EMPLOYMENT TRIBUNALS

Claimant: **Nisar Hussain**

Respondent: **Cedar Health & Wellbeing Limited**

Heard at: **Manchester (by CVP)** **On: 12 July 2024**

Before: **Employment Judge Malik (sitting alone)**

Representation

Claimant: **In Person**
Respondent: **Ms Nowell (Counsel)**

WRITTEN REASONS

JUDGMENT having been given orally in the hearing, these written reasons are provided following the claimant's request under *Rule 62(3) Employment Tribunal Rules of Procedure 2013*.

Introduction

1. These reasons are produced following the striking out of the race discrimination, disability discrimination, age discrimination, discrimination on the grounds of religion or belief, and victimisation claims (thereby ending the whole claim) as the Tribunal had no jurisdiction to hear them. I considered that the claims were presented outside the period specified in section 123(1)(a) Equality Act 2019 and it was not just and equitable to allow a longer period.

2. Oral judgment was given and explained at the hearing. Written notice of the judgment followed. The request for written reasons was sent outside of the required 14 days from written judgment however this was not communicated in a timely manner to the claimant. It was not considered fair or in the interests of justice to deny the request for written reasons in the circumstances. Thereafter there was an administrative delay in communicating the request for written reasons and a delay in producing them, the latter being due to unexpected judicial absence and judicial workload. I apologise for the delay.

The hearing

3. The hearing was listed to deal with the following matters as per Tribunal correspondence dated 17 April 2024:

Employment Judge Holmes has increased the length of the case management preliminary hearing on 12 July 2024 to 3 hours to determine the matters set out in Respondents application:

1. *Whether the Claimant has the requisite service to claim unfair dismissal and, if not, whether the Claimant's claim for unfair dismissal should be struck out;*

2. *Whether the Claimant issued his discrimination claims outside of the Tribunal's time limits and if not whether the Claimant's claims for discrimination should be struck out;*

3. *Whether the Claimant issued his unfair dismissal and any automatic unfair dismissal and/or detriment claim under sections 47B or 103A of the Employment Rights Act 1996 outside of the Tribunal's time limits and if not whether these claim(s) should be struck out; and*

4. *Any case management orders required to effectively progress proceedings for any remaining claims*

4. The hearing was converted to a Public Preliminary Hearing as it was clear that this was the intention in terms of the listed hearing, the parties had both had adequate notice of the application to strike out and it appeared to be an administrative typographical error in not noting it as a Public Hearing. Neither party objected to this course of action and it was clear that both were aware of the application given the correspondence on 17 April and the claimant's undated latter in respect of time limits at page 49 of the bundle

5. At the outset of the hearing the claimant withdrew his claim of unfair dismissal on the basis that he had less than two years' service and therefore the Tribunal would have had no jurisdiction to hear this claim.

6. The hearing then proceeded to take evidence from the claimant in respect of the respondent's application in respect of jurisdiction and out of time for the remaining claims brought by the claimant.

Claimant's evidence

7. The claimant confirmed that he was dismissed by letter on 25 April 2023 and knew on this day that he had been dismissed with immediate effect.

8. The claimant subsequently put in a claim from on 9 July. He confirmed when questioned that he had been thinking about making a claim from around the end of June.

9. The claimant was asked what steps he took to make his claim and he confirmed that he looked on the internet and agreed that he was aware of the three month time limit. He stated that he didn't seek any legal advice and found information online including the Employment Tribunal website where he found guidance on filling out his ET1.

10. The ET1 submitted on 9 July 2023 failed to engage ACAS and was rejected by the Tribunal. The claimant stated in evidence that he initially ticked no in box 2.3 of the ET1, relating to the ACAS early conciliation form. He said he did not understand and thought the form was with ACAS.

11. Following the rejection of the ET1, the claimant did not commence early conciliation until 5 August 2023. He confirmed in his evidence that he tried to get in touch with the Tribunal and could not get in touch and the telephone lines were busy. He conceded that he knew that he had until 24 July 2023 to submit his claim having been dismissed on 25 April 2023.

12. The claimant provided a vague account of a call he made to the Tribunal in which he was told he needed to get in touch with ACAS and start the process.

13. The claimant further stated that when he started the claim he did so online and did not know to get in touch with ACAS. He confirmed that between 9 July and 5 August he was suffering from vascular disease to his leg and it was getting worse and worse. He stated that he was diagnosed with the disease a few months after this.

14. The claimant's evidence was that the delay to 5 August was just over 2 weeks and was as a result of his health issues. He also stated that he did not have any legal representative advising him.

Submissions

15. Each party provided brief submissions on whether it was just and equitable to extend time for the claimant's claims.

Claimant's submissions

16. The claimant stated that it was just and equitable to extend time because he did not have any legal advice or anyone representing him at the time.

