EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103655/2020 (V)

Preliminary Hearing Held by Cloud Video Platform
On 11 January, 2 February and 2 March 2021

Employment Judge M Robison

Mr S Ferguson	**Claimant** **In person**
Skymore RVs Ltd	**Respondent** **Represented by** **Mr C Johnstone** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. the claim has been lodged outwith the period of three months starting with the effective date of termination;

2. it was not reasonably practicable for the claimant to lodge the claim in time; and the claim was lodged within a reasonable period thereafter, in terms of section 111(2)(b) of the Employment Rights Act 1996;

3. the claim is lodged within a period which the Tribunal finds is just and equitable in terms of section 123(1)(b) of the Equality Act 2010;

4. this case will now be listed for a case management preliminary hearing to take place by telephone on a date to be advised.

REASONS

1. This CVP preliminary hearing commenced on 11 January 2021, but had to be adjourned due to an initial failure of the claimant to lodge the relevant medical evidence to support oral evidence which he had commenced at the hearing. Unfortunately, when the hearing resumed on 2 February, the respondent had not received legible copies of the medical records, so the hearing had to be adjourned again.

2. At this continued hearing on 3 March, I heard further evidence from the claimant on oath, and then he was cross examined by Mr Johnstone. I decided to reserve my judgment due partly to connection issues. I wish to thank parties for their patience while technical issues were addressed.

3. Although the claimant had withdrawn the ordinary unfair dismissal claim (as the claimant does not have two years' service), at the case management preliminary hearing which took place on 27 October 2020, it was confirmed that the claimant also pursues claims of arrears of pay and automatic unfair dismissal under section 100 and section 103A of the ERA. This is in addition to the claim of disability discrimination.

4. At this hearing, consideration was given to the question of time bar only.

5. Mr Johnstone had produced a set of numbered medical reports which the claimant had lodged. The claimant had lodged further documents of which Mr Johnstone had copies, which unfortunately were not numbered. I agreed with Mr Johnstone however that the only relevant pages were what he described as a witness statement from the claimant, and a letter dated 24 February 2021 prepared for the claimant on his behalf by the CAB, making submissions on the time bar point.

Findings in fact

6. Having heard evidence and considered the documents lodged, the Tribunal makes the following relevant findings in fact.

7. The claimant commenced employment with the respondent around July 2018. He is a qualified master technician and he was employed as a mechanic. He was the only mechanic looking after a fleet of around 40 vehicles.

8. The claimant suffers from ADHD, autism and has a history of anxiety and depression. He also suffers from PTSD following service in the armed forces in Afghanistan.

9. Following an incident which took place on Monday 16 December, the claimant was called into a meeting with the respondent, following which he was dismissed effective Wednesday 18 December 2019.

10. Thereafter, emails were exchanged between the claimant and the respondent regarding the termination of his employment.

11. On 4 February 2020, the claimant contacted ACAS. He dealt with a Sharon Hughes. She told the claimant that he had three months from the date of termination to lodge a claim in the Employment Tribunal.

12. Following efforts at conciliation, Ms Hughes recommended that conciliation should continue for the further two weeks permitted, and the claimant took advantage of that extension.

13. As no resolution was achieved, an EC certificate was issued on 18 March 2020.

14. Thereafter, within the next week, the claimant downloaded and completed an ET1 form. He sent the completed form by e-mail to Sharon Hughes at ACAS on 23 March 2020.

15. That was on or around the date that the Prime Minister announced a national lockdown due to the covid pandemic.

16. The claimant's mental health took a turn for the worse around that time.

17. The claimant was under considerable stress at that time. He was liaising with the respondent and then the ICO about a subject access request. Shortly prior to losing his job he had raised a civil claim regarding a puppy which he had purchased from a breeder which had suffered various infections. He was facing criminal charges in relation to a charge of dangerous driving which was subsequently dropped. His mother in law, who had been suffering from terminal cancer and who was cared for by his wife, died in July. All of this put considerable strain on his marriage and his mental health.

18. In March the claimant had attempted suicide. He consulted his GP in this regard on 12 March 2020.

19. The claimant took another overdose on 23 or 24 May, after which the claimant was admitted to hospital, but later released. He took another overdose on 27 May and was admitted to hospital by ambulance. He had a short stay in a psychiatric hospital and was discharged on 3 June 2020.

20. After forwarding the ET1 to Sharon Hughes on 23 March, the claimant did not contact ACAS or the ET to aks about progress because from his understanding all court cases were at a standstill due to the covid pandemic until further notice. He came to this belief because he had been advised that both the civil case and the criminal case he was involved in could not progress at this time.

