THE INDUSTRIAL TRIBUNALS

CASE REF: 38501/21

CLAIMANT: **Aaron Farrell**

RESPONDENT: **Studio Rogers Limited**

JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant's complaints of disability discrimination and a failure to make reasonable adjustments were brought out of time. The Tribunal has concluded that it is just and equitable in the circumstances to extend time in order for the case to proceed.

2. The claimant's claim for protected disclosure detriment was brought out of time. The Tribunal has concluded that the claimant has failed to satisfy it that it was not reasonably practicable to lodge his complaint within time, and the Tribunal therefore does not have jurisdiction to hear it. The claimant's complaint on that ground is therefore dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): **Employment Judge Browne**

APPEARANCES

The claimant was represented by Mr Finnian Clarke of the United Voices of the World.

The respondent was represented by Mr Sean Doherty, barrister-at-law, instructed by Judith Blair Solicitors.

ISSUES

1. The claimant commenced work with the respondent as an architectural assistant, at the respondent architects' practice. The claimant and respondent are resident in and employed in Northern Ireland.

2. The claimant's complaints of direct disability discrimination, failure to make reasonable adjustments and detriment on the grounds of public disclosure, were lodged in the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET) in Belfast on 16 August 2021.

3. His ET1 form to the Tribunal included the concession that his complaints were by that stage all out of time and sought therein an extension of time.

4. The timeline of his assertions of discrimination and public interest disclosure detriment started in January 2021, continuing until the claimant resigned on 26 April 2021. His last day at work was 30 April 2021, although he had in fact been absent on sick leave since 3 March 2021.

5. The first formal indication from the claimant as to prospective legal proceedings arising from his resignation was on 2 June 2021, at which point his trade union, United Voices of the World (UVW), based in London, commenced the compulsory dispute conciliation process with ACAS.

6. Such ACAS process has been required by statute in England and Wales since 2020, before any employment tribunal complaint can be commenced in that jurisdiction after unsuccessful conciliation, accompanied by a certificate to that effect, issued by ACAS.

7. In Northern Ireland, which comprises a separate legal jurisdiction, with its own largely identical but separate employment legislation, the same attempted dispute resolution process must be completed through the Labour Relations Agency (LRA), before any related Industrial Tribunal proceedings can be commenced. The relevant governing legislation is the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020.

8. The claimant does not seek to dispute that his advisors were anything other than completely unaware of the jurisdictional differences between what was required by law and the erroneous path they followed.

9. Their error was replicated by ACAS, which at no stage queried the fact that the claimant and the respondent were based in Northern Ireland.

10. The respondent also did not challenge it, and engaged in written correspondence with UVW about the ACAS dispute resolution.

11. That situation continued until June 2021, at which point, on 17 June 2021, there appears to have been a dawning realisation by UWV that there was a separate jurisdiction issue. Up until that point, there was no evidence of anyone advising the claimant even considering if there might be a separate procedure, never mind that it might be a separate jurisdiction. Such information would readily be expected to be found by a straightforward online search, regardless of any specialist knowledge on the part of his advisors.

12. Mr Clarke was at pains in his evidence to the tribunal to point out that he was not then legally qualified to practise, although he holds a law degree and a postgraduate masters degree, as well as being a qualified barrister, about to commence his pupillage. At the relevant time, he was acting as a caseworker for UVW, of which the claimant became a member.

13. Mr Clarke in his online profile listed his previous legal experience as a research assistant at two universities, and in the Court of Appeal in London. He further

quoted his many academic honours and awards, as well as numerous legal publications to which he had contibuted. He also states in his online profile that five people have endorsed his legal research ability.

14. Against that background, Mr Clarke was assigned the claimant's case, when the latter sought the advice and assistance of his union.

15. Mr Clarke was rightly candid in his evidence, and in the claimant's ET1 complaint to OITFET, that he did not realise until mid-June that there might be a potential issue as to jurisdictional procedures. That indication came from a specialist solicitor in a practice whose advices were sought by UVW about the case.

16. Email correspondence clearly showed that Mr Clarke was informed on 17 June that the external solicitor "cannot assist on the case as he has no jurisdiction in Northern Ireland". There was no evidence of any pause for thought by UVW about the implications of such a situation for the whole basis of the claim. Nor was there any evidence that the solicitor was then asked if, arising from the jurisdiction issue, there might as a consequence be any legal or procedural issues. Given that this was mid-June 2021, the claimant's trade union could immediately have approached the LRA, and still be within time to launch the conciliation process and proceedings in Northern Ireland.

17. Instead, Mr Clarke's primary focus appeared from the mid-June emails to be to, in Mr Clarke's word, "inflate" the financial amount which should be sought in negotiations for compensation. Such an approach appeared to the Tribunal to unseat the prudence of establishing a sound foundation for a building before deciding upon the décor.