17. He confirmed that he did not know he had to get in touch with ACAS and that in any event he was not well and had health issues.

18. The claimant confirmed the he was suffering from stress post termination.

19. I also considered the undated letter at page 49 of the hearing bundle which is a statement from the claimant on the issue of time limits. In this letter the claimant stated that he had correctly issue the claim within the 3 months and the tribunal had in fact advised him that ACAS procedure must be completed on 9 July.

20. The claimant set out in the letter that it was not just and equitable to dismiss the claim as the dismissal placed him in a vulnerable position. He stated that

there was no prejudice to the employer and stated that his ill health and pain during the process had taken it's toll.

Respondent's submissions

21. The respondent noted that that claimant had not provided any evidence of his ill health and he had been aware that this was an argument he may want to present based on the Tribunal correspondence from 17 April 2024.

22. The respondent argued that claimant was given an opportunity to explain why his vascular or any other illness would have stopped him taking the appropriate steps. They relied upon the fact that the claimant was able to submit a claim initially within time, able to liaise with the Tribunal, able to make calls and he was also able to look things up online and deal with online forms.

23. The respondent re-confirmed that there was no evidence of ill health before the Tribunal and even if there was it did not cause the issues relevant to my determinations.

24. The respondent said that the claimant's argument that he was ignorant of the fact that he needed to engage in early conciliation was not the test and it was whether he could have reasonably known. They argued that anyone reading box 2.3 would be able to read and understand what needed to be done and the reasons put forward did not stand up to scrutiny.

25. The respondent reminded the Tribunal that the onus was on the claimant to prove that he has a good reason to satisfy the test for an argument of just and equitable to extend time.

26. The respondent stated that the claimant was unable to explain the delay and why the commencement of the early conciliation process took so long. They relied on the argument that he had from 9th July to 5th August to start the process and there was no credible evidence as to why it took him so long.

27. Finally, the respondent stated that the claimant had not demonstrated any reason upon which I could reasonably conclude that it was just and equitable to extend time.

The law

Striking out

28. A claim or response (or part) can be struck out on the following grounds by a tribunal on a number of grounds including that it is scandalous or vexatious or has no reasonable prospect of success — rule 37(1)(a).

Exercising discretion to strike out

29. Establishing one of the specified grounds on which a claim or response can be struck out is not of itself determinative of a strike-out application. Tribunals must take a two-stage approach. First the tribunal must first consider whether any of the grounds set out in rule 37(1)(a)–(e) have been established; and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out.

30. Rule 37 allows an employment judge to strike out a claim where one of the five grounds is established, but it does not require a judge to strike out a claim in those circumstances. The Tribunal must still be satisfied that it should exercise its discretion.

31. In deciding whether to order strike-out, tribunals should have regard to the overriding objective of dealing with cases 'fairly and justly', set out in rule 2 of the Tribunal Rules. This includes, among other things, ensuring so far as practicable that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance, and avoiding delay. It has to be recognised that strike out is a severe sanction, given that fundamental rights and freedoms concerning access to justice are at stake.

32. In terms of striking out a claim (or a part of it) because it has no reasonable prospect of success, the test is not whether 'on the balance of probabilities' the claimant was unlikely to succeed in her claims. Instead, the question is the claimant has no reasononable prospect of success, in other words only a fanciful prospect of succeeding.

33. It is not for the tribunal to determine questions of fact in deciding a strike out application. The tribunal should take the claimant's case at its highest, unless contradicted by plainly inconsistent documents, and care must be taken assessing a case from a litigant in person which may be badly or inadequately pleaded. If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate and a tribunal must carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it.

34. The strike out application in this instance relates not to an assertion that the claimant's complaints have no reasonable prospect of success on their merits as such, but rather on the ground that the claimant has no reasonable prospect of persuading the tribunal that it would be just and equitable to extend time.

Preliminary hearings on time limits in discrimination cases

35. The principles which should be considered when jurisdictional time issues are considered by HHJ Ellenbogen J in E v X, L & Z UKEAT/0079/20/RN and UKEAT/0080/20/RN and previously by HHJ Auerbach in paragraphs 58-66 of Caterham School Limited v Rose [2019] UKEAT/0149/19. These paragraphs were quoted in paragraph 46 of E v X, albeit that Ellenbogen J disagreed with one point.

36. In essence there are two different types of public preliminary hearing about time limits. The first type is a determination of time limits as a preliminary issue under rule 53(1)(b). This will involve hearing evidence, making findings of fact and applying section 123 Equality Act 2010 to determine the issue once and for all. In general such a hearing may be appropriate where the only issue is whether the claimant should be granted a just and equitable extension of time, since the evidence required is unlikely to overlap with the substantive evidence needed at the final hearing. However, if it is reasonably arguable that there was an act

extending over a period, the tribunal must not determine that issue until it has heard all relevant evidence (**Aziz v. FDA [2010] EWCA Civ 304**). The evidence required to determine that is very likely to overlap with the evidence required at the final hearing.

