EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 8000507/2024

Hearing held in Glasgow by Cloud Video Platform (CVP) on 23 October 2024

Employment Judge: R Sorrell

Mr S Spokes	**Claimant** **In Person**
Stork Technical Services UK Ltd	**Respondent** **Represented by:** **Mr E Gilligan** **Counsel**

OPEN PRELIMINARY HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(i) It is just and equitable to extend the time limit in which to lodge the claim and therefore the Tribunal has jurisdiction to hear the claim.

(ii) The respondent's application for strike out of the claim is dismissed.

(iii) The respondent's application for a deposit order is dismissed.

REASONS

E.T. Z4 (WR)

Introduction

1 The claimant lodged a claim for disability discrimination on 19 April 2024. The claimant has intimated a complaint of discrimination arising from disability in terms of section 15 of the Equality Act 2010.

2 A case management preliminary hearing was held on 19 August 2024 by way of video conference, using the Cloud Video Platform. At the hearing, Employment Judge Hosie ordered the claimant to provide further and better particulars of the claim and details of the sum he is seeking within 14 days and that the respondent provide a written response to that within 14 days thereafter. As the respondent does not accept the claimant was a disabled person in terms of section 6 of the Equality Act, the claimant was ordered to comply with the Tribunal's Question and Answer Order within 14 days and that the respondent advise the Tribunal within 14 days thereafter whether or not it was accepted that the claimant was a disabled person in terms of the Equality Act 2010. A preliminary hearing was fixed for today to consider and determine the issue of time-bar.

3 Following the case management preliminary hearing and parties' compliance with the orders, the respondent confirmed that it did not accept that the claimant was a disabled person in terms of the Equality Act 2010. The respondent further made an application for strike out of the claim on the basis that it has no reasonable prospects of success and in the alternative, a deposit order on the basis the claim has little reasonable prospects of success. The Tribunal directed that these applications should also be heard at the preliminary hearing on time bar.

4 This was a virtual hearing held by way of the Cloud Video Platform. The claimant was unable to secure a video conference connection due to working offshore. In the circumstances, it was agreed that the claimant would participate in the hearing by telephone.

5 As the claimant was a party litigant, I explained the purpose and procedure for the hearing as well as the issues I had to decide in accordance with the

law. I further explained that I was required to adhere to the Overriding Objective of dealing with cases justly and fairly and to ensure that parties were on an equal footing.

6 Parties lodged a joint bundle of productions and an agreed chronology. The respondent also lodged written submissions which Mr Gilligan spoke to.

7 Parties agreed that the relevant period in terms of the alleged act of discrimination is from 14 April 2023 until 31 July 2023.

8 As the claimant accepted the joint chronology, Mr Gilligan confirmed that he would not be calling the Respondent Human Resources Manager to give evidence in respect of the time bar issue.

1) The issue of time bar and whether it is just and equitable to extend time in order for the claim to proceed.

Findings in Fact

The following facts are found to be proven or admitted;

9 The claimant's date of birth is 17 March 1976.

10 The respondent is an energy service company providing specialist fabric maintenance services on board offshore installations and elsewhere.

11 The claimant commenced employment with the respondent on 24 March 2021 as a PRC Scaffolder, ESA, Grade 3.

12 The claimant receives a weekly basic salary and additional uplifts for days worked which is based on an anticipated 154 worked days per year between 1 January and 31 December.

13 The claimant suffered an injury at work on 25 September 2021.

14 On 28 April 2022 the claimant was assessed as fit to return to work but restricted to carrying out light duties for a 12 month period which would then be reviewed. (D59-60)

15 On 16 March 2023 the claimant was assessed by an OGUK Doctor who advised the claimant should continue to carry out light manual duties for a further 12 month period and that the respondent arrange a Function Capability Assessment ("FCA") for the claimant.

16 The "FCA" was carried out on 7 July 2023. On 21 July 2023 the claimant was assessed as fit to return to full duties. (D61-2)

17 Between 14 April 2023 and 31 July 2023 the claimant was on standby and only received a retention salary.

18 On 1 August 2023 the claimant resumed active work.

19 At the end of December 2023, the claimant had worked 108 days. (D83)

20 In January 2024 the claimant took advice from his union about raising a disability discrimination complaint against the respondent in respect of being unable to work his anticipated contractual 154 days in 2023 due to the delay in his "FCA" taking place. His union advised him that it was possible there could be a time bar issue if he made a tribunal claim and that he would need to raise a grievance with the respondent first.

21 The claimant did not lodge a tribunal claim about this issue before the statutory time limit expired on 30 October 2023 because he did not know how many of the 154 days he would work in 2023 until 31 December 2023.

22 On 15 January 2024 the claimant submitted a grievance to the respondent that he had been discriminated against due to the delay in his "FCA" taking place which denied him the opportunity to work his anticipated contractual 154 days and sought compensation equivalent to the working days lost. (D64-5)

23 A grievance hearing took place on 30 January 2024. On 8 February 2024 the claimant was notified that his grievance had not been upheld. (D72-4)

24 On 14 February 2024 the claimant submitted a grievance appeal to the respondent and a grievance appeal hearing took place on 27 February 2024. (D75-6)

25 On 7 March 2024 the claimant was notified that his grievance appeal had not been upheld. (D77-80)

26 On 29 March 2024 the claimant instigated the ACAS early conciliation process and a certificate was issued on 16 April 2024. (D3)

27 There was a delay in the claimant instigating this process after the outcome of his grievance appeal due to him having to deal with urgent family matters.

28 The claimant lodged his Tribunal claim on 19 April 2024. (D4-17)

Respondent's Submissions

29 I have read and digested the respondent's written submissions which Mr Gilligan spoke to at the hearing and referred to them in my findings where relevant.

Claimant's submissions

30 The claimant submitted that he had to wait until his contract finished in December 2023 and questions whether the situations in the cases referred to by the respondent were the same as his. He followed the correct process by using the grievance procedure and hoped the respondent would uphold his grievance. He had to wait until he knew exactly how many days he had worked that year before he could do anything. He has already completed 110 days before April this year and intends to do more to go onto the higher rate. He made contact with ACAS under the early conciliation process 22 days after

the grievance process concluded because of personal issues and he was also working at the time. He has apologised in the past for late submissions.

Relevant Law

31 Section 123(1) of the Equality Act 2010 provides that proceedings on a complaint within section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. This is subject to the extension of time limits provision to facilitate conciliation before institution of proceedings introduced by the Enterprise and Regulatory Reform Act 2013.

32 In exercising their discretion to allow out of time claims to proceed, tribunals may have regard to the checklist contained in section 33 of the Limitation Act 1980, as modified by the EAT in the leading authority of ***British Coal Corporation v Keeble and ors 1997 IRLR 336***. This includes the consideration of the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case. In particular, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with requests for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Issue to be Determined by the Tribunal

33 The Tribunal identified the following issue required to be determined:

(i) Is it just and equitable in all the circumstances to extend the time in which to lodge the claim?

Conclusion

34 I have carefully considered all the evidence in the round and taken account of the relevant factors. In doing so, I am satisfied that it is just and equitable in all the circumstances to extend the time in which to lodge the claim. In reaching this view, I had regard to the following.

35 It was not in dispute that the claimant lodged his claim after the expiry of the statutory limitation period. Parties agreed that the last date of the alleged discriminatory act was 31 July 2023 and therefore, subject to any time extension under the ACAS early conciliation provisions, the statutory time limit expired on 30 October 2023.

36 Overall, I accepted the claimant's account of events as credible in respect to his reasons for the delay in lodging the claim.

37 I considered the claimant gave a reasonable explanation for not raising a tribunal claim prior to the expiry of the statutory time limit. This is because while the nature of his complaint was in effect realised after the "FCA" was carried out on 7 July 2023 and he was assessed as fit to return to full duties on 21 July 2023, I accepted he did not and indeed would not have known, the full consequences of that until 31 December 2023 in terms of any detriment regarding the number of days he may work for the rest of the year.

38 I found the claimant's evidence reliable that he sought advice from his union about the issue in January 2024, who raised the possibility of a time bar issue if he made a tribunal claim, yet erroneously advised him that he would need to raise an internal grievance with the respondent first.

39 I further accepted the claimant's explanation that he did not instigate the ACAS early conciliation process until 3 weeks after the outcome of the grievance appeal because he was in the midst of dealing with urgent family matters that had arisen which involved seeking custody of his children in Ireland who had been removed from his former partner.

40 I considered that upon receipt of the ACAS early conciliation certificate on 16 April 2024, the claimant acted promptly in lodging the claim.

41 In terms of the prejudice that either party would suffer as a result of the decision reached, I found that the claimant would not suffer any prejudice if the claim was allowed to proceed, but would suffer considerable prejudice if it were not allowed to proceed as he would be prevented from seeking legal redress.

42 In respect of the respondent, I found they would not suffer any prejudice if the claim were not allowed to proceed and that on balance would suffer less prejudice if the claim were allowed to proceed than the prejudice the claimant would suffer if it were not allowed to proceed.

