.
- 10 16. Mr Lees has been diagnosed as “experiencing complex PTSD”. One of the productions in the Joint Bundle was a Report from a Consultant Clinical Psychologist dated 29 April 2024 (P.142-146).
- 15 17. Mr Lees also maintained that he has Attention Deficit Hyperactivity Disorder (ADHD) and “anxiety”.
18. While Counsel submitted, with reference to the claimant’s medical records in the supplementary bundle, *“that the claimant’s anxiety levels were well-managed with his existing medication between the issue of the ET1 on 3 March 2024 and had no impact on his ability to bring a claim in time”*, I was
20 not persuaded that that was so.
19. While his G.P.’s medical records record that on 23/8/23 that he had, *“a sense of relief”* about being *“sacked”* and that he found the situation *“less stressful”*,
25 I accepted his evidence that shortly thereafter his health deteriorated.
20. In an “Impact Statement” which he produced in response to a Tribunal Order he gave extensive details of the impact of his various health conditions on him (P.53-60). I was satisfied that this information is reasonably accurate and
30 reliable.

21. I accepted Mr Lees' evidence that, in the crucial period from 21 August 2023 to 20 November 2023, he *"couldn't face anything to do with BP"*, that he experienced *"nightmares"* lacked motivation and that he could not *"revisit"* the way he had been treated by the respondent. As he put it, he *"became a hermit"* and he continued to experience *"flashbacks which came from nowhere"*. Clearly, it was a very distressing time for him.
22. It was not until January 2024 that he was able to consider taking advice and he was able to arrange an appointment with the Citizens Advice Bureau on 16 February 2024, having notified ACAS on 2 February 2024 of his intention to bring a claim.
23. Although he had assistance from his wife thereafter, I accepted their evidence, which was corroborative, that Mr Lees did not speak to his wife about the way he had been treated by the respondent or that he was considering bringing an Employment Tribunal claim until January 2024. He was unable to do so.
24. Although I was not persuaded that Mr Lees could reasonably believe that he had six months to bring his claim, as he asserted (he could have ascertained the three month time limit by reasonable enquiry), I was satisfied that his medical condition for some months after his dismissal prevented him making a timeous claim.
25. So far as the other factors relevant to the exercise of my discretion, detailed above, were concerned, Mr Lees' medical condition was an explanation for the length of the delay; I am not persuaded that the cogency of the evidence is likely to be affected by the delay; as far as the management of the case is concerned, Mr Lees has co-operated fully and timeously with all Tribunal Directions and Orders; as soon as he was fit to do so, in January 2024, Mr Lees acted promptly in bringing his claim; it was not unreasonable, at least in the first instance, to seek advice from the Citizens Advice Bureau and

although he said that was not particularly helpful, he had already notified ACAS of his intention to bring a claim.

26. So far as the balance of prejudice is concerned, if I were not to exercise my discretion the claimant will be left with no remedy as his disability discrimination claim is the only one extant as I refused his application to amend to bring a “whistleblowing” claim. The only prejudice to the respondent is that it will have to defend the claim.

27. I arrived at the view, therefore, that I should exercise my discretion, extend the time limit on the basis that it is “just and equitable” to do so and allow the case to proceed.

28. In arriving at this view, I remained mindful that while I have a wide discretion in this matter, the onus was on the claimant to convince the Tribunal that it was just and equitable to extend the time limit and that the exercise of the discretion is “the exception rather than the rule”. However, in the particular circumstances of this case and having regard to Mr Lees’ medical condition which was an impediment to him submitting his claim in time, I am satisfied that this is one of the exceptional cases.

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29. Accordingly, I shall issue a Judgment to the effect that the Tribunal has jurisdiction to consider this claim and direct that the case proceed to a further Preliminary Hearing, in accordance with a separate Note I shall issue to the parties.

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**Employment Judge: N M Hosie
Date of Judgment: 8 August 2024
Entered in register: 8 August 2024
and copied to parties**