37. The second type of hearing is consideration under rule 53(1)(c) of striking out under rule 37 on the basis that the claimant has no reasonable prospect of success in establishing that the claim (or relevant part of the claim) has been brought within time. Such consideration may be commonly combined with consideration of a deposit order under rule 39 as an alternative on the basis that the claimant's time limit contention has little reasonable prospect of success. This type of hearing is more likely to be appropriate for a continuing act argument than a just and equitable extension because rather than determine the issue the tribunal will consider is whether it is reasonably arguable that that the alleged discrimination formed part of an act extending over a period. If it is not, the relevant allegations can be struck out. If it is, the question of time limits and continuing acts is not definitively resolved but is deferred to the final hearing. Although such a hearing can sometimes be dealt with on the basis of the pleaded case alone or it may be appropriate in such strike out applications for the claimant to provide a witness statement and give oral evidence as part of demonstrating that he or she has a prima facie case on the point. It is unlikely, however, that evidence from the respondent will be needed.

Just and equitable extensions of time

38. In terms of deciding whether the claimant has a reasonable prospect of establishing that time should be extended it is essential to have regard to the case law on how that discretion must be exercised.

39. In **Abertawe Bro Morgannwg University Local Health v Morgan [2018] EWCA CIV 640** Leggett LJ said this "it is plain from the language used ("such other period as the Employment Tribunal thinks just and equitable") that Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike Section 33 of the Limitation Act 1980, Section 123(1) of the Equality Act does not specify a list of factors to which the Tribunal is instructed to have regard, and they will be wrong in those circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list. Although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in Section 33(3) of the Limitation Act 1980 the Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. The position is to that where a Court or Tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under Section 7(5) of the Human Rights Act 1998.

40.. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA** the Court of Appeal set out guidance on how to approach the application of the list of factors referred to in the **British Coal Corporation v Keeble case. [1997] IRLR 336**. In **Adedeji** the Court of Appeal cautioned that Keeble does no more than suggest that a comparison with S.33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a

framework for any decision. The Court of Appeal emphasised that the "Keeble" factors should not be taken as the starting point for tribunals' approach to 'just and equitable' extensions and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, these may well include factors considered in Keeble – for example the length of, and the reasons for, the delay is always likely to be a relevant consideration but ultimately the question is what is just and equitable.

41. This means the exercise of the discretion to extend time because it is just and equitable to do so involves a multi factual approach, taking into account all the circumstances of the case in which no single factor is determinative of the starting point. In addition to the length of the delay, the extent to which the weight of evidence is likely to be affected by the delay, the merits, and the balance of prejudice; other factors which may be relevant include the promptness with which a claimant acted once he or she knew factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.

42. In terms of relevant factors, as well as the length of delay and the reasons for it, other relevant factors will usually include the balance of prejudice between the claimant and the respondent. The prejudice to a claimant is perhaps obvious. They are not able to pursue their complaint. In **Miller and ors v Ministry of Justice and ors and another EAT 0003/15** Mrs Justice Elisabeth Laing set out five key points derived from case law on the 'just and equitable' discretion. In terms of the balance of prejudice, she explained that the prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is 'customarily' relevant. Elisabeth Laing J elaborated that there are two types of prejudice that a respondent may suffer if the limitation period is extended: (i) the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and (ii) the forensic prejudice that a respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

43. The EAT provided important further clarification on this issue in **Concentrix CVG Intelligent Contact Ltd v Obi 2023 ICR 1, EAT**. The employment tribunal found that the claimant had been sexually harassed by her line manager on three separate occasions. It went on to find that these three incidents amounted together to conduct extending over a period, and accordingly time for presenting a complaint to the tribunal in respect of all of them ran from the date of the last incident. Calculating limitation in that way, these complaints had been presented one day out of time. The tribunal decided it was just and equitable to extend time. The respondent appealed in respect of the decision to extend time. One of the grounds was that the tribunal had erred in its approach to the question of forensic prejudice to the respondent. This ground succeeded. The EAT found that the tribunal had erred by confining its consideration of that question to whether any such prejudice had been occasioned by the complaints being one day out of time, and by failing to take into account its own earlier findings about forensic prejudice when determining a complaint of racial

harassment relating to one of the three incidents found to amount to sexual harassment (which was found to be a one off incident and the complaint about that had been submitted 4 months out of time).