21. It was not until the end of June that the claimant contacted Ms Hughes for progress relating to his employment tribunal application.

22. It was at this time that she explained his mistake. She had understood that when he had sent her the ET1 form by e-mail that he was simply sending her a copy of the form which he had submitted to the Tribunal.

23. The claimant then contacted the Employment Tribunal and was told on the telephone that the ET1 could not be send in electronically and that an e-mail

version could not be accepted. He therefore sent the ET1 form recorded delivery with a covering letter dated 2 July 2020, explaining why it was late.

24. The ET1 was accepted as presented on 6 July 2020.

Claimant's submissions

25. Mr Ferguson relied on what he had said in evidence, and on the letter which was prepared for him by the CAB dated 24 February 2021.

26. In that letter the CAB submitted on behalf of the claimant that the respondent was aware that Mr Ferguson had concerns about his treatment by them and specifically about his dismissal and that Mr Ferguson made clear his intention to raise a claim against his former employers within the time frame allowed by the ECC.

27. With regard to the unfair dismissal claim, this can be allowed late where it was not reasonably practicable to lodge the claim in time. Applying the principles set out in the decision of the Court of Appeal in *Lowri Beck* to the facts of this case, there is a clear intention to pursue a claim to the Tribunal. There had been an effort to resolve the matter through ACAS so the employers are fully aware of the nature of the claim and the factual background. All that the claimant had done was make a mistake which would have been noted and corrected had it not been for the unprecedented situation which prevailed at the time. The approach taken by the Tribunal service at the start of the pandemic will be within judicial knowledge but the substantive point is that there was a total freeze on any judicial business from around March 2020 [as he understood it].

28. Mr Ferguson had throughout acted in accordance with established procedures. He made an error in where he submitted his ET1 form and this was not noted or corrected at the time. This was a reasonable error which the Tribunal should excuse. Even if the Tribunal may hesitate in some cases to excuse this error it should recognise the specific issues relating to Mr Ferguson and in particular his mental health issues, and [as he understood it] the evidence would show that Mr Ferguson had severe mental health issues at the time when the

application to the Tribunal should have been made. If the Tribunal were to consider that he was disabled this would trigger the duty to make a reasonable adjustment under the Equality Act.

29. With regard to the disability claim, this can be allowed late where it is just and equitable to do so. This test has been interpreted by the courts as being a very wide and flexible test, for example in *Abertawe Bro v Morgan*, where the Court of Appeal confirmed that factors which will always be relevant are length of and reasons for delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). Here there is no prejudice to the employer given the fact that matters were canvassed in the ACAS process, which had only recently been completed and so there was no lengthy delay. Further, by reference to the overriding objective, account should be taken of the fact that the claimant is representing himself while the other party has the benefit of being represented by a qualified and experienced solicitor.

30. Following oral submissions from Mr Johnstone, Mr Ferguson argued that Mr Johnstone's submissions failed to take account of his diagnosis of ADHD, and that this explains why he did not understand how to submit the ET form and the mistake which he made.

Respondent's submission

31. Mr Johnstone submitted that notwithstanding the medical evidence and the severity and complexity of the claimant's condition, this has no direct relevance on the delay in this case which must be attributed to a mistake.

32. However, the claimant was able to locate and prepare an ET1 form, which clearly indicates where it is to be returned, and to deal with early conciliation; he knew how to make a SAR and to engage with the ICO. He puts his failure to send the ET1 to the correct place down to inexperience but the majority of claimants are in the same position.

33. Although at least one of his drugs has the potential to impact on his memory and understanding, there is no evidence that this is the case, and one of the

medical reports suggests he has “no impairment of decision-making abilities or capacity and his insight was intact”. He was able to carry out a technical job which taking the medication which had no impact on driving.

34. He was able to engage with these matters for the majority of the time following his dismissal, apart from the week in March and again at the end of May when he was suffering symptoms/in hospital. While the claimant has complex medical needs this does not explain why he lodged the ET form with the wrong organisation.

35. The claimant is well versed in engaging in litigation, given his reference to the civil claim, the criminal proceedings and the GDPR claim which is a formal process with time limits.

36. This background is relevant for the different two tests.

37. On reasonable practicability, his explanation boils down to the fact that he made a mistake but was otherwise able to engage with the process including completing the ET1 and sending it to ACAS. It was therefore reasonably practicable to bring the claim.

38. While he lodged the claim shortly after he realised his mistake, still there was a long period, from 29 April, when the claim should have been lodged, so it was not lodged within a reasonable time thereafter.

39. He argued that it was not just and equitable to extend time, and for the same reasons the extension should not be allowed. There is no presumption that discretion will be exercised and there is significant case law that it should be used sparingly.

40. It is necessary to look at the facts of each case, and while on the face of things the claimant has an explanation for the delay, on closer consideration there is no reason why it could not be lodged, given that his medical history is not relevant to the reason why he made the mistake.

41. The respondent in this case will suffer both primary and forensic prejudice. It is clear the claimant's recollection is already starting to fade and this will be the case for all relevant witnesses.

Relevant law

42. The law relating to time limits in respect of unfair dismissal is contained in the Employment Rights Act 1996. Section s111(2) states that an Employment Tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the effective date of termination or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

43. Thus, where the claim is lodged out of time, the tribunal must consider whether it was not reasonably practicable for the claimant to present the claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time, then the tribunal must then be satisfied that the time within which the claim was in fact presented was reasonable.

44. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability (*Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490). Lord Justice Underhill summarised the essential points as follows:

    1) The test should be given "a liberal interpretation in favour of the employee" (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 479, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53);
    2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119*….
    3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires

in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will [not] have been reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made;

4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*)…

5) The test of reasonable practicability is one of fact and not law (*Palmer*).

45. Section 123 of the Equality Act 2010 states that a complaint under that Act must be made to the employment tribunal before the end of three months starting with the date of the act of discrimination, or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period; failure to do something is to be treated as occurring when the period in question decided upon it.

46. The discretion to extend time is broader than under the "not reasonably practicable" formula (*DPP v Mills* 1998 IRLR 494), and the court's power to extend time on the basis of what is just and equitable entitles the tribunal to take into account anything which it judges to be relevant (*Hutchison v Westward Television Ltd* 1977 IRLR 69).

47. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, but the exercise of discretion is the exception rather than the rule (*Robertson v Bexley Community Centre* 2003 IRLR 434).

48. Whilst not mandatory, the list of factors contained in section 33 of the Limitation Act 1980 is a useful checklist of relevant factors (*British Coal Corporation v Keeble* 1997 IRLR 336), namely:

1) Prejudice;

2) The length of, and reasons for the delay;
3) The extent to which the cogency of evidence is likely to be affected by the delay;
4) The extent to which the party sued has co-operated with requests for information;
5) The promptness with which the claimant acted once he knew the facts giving rise to the cause of action; and
6) The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

49. The Court of Appeal in *Southwark London Borough Council v Afolabi* 2003 ICR 800 confirmed that, while that list provides a useful guide for tribunals, it need not be adhered to slavishly. While it is important that the tribunal does not leave out of account any important factor, the s33 factors should not be elevated into a legal requirement. The Court in that case went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.

50. The Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* 2021 EWCA Civ 23 recently confirmed 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.

Tribunal decision

51. It is not disputed that the claimant's employment ended on 18 December 2019. That therefore is the effective date of termination and the date from which any time limit should run. Ordinarily, the time limit would expire on 17 March 2020 but the claimant commenced early conciliation on 4 February 2020. The early conciliation period lasts until ACAS issue the EC certificate, which in this case was on 18 March 2020. This gives the claimant the benefit of a 43 day extension to the limitation period, which would thus expire on 29 April 2020.

52. The claim should therefore have been lodged by 29 April 2020. The ET1 was not lodged until 6 July 2020. The claim is thus lodged more than two months late. There is no dispute about this.

53. There being claims for both unfair dismissal and disability discrimination, the focus for the Tribunal must therefore be to consider two different questions which involve the exercise of discretion, in respect of the unfair dismissal claims (and other wages claims) whether it was reasonably practicable for the claimant to have lodged the claim in time, and in respect of the discrimination claim whether it was just and equitable to extend time. Given that the just and equitable test is broader, I deal with it first.

Is it just and equitable to extend time?

54. The focus when it comes to the disability discrimination claim is only on the question whether it is just and equitable to extend time.

55. Although the *Keeble* factors are relevant as discussed above they are not a checklist, and all are not relevant here, but certain factors will almost always be relevant, namely the length and reason for the delay and the prejudice to the respondent. These were the main factors at play in this case, and I considered these first and then other factors which were raised by the parties.

Length of the delay

56. As discussed above, although time would normally have run until 17 March 2020, given extensions due to ACAS conciliation, the time limit would in fact have expired on 29 April. Since the claim was not lodged until 6 July, the delay is approximately two months and one week.