43 This is because while the respondent would suffer the obvious prejudice of having to meet a claim that would otherwise have been defeated by a limitation defence and which had been submitted more than 5 months late, the respondent had been put on notice of the claimant's complaint on 15 January 2024 when the claimant lodged a grievance and did not suggest there was any forensic prejudice. Furthermore, in accordance with ***Wright v Wolverhampton City Council EAT 0117/08***, I noted that incorrect advice received from a trade union official should not be ascribed to the claimant. While the respondent did suggest in terms of ***Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283*** that the merits of the claim do not support any time extension, there were no substantive submissions made by parties about this issue for me to consider.

44 Having applied ***British Coal Corporation v Keeble and ors 1997 IRLR 336*** and weighed all the relevant factors in the round, I am satisfied that it is just and equitable to extend the time in which to lodge the claim in all the circumstances of the case.

45 For all these reasons, the Tribunal has jurisdiction to hear the claim.

2) Respondent's Application for Strike Out of the claim and a Deposit Order

Respondent's Submissions

46 I have read and digested the respondent's written submissions which Mr Gilligan spoke to at the hearing and referred to them in my findings where relevant. In response to the claimant's submissions, Mr Gilligan further stated the claimant has not previously intimated that the respondent's delay in arranging the "FCA" was due to his personal injury claim.

Claimant's submissions in reply

47 The claimant submitted that he had an industrial accident at work which the respondent has accepted responsibility for. He tore his ham string and suffers from chronic pain. He is still receiving physiotherapy treatment from the NHS and can find jobs off shore challenging. The respondent stopped providing him with physiotherapy in November 2022. He was only seen by the respondent human resources at the time of his "FCA," he was passed as fit and the report was not sent to him.

48 His claim should proceed because of the ongoing situation he is in. He feels it is because he made a personal injury claim in January 2023 that he was kept at home between March and November 2023, even though this is a very busy period. He has not said this before because he thought that at this point it was just about whether the case would go ahead because of the time bar issue.

49 He is an advanced scaffolder and has been in the trade for 29 years. The respondent said he was putting a strain on the work force which he does not accept and he cannot get any witnesses to come forward as they afraid they will be paid off if they speak up. He has since been working off shore and has still managed to complete his duties. He also believes that it only took 10 days to have a "FCA" this year because he made a claim to the employment tribunal. In addition, he relies on his further and better particulars.

Findings in Fact

The following facts are found to be proven or admitted;

50 The claimant is paid £1,100.00 gross per week for off shore work and £400.00 gross per week onshore.

51 The claimant is not in receipt of any benefits.

52 The claimant does not have any savings.

53 The claimant has three children, a step-daughter and grand-daughter that he financially supports.

54 Since his injury at work, the claimant has struggled financially due to a loss of earnings and his partner also being off work as a result of breaking her wrist.

Relevant Law

55 Rule 37 (1) (a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 provides that a Tribunal may strike out all or part of a claim or response if it is scandalous, or vexatious or has no reasonable prospect of success.

56 The case of ***Ezias –v- North Glamorgan NHS Trust [2007***] IRLR 603 held that it would only be in an exceptional case that a strike out application for no reasonable prospects of success would succeed when the central facts are in dispute and no evidence has been heard in respect of those facts in order to be considered. In ***Balls v Downham Market High School & College UKEAT/0343/10/DM,*** Lady Smith identifies it as a high test and that there must be no reasonable prospects after careful consideration of the available material.

57 In ***Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL***, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination in order to make a proper determination.

58 The authority of ***Cox v Adecco and ors 2021 ICR 1307, EAT*** provided detailed guidance on how Tribunals should approach strike out applications against litigants in person.

59 Rule 39 (1) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states that where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Rule 39 (2) provides that the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

60 The authority of ***Jansen Van Rensberg v Royal Borough of Kingston-Upon-Thames and ors EAT 0096/07*** held that the test for little reasonable prospect of success for a deposit order is plainly not as rigorous as the test that the claim has no reasonable prospect of success and while a tribunal has greater leeway when considering whether to make a deposit order, it must have a proper basis for doubting the likelihood of the claimant being able to establish the facts essential to the claim.

61 In ***Sharma v New College Nottingham EAT 0287/11*** the EAT quashed the deposit order due to there being underlying factual disputes and that the claimant was asserting behind the documentation there had been behaviour towards him that constituted acts, which in the absence of an acceptable explanation, the tribunal could conclude were on the ground of his race. In reaching this view, the EAT referred to ***Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*** where it was held that discrimination issues should as a general rule be decided only after hearing the evidence and that it would be illogical to require an employment judge to take different approaches depending on whether he or she was considering striking out or making an order for a deposit as either order was a serious and potentially fatal course of action.

