EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 8001232/2024

Held in Dundee on 10 March 2025

Employment Judge M Robison

Mr A Sherriff	**Claimant** **In Person**
Stirling Council	**Respondent** **Represented by** **Dr A Gibson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal, having decided that the following claims have been lodged out of time:

(i) the facemask/lanyard issue;

(ii) the lack of support issue; and

(iii) the book issue,

finds that it is not just and equitable to extend time; and therefore that it does not have jurisdiction to hear those claims, which are dismissed.

This case will proceed to a final hearing to determine outstanding issues, namely those arising from the claimant accessing prescribed cannabis-based medication on the respondent's premises.

REASONS

1. The claimant lodged a claim in the Employment Tribunal on 15 August 2024 claiming disability discrimination. The respondent resists the claim.

2. This hearing was listed following a case management preliminary hearing on 28 January 2024. At that hearing EJ McFatridge noted the respondent's assertion that certain parts of the claim were time barred, namely the instruction to wear a mask and lanyard ("the facemask/lanyard issue"); the

allegation into the delivery of a book ("the book issue"); and the allegation that the respondent had failed to support the claimant in relation to a complaint by a young person ("the lack of support issue"). I have subsequently collectively called these the "three identified matters".

3. EJ McFatridge accepted that it was arguable that these were entirely separate matters from the issue relating to medicinal cannabis which had commenced in June 2022 ("the prescription medication issue"), which the respondent accepted was at least arguably a continuing act. While the claimant argues that all issues were a continuing act, and therefore that his claims are lodged in time, the respondent argues that the claims relating to other issues were significantly out of time; were not part of a continuing course of conduct which extended into the prescriptive period; and that it would not be just and equitable to extend the time limit.

4. EJ McFatridge decided (nothwithstanding this is a discrimination claim which would proceed to a final hearing in any event) that a separate preliminary hearing should be fixed when the question of time bar would be determined.

5. EJ McFatridge decided that the hearing would proceed on the basis that the claimant's written case is true and will be taken at its highest and that the Tribunal will only be required to hear evidence from the claimant about whether or not a just and equitable extension should be granted.

6. At the outset of the hearing, I explained, parties not objecting, that I intended first to hear submissions on the question of whether these four identified matters could be accepted as a continuing act, such that the claim was not lodged out of time. The matter was to be determined on the basis of the written case which the claimant has now set out (over 57 pages) but for the sake of argument accepting that he could prove what he offers to prove, that is that everything he sets out there is true. There was therefore no need to hear evidence about that. I decided that I should first hear submissions on that matter, because if I decided that it was a continuing act then I would not require to hear evidence at all. It was only if I did not accept that it was a

continuing act that I would require to hear evidence (and make findings in fact) on the question whether it was just and equitable to extend time.

7. Clearly in order to determine whether such claims were out of time, I had to take account of the dates when these three identified matters occurred. Following discussion, it was agreed that the facemask/lanyard issue took place between October and November 2020; that the lack of support issue took place in November 2020; and that the book issue took place on 23 December 2020. Further, the respondent accepts that it is at least arguable that the prescription medication issue, which was first raised in June 2022, was a continuing act such that a claim lodged on 15 August 2024 was not out of time.

8. Having then heard parties submissions, I gave an oral judgment, with reasons, that the three identified matters did not constitute a continuing act and accordingly they were out of time, the events having taken place towards the end of 2020 and not being sufficiently linked in terms of subject matter, time or personnel with the prescription medication issue.

9. Accordingly I then heard evidence from the claimant relating only to the just and equitable question, and then he was cross examined by Dr Gibson. Thereafter I heard submissions from both parties. There being insufficient time to issue an oral judgment I reserved judgment.

10. At the conclusion of the hearing, I discussed case management issues, but noted that the question of the length of the hearing and in particular the number of witnesses who required to be called could only be estimated once the just and equitable question has been determined.