The reason for the delay

57. The claimant has given evidence explaining the delay in this case, which is supported by medical evidence.

58. The claimant was aware of the three-month time limit. He was getting advice from ACAS who had made him aware of it. The claimant's ignorance was not

about the three-month time limit, but about where to send the ET1 form to. He wrongly thought it should have been sent to ACAS.

59. Ordinarily it might be expected that ACAS would notice the error. Ms Hughes however subsequently stated that she had assumed that the claimant was just sending her a copy. Notwithstanding, that error may well have been picked up before the expiry of the time limit but for the unprecedented covid pandemic.

60. This goes some way to explaining the reason for the delay because but for the pandemic the error may have been picked up.

61. The focus in this case has to be on the fact that the claimant made a mistake. His mistake was in sending the claim form to ACAS and not appreciating that he should have sent it to the Employment Tribunal.

62. However, having sent it to ACAS and having heard nothing, the claimant took no steps to follow up or find out about the progress of his claim. During this period (from 23 March to end June) the claimant has lodged medical evidence to support his evidence that he was suffering from (quite extreme) mental health difficulties during that time. He was suffering from considerable stress, including dealing with a civil claim, dealing with a criminal charge, dealing with his mother in law's terminal illness, all of which placed inevitable pressures on his marriage and mental health.

63. Even if the claimant's mental health had been such that he could have made enquiries about progressing his claim, this coincided with the time when the country was in almost complete lockdown. The claimant was labouring under the misapprehension that the courts were at a standstill. He understood this from correspondence he had received relating to his civil and criminal claims. I noted that the CAB adviser was also under the mistaken understanding that there was a "total freeze" on "judicial business" during this period. As I understand it, it is correct to say that the Scottish courts were not operating during much of this period. However, the Employment Tribunal is run by HMCTS not SCTS and has been operating to some extent at least throughout the whole of the pandemic. I accept therefore that is a reasonable assumption

to make given the courts in Scotland were essentially at a standstill, if not the Employment Tribunal.

64. Mr Johnstone submits that the mistake cannot be explained by the claimant's medical difficulties. He submitted that during most of the period in question (from December through to July) the claimant showed himself to be capable to dealing with a civil claim, a criminal claim and with the ICO. Apart from when he had particular mental health challenges in March and again in May, the claimant was not prevented from lodging a claim. His medical condition cannot explain or account for his mistake.

65. Mr Ferguson made forceful submissions to the contrary, focusing on the manifestations of ADHD. He explained in evidence that as a result of this condition his ability to complete and comprehend documents is impaired and he struggles to read and understand documents, which he finds stressful and frustrating.

66. I did not agree that it was black and white in the way that Mr Johnstone presented it. It cannot be said that the only times when Mr Ferguson's mental health had an adverse impact on him was the week in March (when he attempted suicide) and the week in May (when he was in a psychiatric hospital). Clearly the claimant's mental health was fragile during the whole of the period from March to May but in any event the claimant thought that he had done what he needed to do. In fact, the reason for the delay is to be attributed as much to his misunderstanding about lockdown, and to ADHD, as to his mental health.

Prejudice to the respondent

67. Mr Johnstone argued that in addition to "primary" prejudice, by which I understood him to mean that the respondent was otherwise put to the time and expense of defending a claim which was on the face of it time barred, he argued that there is also "forensic prejudice" in this case. The claimant is already showing that his recall regarding events is vague. While I accept that

it is inevitable that memories will fade, in this case the delay was only two months.

68. Although the Employment Tribunal has been carrying on business, the pandemic has impacted to the extent that there are some delays in hearing cases so that it is likely there would be some delay in listing cases anyway.

69. But more significantly I accepted the submission made on behalf of the claimant by the CAB that this is a case where the respondent was aware of the claimant's intention to lodge a claim and more importantly the respondent had been involved for some six weeks with ACAS in attempting to negotiate a settlement in this case. This is not a case where there has been a long lapse of time during which the respondent was not aware that a claim would be raised, and it could not be said that the respondent will now be put to the trouble of investigating a stale claim. I came to the view therefore that the prejudice to the claimant in not having his claims considered by the Tribunal outweighed any potential prejudice to the respondent in dealing with the delay.

Reasonable adjustments

70. The CAB submitted on behalf of the claimant that were the Tribunal to consider that the claimant is disabled, then it should make a reasonable adjustment. As I understood it that was to argue that allowing the claim in late would be a reasonable adjustment. The Employment Tribunal Service is of course alert to the need to make reasonable adjustments in appropriate circumstances. However I take account of the claimant's mental health and particularly ADHD as a factor which weighs in favour of me exercising my discretion.