44. The EAT in **Concentrix** also considered whether the tribunal's approach to extension of time must be 'all or nothing' in cases where a series of discrete discriminatory incidents are said to amount to conduct extending over a period, but which is still out of time,. HHJ Auerbach suggested that if the tribunal considers that issues of forensic prejudice render it not just and equitable to extend time in relation to the whole compendious course of conduct, the tribunal may then need to give further consideration to whether it is alternatively just and equitable to extend time in relation to the most recent incident in its own right, standing alone, on the basis that the same forensic difficulties might not arise, or arise so severely, in relation to it. The EAT reasoned that, just as it is not an error to take 'real time' forensic prejudice into account, so, conversely, in a case where there may be an issue of such potential forensic prejudice if time were to be extended, the tribunal would err in principle if it failed to consider that aspect, as it would fail to take into account a relevant consideration.

45.. It is well known that in the judgment of the Court of Appeal in **Robertson -v- Bexley Community Centre** it was said that in relation to the exercise of discretion, '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 the discretion is the exception rather than the rule.' However I have also reminded myself that that does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. In the same judgment Lord Justice Auld said "The Tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision". The law does not require exceptional circumstances, it simply requires, that an extension of time should be just and equitable – **Pathan -v- London South Islamic Centre EAT 0312/13**. The approach I adopt is that what Robertson reminds tribunals, is that if a party seeks the exercise of judicial discretion it is for them to show that the discretion should be exercised in their favour. In other words, the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit and the extension must be justifiable.

Discussion and conclusions

46. In reaching my decision I considered the documents contained in a small bundle of documents running to 52 pages as well as the oral submissions of both the claimant and the respondent.

47. In this case it is accepted that the last date on which any alleged discriminatory act or detriment could have occurred is the date of termination on 25 April 2023.

48. In terms of the claimant's prosects of persuading the tribunal to extend time for complaints which were not brought within the primary statutory time limit, the claimant did not provide any evidence to confirm why his claim was not presented in time or any evidence which might be relevant to the question of whether it is just and equitable to extend time, other than his oral evidence

49. I was satisfied that the claimant had full opportunity to do so having been informed of the strike out application by Tribunal correspondence dated 17 April 2023. It is clear the claimant knew about the nature of the hearing, the application and the arguments being considered as he chose to put into evidence, as set out at page 42 of the bundle, an undated letter stating why it was just and equitable to extend time . In this letter he made broad brush claims that were no substantiated with any medical evidence or otherwise about the reason for the delay in presenting his claims.

50. Further, the claimant chose not to provide any evidence to the Tribunal at the hearing on 12 July, again, having been on notice since 17 April 2023 of the nature of the application.

51. Although an individual does not have to give a good reason for not submitting their claim, or indeed any reason or at all, it is almost always relevant to consider why a claim has not been presented in time and it is difficult to imagine a case where a tribunal could find it is just and equitable to extend time without being asked to making a finding about why that has happened.

52. It was for the claimant to persuade the tribunal to exercise its discretion in his favour. There is no presumption that such discretion should be exercised and I am reminded that the exercise of discretion is the exception and not the rule.

53. Whilst, the delay between the limitation period and the subsequent issue of the claim in this case was only a matter of a few weeks, the claimant, on who the onus falls, failed to persuade me that discretion should be exercised in his favour. The Tribunal can not continue to hear a complain unless the party, in this case the claimant, convinces it that it is just and equitable to extend time.

54. I consider that there was no evidence before me, and the claimant had opportunity to provide this in advance of the hearing, that it was not reasonable practicable to issue the claim in time. The claimant had between 9 July 2023 and 5 August 2023 to engage ACAS and resubmit the claim.

55. Whilst the absence of evidence is not necessarily a deciding factor to refuse an extension, here the claimant stated that his health conditions prevented him from submitting the claim in time. There was no such medical evidence or explanation why the claimant was not able to re-submit the claim within that 4 week period.

56. I considered all factors and weighed these up. I of course also considered that prejudice to the claimant in his case ending against the prejudice to the respond in facing what may then be a time-barred claim. I considered the length of delay, although minimal to be without any evidenced explanation. I also considered the information provided to me by the claimant about the steps he took from start to finish to issue and then resubmit his claim. I was persuaded by the point from the respondent that the claimant ought to reasonably have known about the need to contact ACAS and failed to act in a timely manner even when he did know. I considered all factors in the round and reached the conclusion that the claimant had failed to show that the Tribunal should exercise its discretion on this occasion.

57. Accordingly, I conclude that it was not just and equitable to extend time for the remaining heads of claim and on that basis that they would have no reasonable prospect of success they must be struck out and the claim dismissed.

Employment Judge Malik

Date: 26 March 2025

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JUDGMENT SENT TO THE PARTIES ON

14 April 2025

FOR THE TRIBUNAL OFFICE