Issues to be Determined

62 The Tribunal identified the following issues required to be determined:

(i) Does the claim have no reasonable prospects of success?

(ii) If not, should the claim be struck out under Rule 37 (1) (a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013?

(iii) Does the claim claim have little reasonable prospects of success?

(iv) If so, should a deposit order be issued under Rule 39 (1) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013?

(v) If so, what should be the amount of the deposit order?

Conclusion

63 I have carefully considered parties' submissions, the productions lodged and the relevant material held on the Tribunal file in the round.

64 The essence of the claimant's position, as set out in his further and better particulars, is that he has been discriminated against by the respondent due to the delay in his "FCA" taking place which is linked to his asserted disability and that in turn, denied him the opportunity to work his anticipated contractual 154 days in 2023.

65 The claimant explained in his response to the Tribunal written answers dated 6 September 2024, that during the period he was awaiting his "FCA," he felt the respondent was deliberately trying to stop him from returning to offshore work as each time he contacted them, he was told they would be in touch with more news. He then compared this to the speed at which the respondent arranged his "FCA" in 2024. (Qu. No.4) He also stated in his further and better particulars that even though he has always made himself available for work,

he was kept at home for 16 weeks while awaiting the "FCA" without any support or clear communication as to when it would be arranged. In addition, he submitted at the hearing that the reason for the delay in arranging the "FCA" was due to him raising a personal injury claim against the respondent for his work injury in January 2023.

66 The respondent's principal submission is that the claim has no or little prospects of success in the absence of any basis for an inference that any delay in arranging the "FCA" was causally related to something arising in consequence of the claimant's asserted disability. As discussed in ***Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16***, his asserted disability was merely the context in which the issue of the "FCA" arose.

67 I have noted that at paragraph 13 of their response to the claim, the respondent has also stated: *"During the period between 14 April and 1 August 2023 the claimant was not utilised by the respondent and remained on standby and in receipt of his contractual remuneration due to the inability of the respondent to identify suitable work consistent with the claimant's capability limitations or which the claimant was willing or available to undertake."* I further noted that their response did not provide an explanation for any delay in arranging the "FCA" and that the Tribunal were advised on 12 September 2024 that an application to amend the response would not be made at this point due to the scheduled preliminary hearing to determine time bar. As the respondent did not have previous notice of the claimant's oral submission that the delay was due to his personal injury claim, Mr Gilligan was not in a position to respond to that.

68 In view of these respective positions, I considered there is a material factual dispute as to whether any delay in arranging the "FCA" was causally related to the claimant's asserted disability, or if it was only the context in which the issue of the "FCA" arose.

69 In particular, while the claimant has given some explanation for his belief that the delay in arranging the "FCA" is causally related to something arising in

consequence of his asserted disability, the respondent considers the claimant's asserted disability is merely the context in which the issue of the "FCA" arose, and has not, as yet, provided their reason for any delay. There is also factual dispute between parties regarding the claimant's willingness and availability to work when he was waiting for his "FCA."

70 In applying ***Ezias*** ("*supra*"), ***Anyanwu*** ("*supra*") and ***Cox*** ("*supra*") to the above, I found that the central facts as to the reasons for the act complained of; namely the respondent's delay (if any) in arranging the claimant's "FCA," would require a Tribunal to make findings in fact after a full hearing.

71 For these reasons, the respondent's application to strike out the claim on the grounds there is no reasonable prospect of success is dismissed.

72 For the same reasons, I have taken the view that the respondent's application for a deposit order on the ground there is little reasonable prospect of success shall be dismissed. In doing so, I have had particular regard to the EAT's decision in the case of ***Sharma*** (*"supra")* to quash a deposit order due to there being underlying factual disputes, as well as the leading authority of ***Anyanwu*** ("*supra*"), which held that the same approach should be taken in respect to the consideration of a deposit order application as a strike out application as either order was a serious and potentially fatal course of action.

73 As I have dismissed the deposit order application, I have not considered the claimant's ability to pay such an order.

74 For these reasons the respondent's application for a deposit order is dismissed.

75 **A preliminary hearing for the duration of one day heard by way of video conference using the Cloud Video Platform shall proceed to be fixed in order to determine the claimant's disability status.**

Employment Judge: R Sorrell

Date of Judgment: 11 December 2024

Date Sent to Parties: 12 December 2024