Equal footing

71. I am also alert to the fact that, as submitted by the CAB, the claimant is an unrepresented party, bearing in mind the overriding objective to deal with cases fairly and justly so far as practicable, to ensure parties are managed on an equal footing.

72. For these reasons I conclude that it is it is just and equitable to extend time.

Was it reasonably practicable for the claimant to present his claim in time?

73. This test is different from the "just and equitable" test, and indeed the scope of my discretion is narrower.

74. I accept that the burden of proof is on the claimant, and that following *Palmer* the test is whether it was "reasonably feasible" for the claim to have been lodged in time. However, this question has recently been considered by the Court of Appeal in the case of *Lowri* and five guiding principles from previous case law have been identified, as set out above, which I have considered.

75. Although the claimant could complete and submit an ET1 claim form albeit to the wrong organisation, the fact is it was therefore physically practicable for him to have lodged the claim. However, reasonably feasible goes beyond that, and I am enjoined to look beyond simply physical impracticability. The claimant's mental health is certainly relevant but I take the view that the claimant's condition that is ADHD is also relevant. I took account of his explanation about the symptoms of that condition.

76. Here on the question of whether the ignorance was reasonable, it is clear in this case that the claimant was well aware of the three-month time limit, so I focus on the question whether his ignorance with regard to where to send the claim form to was reasonable. Mr Johnstone submitted that it was clear where the claim form was to be sent to from the form itself, although I do not necessarily agree, in any event the majority of claimants will complete forms online so will not require to give consideration to where to send forms to (and indeed I note the fact that they cannot be send in by e-mail). Mr Ferguson had been dealing with ACAS and made the assumption that this was the correct organisation to deal with the application. Again, I take account of the claimant's diagnosis of ADHD when assessing whether the claimant's ignorance

77. This is a question of fact for me to determine, not law. I take account of these difficulties in assessing the extent to which the claimant's failure to send in the

ET1 form to the correct organisation given the factual context of this claim meant that it was not reasonably practicable for him to lodge his claim in time. I have therefore come to the view, bearing in mind that the test should be "given a liberal interpretation in favour of the employee", that it was not reasonably practicable for the claimant to have lodged his claim in time.

Did the claimant lodge his claim within a reasonable time thereafter?

78. I understood Mr Johnstone to argue that if the Tribunal were to conclude that it was not reasonably practicable for the claimant to lodge the claim in time, that he did not do so as soon as was reasonable.

79. However, in this case, it is clear from the facts that the claimant acted speedily as soon as he realised his mistake. He stated that he had spoken to Ms Hughes at the end of June, then spoken on the telephone to ET staff immediately thereafter. The letter which he wrote explaining his mistake and sending in the ET1 form was dated 2 July 2020, with the ET1 arriving in the post on 6 July 2020.

80. Given that background, I accept that the claimant lodged his claim within such time as was reasonable following it becoming reasonably practicable.

Conclusion and summary

81. I have concluded that it is it is just and equitable to extend time for the reasons set out above. I conclude therefore that the Tribunal does therefore have jurisdiction to hear the disability discrimination claim.

82. Although the test is different, and stricter, for unfair dismissal, I came to the view in the particular circumstances of this case, and taking account in particular of ADHD as well as mental health, that is was not reasonably practicable to lodge the claim in time and the claimant lodged within a reasonable time thereafter. The Tribunal therefore also has jurisdiction to hear the unfair dismissal claim (and if relevant any other wages claims).

Next steps

83. It is important that progress in now made in progressing this claim. Mr Johnstone was not able to say what he understood the next steps to be because he has been assisting Mr Muirhead with this case. I noted from the PH note issued following the telephone case management preliminary hearing which took place on 27 October 2020 that disability was not yet conceded at that point. This would normally require a further preliminary hearing.

84. That however was before the respondent had seen the claimant's medical records and it may be that the respondent is now able to concede the question of disability status bearing in mind the fact that the Tribunal will assess the situation absent medication.

85. While the respondent may not concede that they knew the claimant was disabled the question of knowledge is of course another matter and would normally be considered when hearing evidence about the other claims to be pursued in this case.

86. Notwithstanding I have decided that it is appropriate to list this case for another CMPH by telephone to assess whether another preliminary hearing is required and if not to list and prepare for a final hearing. This case should therefore now be listed for a telephone case management preliminary hearing (one hour).

Employment Judge: Muriel Robison
Date of Judgment: 09 March 2021
Entered in register: 20 March 2021
and copied to parties