11. In order to avoid a fourth preliminary hearing before the final hearing, I stated that along with my decision, I would issue date listing letters. These request parties to list any witnesses to be called, to confirm their availability and to estimate the length of the final hearing. Once a final hearing is listed, standard orders relating in particular to the production of documents for the hearing can be issued.

Findings in fact

12. The Tribunal finds the following relevant facts agreed or proved, based on the evidence heard and the productions lodged.

13. The claimant commenced employment with the respondent on 7 January 2019 as a support for learning assistant based at Fallin Primary School.

14. In October/November 2020, the claimant raised concerns about being required to wear a face mask although he believed that he was exempt from that requirement, as well as the requirement to wear a lanyard.

15. He was referred to occupational health on 2 November 2020; a report was produced on 5 November 2020.

16. The claimant was absent on sick leave from 4 December 2020 until 4 April 2021.

17. The claimant was again referred to occupational health on 13 January 2021, and a further report was produced.

18. That report recommended a workplace wellbeing assessment, which was undertaken and submitted to the claimant's line manager prior to 14 April 2021. A meeting was arranged to discuss that and an action plan. A further occupational health report was produced on 15 April 2021, and another on 1 June 2021. The claimant does not accept that an action plan was produced or implemented.

19. The claimant was again absent on sick leave from 27 January 2022 until 21 March 2022. The claimant was suspended in June 2022.

20. On 23 June 2022, the claimant wrote to the respondent following an occupational health consultation on 22 June 2022.

21. In March 2023, the claimant wrote to the respondent responding to their enquiry regarding reasonable adjustments. He raised concerns about issues, including the book issue and the lack of support issue, which had occurred in

late 2020. By that time the claimant had received advice from Acas, his trade union representative and a legal representative.

22. The claimant wrote again to the respondent again on 22 June 2023. On 30 June 2023, Fiona Norrie, senior HR business partner with the respondent, advised that a further meeting would take place to discuss his concerns in August. She stated that she was happy to look at setting aside time outwith that meeting to look at historical issues.

23. A meeting took place on 22 August 2023. Fiona Norrie asked the claimant to set out the points he would like to discuss at a subsequent meeting to be arranged. She confirmed that she would set aside time to discuss historic matters.

24. By e-mail dated 8 September 2023, the claimant attached a list of proposed discussion points, extending to seven pages. A meeting took place on 11 September 2023.

25. There followed an exchange of e-mails between the claimant and the respondent regarding his claims. That included an e-mail dated 13 November 2023 in which the claimant was told that “the employer has committed to supporting you back to work and ensuring that they address your historical concerns, however, cannot progress this process/discussions until you engage with occ health”.

26. A disciplinary investigation, relating to the claimant’s refusal to attend occupational health, took place in January 2024. A report was produced on 4 March 2024, and the claimant was invited to a disciplinary hearing to take place on 4 June 2024, rescheduled to 20 June 2024.

27. On 13 June 2024, the claimant raised a formal grievance.

28. The claimant intimated early conciliation with Acas on 24 June 2024. An Acas certificate was issued 2 August 2024.

29. The claimant lodged a claim in the employment tribunal on 15 August 2024.

30. The claimant was aware, prior to his employment with the respondent, that he had three months less one day in which to lodge a claim in the employment tribunal.

31. The claimant consulted his GP on 4 December 2020 regarding stress at work for the first time. The claimant consulted his GP on 7 January 2021 regarding generalised anxiety disorder for the first time, and subsequently on 21 March 2021; 16 April 2021; and again on 1 and 23 February 2022. In June 2023, he consulted his GP regarding "anxiety states". In January and June 2024 he had discussions with his GP about work issues.

Relevant law

32. The relevant provisions relating to time limits in discrimination cases is set out in section 123 of the Equality Act 2010 which states:

"(1) …..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".