18. Even at that point, UVW continued with the ACAS process, with no evidence of even a telephone call or email to OITFET, seeking clarification. Mr Clarke instead in his evidence sought to attribute this lack of action or lateral thought to the fact that neither ACAS nor the respondent informed UVW of the correct jurisdiction "even though the address of both the claimant and the respondent's offices were clearly Northern Irish." It did not seem to occur to him in evidence that such a statement might cut both ways when applied to those with carriage of the claimant's case.

19. By continuing to follow the ACAS procedure path, while knowing the clear concerns issued by the external solicitor, UVW took no steps to clarify or remedy this clear potential defect.

20. The ACAS conciliation certificate was issued on 14 July 2021, with the claimant being advised by UVW that the application to OITFET was due by 14 August 2021. It was the intention of the claimant's trade union from the outset to lodge proceedings with OITFET, as it was always aware that that was the correct jurisdiction because of the claimant's and respondent's location. No effort appears to have been made to determine if the relevant law and procedures in Northern Ireland might differ from those in England.

21. Mr Clarke advanced the argument that UVW was not the claimant's legal representative. Despite the fact that no professional fees were being charged, Mr

Clarke and his colleagues, as part of their designated role within the union as caseworkers, undertook carriage of the legal case for the claimant.

22. Mr Clarke's CV is replete with his legal expertise, and the nature of the emails between him and his colleagues demonstrates a fluency in legal issues, including discussion around the tactics to be deployed regarding the financial negotiations. In the view of the Tribunal, these factors would certainly place them in a position far ahead of a layman such as the claimant or a trade union workplace representative, and into the category of legal advisors.

23. The union also had a clear professional relationship with an external employment law specialist. Whilst there can be no expectation that the claimant's representatives have anything other than a general understanding of employment law, this case is somewhat different, in that the specialist advice they received demanded further research and enquiries to be made. That it was not done until the very last minute resulted in the claimant's complaint being lodged out of time.

24. Mr Clarke gave evidence that the practice of UVW is to wait until the very last minute before lodging proceedings, due to "capacity issues", thereby explaining why the claimant's complaint to OITFET was not drafted until 13 August 2021.

25. It was as that point that Mr Clarke realised the error regarding the conciliation certificate's proper authority as being the LRA in Northern Ireland.

26. He immediately contacted the LRA in Northern Ireland, and requested that they issue the appropriate conciliation certificate, which was issued on 16 August 2021; the claimant's ET1 form complaint was lodged with OITFET on the same date. It is of note that, had such action been taken promptly after the warning of 17 June, there is a probability, from the LRA's immediate response, that the entirety of the case could have been lodged within time.

27. The tribunal is satisfied that there was a considerable amount of preparatory work, focused upon the relevant legal and factual issues. The only "blind spot" in that preparation was the forum for conciliation, occasioned due to assumptions being made about Northern Ireland being subject to the same legislation as that applicable to England.

28. Two other factors also were in play, namely: the failure of the claimant's representatives to act upon what was a clear warning on 17 June 2021 from their specialist legal advisor as to separate jurisdictions; and the persistence with the "just in time" practice of lodging proceedings as close to the statutory deadline as possible.

29. The tribunal has concluded however that the prompt action in addressing the conciliation issue is supportive of the claimant's contention that the tribunal can properly exercise its discretion in favour of extending the time limit in the two discrimination complaints, permitting the claimant's case on those matters to proceed.

30. It is of note that the respondent during the initial conciliation process was fully aware of the issues complained of. Whilst it is not the responsibility of the

respondent or ACAS to administer the claimant's case, it seems to the tribunal to be oppressively harsh to deprive the claimant of recourse to pursuing his claim, when the same error was made by the respondent and the responsible body for conciliation.

31. As regards the public interest disclosure aspect, however, the tribunal considers that the claimant has failed to satisfy it that it was not reasonably practicable to lodge his complaint within time.

32. The mistake as to jurisdiction was a contributory factor, but that was compounded by the claimant's representative's failure to act to clarify what the implications might be of the jurisdictional issue. That failure was further compounded by an absence of any evidence to suggest that the "just in time" practice was anything other than a device to offset shortage of internal resources. There was nothing to suggest that it cannot be set aside to deal with the exigencies of individual cases.

33. The tribunal is therefore not satisfied by the claimant that that aspect of the claimant's case was otherwise unachievable for any practical reason. It therefore is satisfied that lodging that complaint with OITFET was reasonably practicable; that complaint is therefore dismissed in its entirety.

Employment Judge:

Date and place of hearing: 20 May 2022, Belfast.

This judgment was entered in the register and issued to the parties on: