EMPLOYMENT TRIBUNALS

Claimant: **Mr A Beaumont**

Respondent: **Nationwide Building Society**

Heard at: **Bristol** **On: 6 December 2018**

Before: Employment Judge Maxwell

Representation
Claimant: in person
Respondent: Mr French-Williams, solicitor

JUDGMENT

1. The claimant's claims under the Equality Act 2010, with respect to being dismissed / "forced […] out" on 6 April 2018, were presented within a period which is just and equitable, pursuant to section 123(1)(b) of the Equality Act 2010.

REASONS

Background

2. The claimant presented a claim form to the Tribunal on 23 July 2017, bringing claims of unfair dismissal, sex discrimination and disability discrimination against the respondent.

3. The claimant lacked the necessary two years continuous employment to bring an unfair dismissal claim, and this part of his claim was rejected.

4. The discrimination claims were accepted. Factually, the substance of the claimant's claim was that: he suffered with two long-term conditions, namely

skin cancer and depression; his family circumstances changed such that he was no longer as able to work remotely; his employer was unsympathetic when he "requested flexibility to be able to work closer to [his] son"; he was not offered "occupational health support"; his grievance and appeal were poorly dealt with; he was "forced to choose between [his] son and [his] employer; he would have been treated differently if he were "single female"; he was "forced […] out. No particular kind of discrimination or relevant provisions within the **Equality Act 2010** ("EqA") were identified. The claimant's claim form also included:

> **The delay in issuing the claim is due to a delay in the respondents grievance process which was only concluded last week following an appeal. The grievance was submitted on my last day working for the respondent. I believe the respondent has delayed the process to ensure the claim is out of time.**

5. In connection with time issues, the following chronology is noted:

   5.1. 8 August 2016 - the claimant commenced employment;

   5.2. 6 April 2018 - the claimant's employment terminated;

   5.3. 20 July 2018 - the claimant contacted ACAS (Day A);

   5.4. 23 July 2018 - ACAS issued a certificate (Day B);

   5.5. 23 July 2018 - the claim form was presented.

6. Given a termination of the claimant's employment on 6 April 2018, that might appear to be the latest date from which time would have begun to run with respect to any alleged discrimination. Under EqA the primary limitation period would have expired on 5 July 2018. Given that the claimant did not commence ACAS early conciliation until after time had already expired, no extension was provided by that mechanism. Accordingly, his claim for was at least 18 days late.

Further Information

7. Subsequent to a direction from the Tribunal, the claimant provided further information about his claim and this included:

> **Regarding the timescales, the Claimant accepts the claim falls outside of the statutory time limits. The Claimant does, however, believe that the Tribunal should consider his claim as (a) the Claimant believed the 3 month timescale commenced on conclusion of the grievance process, (b) had the Respondent concluded its grievance process in a timely manner the statutory time limit would have been adhered to, (c) because of his enhanced mental state and the anxiety caused by both the Respondent's behaviour and his cancer treatment, it would be just an equitable to extend the time limit and (d) the claim is not significantly out of time**

Evidence

8. The claimant gave evidence. He is an experienced HR professional, having worked in the field for many years and held senior positions. He was well aware of a 3-month time limit for the presentation of claims, but believed this ran from the conclusion of the grievance and appeal processes. Because of this belief, he did not make any enquires or seek legal advice about when his claim should be presented. The claimant also explained that he was in an "enhanced mental state" given the workplace dispute, difficulty with his skin cancer treatment, and his domestic arrangements regarding his son. Very fairly, the claimant volunteered that even if these other stressors had not been present he may not have presented the claim any earlier, as the timing was based on his understanding of how the 3-month period was calculated.

Law

9. So far as material section 123 of the **Equality Act 2010** ("EqA") provides:

> **(1) Subject to sections 140A and 104B 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.**
>
> **[…]**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P does an act inconsistent with doing it, or**
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

10. An Employment Tribunal applying section 123 has a broad discretion and, pursuant to the decision in **British Coal Corporation v Keeble [1997] IRLR 336 EAT**, the factors relevant to its exercise may include those under section 33 of the **Limitation Act 1980**, in particular:

    10.1. the length of and reasons for the delay;

    10.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

    10.3. the extent to which the party sued had cooperated with any requests for information;

10.4. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.

11. The balance of prejudice between the parties will always be an important factor.

12. There is, however, no presumption that time will be extended; see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 343 CA**, per Auld LJ:

> **25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds 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 discretion is the exception rather than the rule. […]**

13. Most recently, the Court of Appeal considered the exercise of this discretion in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, per Leggatt LJ:

> **18. First, 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 any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, 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 (see British Coal Corporation v Keeble [1997] IRLR 336), 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: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. […]**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).**

14. Whilst awaiting the outcome of an appeal, may be a relevant factor, it is not does not automatically give rise to an extension of time; see **Apelogun v Lambeth London Borough Council [2002] ICR 713 CA** per Gibson LG

> **16 […] I regard the decision in Robinson's case as being plainly correct. If one considers what was said in Aniagwu's case it may be that the headnote to the Industrial Relations Law Reports is not quite accurate in appearing to suggest that it was laying down some general principle to be followed in all cases by tribunals, as the tribunal with which we are concerned appears to have thought. Instead, as it seems to me, what was said in Aniagwu's case was intended to be limited to the particular circumstances of that case, and on those facts the appeal tribunal was expressing the opinion that every employment tribunal, unless there was some particular feature about the case or some particular prejudice which the employers could show, would take the view that to await the outcome of the grievance**

> **procedure was an appropriate course to take. To the extent that Aniagwu's case goes any further than that and lays down some general principle that one should always await the outcome of internal grievance procedures before embarking on litigation, in my judgment Aniagwu's case was plainly wrong. It has long been known to those practising in this field that the pursuit of domestic grievance or appeal procedures will normally not constitute a sufficient ground for delaying the presentation of an appeal. The very fact that there have been suggestions made by eminent judges in 1973 and in 1982 that the statutory provisions should be amended demonstrates that, without such amendment, time would ordinarily run whether or not the internal procedure was being followed. For my part, therefore, I can see no error whatever in what Lindsay J said in the present case in relation to this matter, that is to say that the fact, if it be so, that the applicant had deferred commencing proceedings in the tribunal while awaiting the outcome of domestic proceedings is only one factor to be taken into account. It is clear from the tribunal's decision that the tribunal was applying what it thought was a general approach laid down in Aniagwu's case, and that was erroneous. I see no real prospect of success on this first ground of appeal.**

15. Mr French-Williams also referred the Tribunal to **Hunwicks v Royal Mail Group plc UKEAT/0003/07/ZT**, in particular paragraph 5 for the proposition:

> **5. […] It remains the law that the non-exhaustion of domestic internal procedures will not necessarily be treated as a sufficient reason for extending time in cases where the tribunal has jurisdiction to do so on the basis of what is just and equitable, and it is indeed arguable that normally it will not be […]**

Continuing Act

16. The question of what amounts to a "continuing act" was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

> **52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. [...]Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.**

Conclusion

Time

17. During the course of the claimant's evidence it became apparent that his complaints included criticism of the appeal process or outcome. Given the claimant did not present his appeal until 25 May 2018 and the outcome was in the respondent's letter of 20 July 2018, it may be arguable that time ran from a late date than initially appreciated and, notwithstanding the claimant's concession that he was out of time, that the claim was presented within the primary limitation period. The position is unclear, however, because the claim is at present poorly particularised, as such I cannot discern whether the

criticism of the appeal was part of the unfair dismissal claim the Tribunal rejected, or a discrimination claim or both. In the circumstances, I have gone on to consider the position on the basis both parties actively advanced, namely that time ran from 6 April 2018 and the claim was 18 days late.

Length of Delay

18. The delay in the present case, 18 days as against a 3-month time limit, was a relatively modest one, being neither trivial on the one hand nor very substantial on the other.

Reason for Delay

19. Plainly, the claimant's explanation that he was awaiting the conclusion of the internal grievance procedure is not an answer to his claim being late. As an experienced HR practitioner, it might, reasonably, be expected that he would have good knowledge of the Tribunal time limits and the importance of adhering to the same.

20. Whilst the claimant was having a difficult time at work, domestically and with his health, this does not appear to have been a cause of his late claim.

Cogency of Evidence

21. The delay in the presentation of this claim, 18 days, will have no effect on the cogency of the evidence.

Request for Information

22. The claimant did provide a response to the Tribunal letter requiring that he provide further information on his claim, albeit the detail in terms of dates, events and legal causes of action is still missing.

Prejudice

23. The delay in the presentation of this claim, 18 days, will not prejudice the respondent in defending the same. Realistically and fairly, Mr French-Williams did not argue otherwise.

24. The matters about which the claimant seeks to complain were ventilated in correspondence and the subject of a grievance and appeal process. This should have resulted in the reason for the respondent doing as it did having been focused upon and recorded in writing.

25. Whilst the claimant's claim still lacks definition, as to the precise factual complaints and the particular provisions of EqA that he relies upon, the broad thrust of his factual complaint is clear and the relevant statutory sections can be ascertained in the case management process.

Just and Equitable

26. I am satisfied that it is just and equitable for the claimant's claim to be heard, notwithstanding that it was presented when it was. The delay is relatively modest, the claimant has given an honest explanation for the same. Whilst a mistaken understanding of the time limits and / or a belief that internal proceedings should be exhausted may not, on its own, be a sufficient reason for extending time, neither is it an absolute bar. Accepting that the time limits should not be dispensed with lightly, I am especially mindful that in this case the delay will have no effect on the cogency of the evidence and there is no prejudice to the respondent in defending the same. The claimant will, however, lose his claim entirely if time is not extended. The balance of prejudice favours allowing this complaint to proceed.

Earlier Events

27. The question of a continuing act and / or whether it is just and equitable for the Tribunal to determine the claimant's complaints about earlier events is reserved to a final hearing.

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Employment Judge Maxwell

Date: 6 December 2018