33. *British Coal Corporation v Keeble* [1997] IRLR 336, provides that, whilst not mandatory, the list of factors contained in section 33 of the Limitation Act 1980 is a useful checklist of relevant factors to take into account when considering the just and equitable question, namely:

a. Prejudice;
b. The length of, and reasons for the delay;
c. The extent to which the cogency of evidence is likely to be affected by the delay;
d. The extent to which the party sued has co-operated with requests for information;
e. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action; and

f. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

34. In *Abertawe Bro Morgannwg Health Board v Morgan* [2018] ICR 1194, the Court of Appeal described the Tribunal as having the 'widest possible discretion to extend time'. While there are no prescribed factors to which the tribunal is enjoined to have regard in determining whether to exercise its discretion in favour of allowing a late claim to proceed, but the length and reasons for the delay, and prejudice to the respondent will almost always be relevant.

35. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* 2021 EWCA Civ 23 the Court of Appeal confirmed that is that a rigid adherence to what have become known as the Keeble factors is to be discouraged when dealing with what is a very broad general discretion on the just and equitable question.

36. Dr Gibson also referenced *Miller and others v MOJ* EAT/0003/15. That case simply confirms these principles, although it should be noted that one of the relevant points referenced was that the discretion to extent time was the exception rather than the rule, following *Robertson v Bexley Community Centre* 2003 IRLR 434. That formulation was criticised by the EAT recently in *Jones v Secretary of State for Health and Social Care*, upheld by the CA at 2025 IRLR 282, to the effect that that was stated in the context of confirming the wide discretion permitting an extension of time on just and equitable grounds.

37. In cases of disability discrimination, the disability itself may well also be a relevant factor (*Department for Constitutional Affairs v Jones* [2008] IRLR 128), and the state of a claimant's mental health is a potentially relevant factor, in particular in regard to the reason and length of delay.

Tribunal deliberations

38. In this case I have found that the three identified claims have been lodged out of time. The sole question to determine is whether I should exercise discretion to extend time.

39. While cognisant of Lord Justice Underhill's health warning in Adedeji, in assessing whether it is just and equitable in this case to extend time, I first considered the relevant "Keeble" factors, then focussed on the question of prejudice.

Length and reason for the delay

40. I understood the claimant to accept, in cross examination, that bearing in mind the standard time limit, the latest date that he should have lodged a claim in relation to the facemask/lanyard issue was 23 February 2021; the book issue was 23 March 2021; and the lack of support issue was 31 March 2021.

41. In this case the claimant notified Acas of his intention to raise a claim on 24 June 2024. Accordingly, the claimant's claims are intimated at least 3 years out of time. The delay in this case is thus considerable; that is the claimant has lodged these claims just over three and a half years late.

42. As I understood the claimant's evidence, the reason for the delay was because he was assured in writing by the respondent that his historic issues would be resolved; and if not, then it was his intention to put in a claim after all internal avenues had been exhausted. He references interaction between himself and the respondent after initial complaints, and in particular he references meetings and correspondence during the course of 2023, when he states that he understood that matters were being dealt with.

43. In particular, he said that, following the wellbeing assessment in 2021, he was expecting the respondent to issue and implement an action plan, including assigning someone to support him, but, he claims, that did not happen. He did not however make any formal complaints or even put the matter in writing to his employers in the meantime. Eventually in September 2023 he raised his concerns that the historic issues had not been resolved and then he wrote

to the CEO and at the same time intimated a grievance on 13 June 2024. He says that he believed, in good faith, that the respondent was, as they asserted, actively going to resolve the issues; and that he had no reason to doubt them.

44. The claimant appeared to rely on an understanding that the respondent had admitted discrimination in respect of these historic issues (at least the face mask and lanyard issue) and that the head teacher had apologised to him. Further, he suggested that there was an "acceptance" of the list of issues which he advanced to discuss at the meeting on 11 September 2023. It was clear, following cross-examination, that this was based on a misunderstanding of what is noted in the meeting on 11 September 2023. What is not clear is why the fact that the claimant's impression that the respondent had admitted discrimination would be relied on to delay lodging a claim.

45. The flaw in the claimant's argument of course is that the claimant lodged his claim before internal procedures had been exhausted or any resolution reached. Further, in evidence he said that he did not put in a grievance because he had a lack of confidence in the whole organisation, yet he was relying on internal processes to resolve his concerns.

46. Further, Dr Gibson put it to the claimant in cross examination that there was nothing to resolve in regard to the facemask/lanyard issue given the fact that all Scottish Government requirements to wear face masks were ended by April 2022. He submitted that it was not logical for the claimant to say that he was waiting for the matter to be resolved when there was nothing to resolve.

47. The claimant also conceded in response to questions that he had not made any claim that the respondent's failure to resolve matters over the years was an act of discrimination in itself.

48. Thus while the claimant says he was waiting for matters to be resolved and for internal procedures to be exhausted before lodging the claim, that rationale hardly stands up to scrutiny.

49. Although the claimant made little or no reference to health issues during his evidence in chief, he brought up his "acute mental health problems" during cross examination to further explain the delay, and made reference to medical records which he had lodged.

50. While it is accepted that the claimant has suffered from mental health issues, and the medical evidence lodged supports that, I take account of the fact that the claimant apparently did not consult his doctor during the period between early 2021 and mid 2022 about mental health concerns.

51. In any event, the claimant confirmed in evidence that after he returned to work in April 2021 until he was suspended in June 2022, he was fit for duties (except he said those which were covid related) and that he was "fit and well so far as mental health issues" were concerned during that time.

52. Had the claimant delayed only until April 2021 to lodge claims about these matters, then I would accept that his health may well have impacted on his ability to deal with matters in a timely manner. However, there was over a year between 2021 and 2022 when the claimant was not apparently suffering from mental health issues, as appears to be supported by the medical evidence lodged. Not only did the claimant not lodge a claim in that time, but he did not lodge any formal complaint or grievance or follow up any informal complaints.

53. The only reason then which the claimant can rely on was his assertion that he was waiting until his issues had been resolved internally before lodging a claim. Even if this is the genuine rationale, then little weight can be put on this, because this, in the same way for example a claimant waiting for the outcome of an appeal, is not a valid reason to delay lodging a claim outwith the primary time limits.

The extent to which the cogency of evidence is likely to be affected by the delay

54. Dr Gibson argued that the passage of time means that it will be more difficult for the respondent to prepare their defence. Had the claimant lodged the claim within six months to a year of these matters, then the respondent would have

been aware that these allegations were to be tested in the employment tribunal and the respondent could have looked out relevant documents.

55. He submitted that the evidence is likely to be affected by the delay, and he gave the example of the evidence about the reasons why the book was sent; he submitted that it is well known that people have difficulty remembering what covid restrictions were in place at any time; and with regard to the failure to support comment, the position regarding which children were in school at the time is not known. Here he said there is no great paper trail to assist the respondent and the witnesses.

56. I accepted, even if the claimant was reluctant to, that the passage of time inevitably means that memories will fade, and the documents may not have been retained, and that witnesses may not be identifiable or contactable.

57. Accordingly I accept that the passage of more than three years from the events relied on until a claim is lodged, and longer before a final hearing takes place, means that the cogency of evidence will be impacted.

Promptness of claimant's action

58. The claimant made it absolutely clear in evidence that, apart from the book issue, he believed these issues to be acts of discrimination at the time.

59. He asserted in cross examination that he was aware immediately that the way that he had been treated could amount to discrimination. He said that he believed that the conduct was discrimination from the outset. That was why he had reported these events at the time to the respondent. The events in question took place between October and December 2020, but the claimant did not lodge the claim until August 2024.

60. He relies however on the fact that he had raised the matters with his employers; and that he relied on his employers to resolve matters, especially when, in his view, they had admitted discrimination. However, there is no evidence that the claimant had complained that these were acts of discrimination at the time; and if he did there is no correspondence lodged suggesting that his complaints were being considered from 2021 onwards.

The first document lodged setting out concerns is dated 23 June 2022, and that relates to the prescription medication issue and apparently makes no reference to what came to be known as “historic issues”.

61. Dr Gibson in cross examination raised the significance of these being described as “historic issues”. Although it may well be that the claimant raised these issues at the time, no further formal complaints were apparently made and there was no follow up until they were raised by the claimant in an e-mail dated 5 March 2023. It appears then subsequently that these issues were described, both by the claimant and the respondent, as “historic issues” the implication apparently being that they had not been raised (as alleged acts of discrimination) at the time.

62. In any event, the claimant did not in fact contact Acas regarding early conciliation until June 2024, and did not lodge the claim in the employment tribunal until August 2024.

63. Given this factual background, I could not say that the claimant acted “promptly” in raising a claim in the employment tribunal after he realised that the actions of the respondent may amount to discrimination.

Steps taken to obtain advice

64. Although the claimant made little or no reference to having obtained advice during oral evidence, and was not asked about that in cross examination, it is clear from the documentary evidence which he lodged and relied on, that he had access to advice from his union and from a legal representative from at least March 2023. That is apparent because he makes reference in his e-mail of that date to having obtained advice from Acas, from his union and from a legal representative.

65. Accordingly, the claimant did have access to sources who could have and indeed should have given him advice about time limits.

66. Crucially, however, the claimant made it absolutely clear in evidence that he was well aware of the three month time limit for lodging claims. Indeed he said

he had become aware of it “years and years ago”, before he started working for the respondent.

67. It is therefore difficult to understand, given that awareness, if he genuinely believed that he had been subjected to discrimination and that any issues he had were not resolved at the time, why he would delay for more than three years before lodging a claim.

Prejudice to the parties caused by the delay

68. A key consideration that I must take into account is the prejudice to the parties in granting, or refusing, the application for the extension of time.

69. Dr Gibson argued that the prejudice to the respondent outweighs the prejudice to the claimant. In particular, he argued that, given the passage of time, and for the reasons referenced above, that the respondent will inevitably be prejudiced if the claims are allowed to proceed.

70. In regard to the claimant, as Dr Gibson pointed out, the claim will still proceed in relation to the prescription medication issue which relates to the period from June 2022. If the claim succeeds, then he will receive compensation. Dr Gibson further submitted, and I accept that he may well be right about this, that the level of compensation which would be awarded in that event would not be significantly different.

Claimant’s motivations

71. With regard to other factors, Dr Gibson argued that the Tribunal should also take into account the claimant's motivations for bringing this claim. He submitted that the claimant’s evidence that he believed these to be acts of discrimination worthy of a complaint to the employment tribunal, and that he was waiting for his complaints to be resolved, is not credible. Rather, he submitted that this claim was brought only after disciplinary proceedings were instituted, and that the issues arising in late 2020 were included in hindsight to bolster his claim.

72. The claimant denied that, stressing that the reason for the delay was his belief that matters would be resolved.

73. However, I noted that the claimant was notified of disciplinary proceedings (apparently relating to the claimant's refusal to engage with occupational health) in December 2023, with a subsequent investigation, and disciplinary hearing due to take place in June 2024. Accordingly, at the very least, there was a coincidence of timing between the claimant approaching Acas and the date that the disciplinary hearing was due to take place.

74. As noted above, while the claimant says that the delay related to him waiting for matters to be resolved by the respondent, in fact he raised the claim before the prescription medication issue was resolved, so that at least casts doubt on his stated rationale.

Conclusions

75. Considering these relevant factors taken cumulatively, I conclude that given in particular the length and reasons for the delay and the limited prejudice to the claimant, that it is not just and equitable to grant the extension in this case. The Tribunal therefore does not have jurisdiction to hear the three identified claims, which are dismissed.

76. The outstanding claims, relating to the prescription medication, will proceed to a final hearing. Date listing letters will now be issued to parties.

Date sent to parties 18 March 2025