EMPLOYMENT TRIBUNALS

Claimant: **Mark Wright**

Respondent: **Flogas Britain Limited**

Heard at: Watford Employment Tribunal **On: 18 April 2024**

Before: Employment Judge S. Matthews

Representation
Claimant: Mr. Michell (Counsel)
Respondent: Mr. Bignall (Counsel)

RESERVED JUDGMENT

1. **It is just and equitable to extend time in respect of the Claimant's claims for disability discrimination.**

2. **The respondent's application for a Strike Out order is refused.**

REASONS

Introduction

1. The claimant was employed by the respondent, a company in the petroleum products sector, as a Hiab driver, from 3 May 2022 until 6 September 2022. He brings claims of disability discrimination under the Equality Act (EqA) 2010. Early conciliation started on 3 December 2022 and ended on 14 January 2023. The claim form was presented on 15 March 2023.

2. This preliminary hearing has been listed to decide whether the disability discrimination claims have been brought out of time and whether the Tribunal should strike out for lack of jurisdiction. I was provided with a bundle of 156 pages. Numbers in brackets below are references to pages in the bundle.

Procedural background

3. Previous preliminary hearings were held on 1 November 2023 and 29 January 2024. The claimant was not legally represented at those hearings.

4. At the first Preliminary hearing on 1 November 2023 Employment Judge Henderson directed that a Preliminary hearing be held to decide (so far as is relevant to this Judgment):

    a. Whether the claims for disability discrimination were made outside the time limit as set out in section 123 of the EqA 2010 and if so, whether the Tribunal should exercise its discretion (on a just and equitable basis) to extend the time limit to allow the claim to proceed.
    b. The respondent's Strike Out application under rule 37 (1) (a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 (the Rules of Procedure) dated 3 October 2023 (38-41). The application asserted, so far as is relevant to this Judgment, that the Tribunal has no jurisdiction as the whole of the claim has been brought outside the time limit.

5. At the second Preliminary hearing on 29 January 2024 the claimant had not complied with orders set out by Employment Judge Henderson. The claimant was not represented. Employment Judge Dick exercised his discretion to postpone the hearing to allow the claimant time to seek legal representation.

6. The claimant has now instructed Solicitors. The claimant's Solicitors applied for permission to amend the claim by email dated 18 March 2024. That application was heard at the same time as this application and is dealt with in a separate Record of Preliminary Hearing. Leave to amend was granted. In summary the claimant was permitted to further particularise his claim for reasonable adjustments (s.20 and 21 EqA 2010) and to add new claims of discrimination arising from disability (s. 15 EqA 2010) and victimisation (s. 27 EqA 2010).

Chronology of Events

7. I set out a chronology of events at paragraphs 8 and 9 below, derived from the Amended Particulars of Claim, the Further and Better Particulars and the skeleton argument prepared by Counsel for the claimant. I do not make findings of fact in paragraphs 8 and 9, but it is necessary to set out the claimant's case at its highest in order to decide whether there are grounds to strike out the claim under rule 37 (1) (a) of the Rules of Procedure.

8. The claimant commenced employment with the respondent on 3 May 2022. His contract stipulated a 3 month probation period which expired on 3 August 2022. On 11 July 2022 he submitted a written grievance stating that his manager, Mr. Grant, did not manage him properly in terms of his disability and asked for a change of manager. At a subsequent grievance meeting on 22 July 2022, he was informed that he could not have a new manager, but training would be arranged for him.

9. On 6 September 2022 the claimant was told that he had failed his probation. A letter dated 8 September 2022 informed the claimant that his employment was terminated with immediate effect. On 10 September 2022 the claimant appealed his dismissal. The appeal was heard on 3 October 2022. There was a second appeal meeting on 21 October 2022. On 2 November 2022 a letter rejecting his appeal was sent to the claimant by post.

Evidence Heard

10. I heard evidence from the claimant on why he did not issue his claim until 15 March 2023. He explained that he thought he had to go through internal procedures with his employer before contacting ACAS. He was told this by the manager hearing his appeal on 3 October 2023. He accepted this advice because 'he was a manager and I thought he knew the rules'.

11. When the claimant received the letter rejecting his appeal he contacted ACAS. When he received the ACAS certificate on 14 January 2023, he thought that 'there would be a roll over so one would go into the other and ACAS was going to notify the tribunal that there was a case pending'. On or around 10 March 2023 he contacted Citizens Advice and received the advice that he needed to lodge the ET1 form himself and it would not automatically carry over from the ACAS process. He did this on 15 March 2023.

12. His disability meant he found it difficult to research the law relating to disability and Employment Tribunal procedure. He is slow at reading and relies on You Tube videos he finds online rather than written information. He made attempts to seek legal advice following the first case management hearing, including through the Bar's direct access scheme. A letter in the bundle from John Horan of Counsel, mindful of his duty to the Tribunal and the claimant, states that he considers that the claimant's disability means that he is not able to do the necessary parts of the litigation without assistance, which he is unable to give under the scheme (55).

13. I accept that the reason the claimant delayed contacting ACAS until after the rejection of his appeal was that he was informed that was what he should do by the manager who heard the appeal. Having engaged with ACAS he did not understand the difference between the ACAS process and lodging the claim until it was explained to him by Citizens Advice. He had difficulty researching the law and procedure because of his disability.

14. When deciding to permit the amendment of his claim to bring s.15 and s. 27 claims I found it entirely understandable that the claimant was unable to articulate his case properly before he was legally represented because of his difficulty in understanding the law relating to disability. I find that he appreciated that he needed legal advice and made reasonable attempts to seek legal assistance following the first case management hearing on 1 November 2023.

Law

15. Section 123 (1) EqA 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

16. Anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim (s18A of the Employment Tribunals Act 1996). Time stops running for calculating the time limit during the certificate period.

17. The Tribunal can extend time for bringing a discrimination claim by such period as it thinks just and equitable (section 123(1)(b)). Tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule (Robertson v Bexley Community Centre [2003] EWCACiv536).

18. British Coal Corporation v Keeble [1997] IRLR 336 sets out a list of factors that can be useful to consider when deciding whether to exercise discretion to extend time. The factors are (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

19. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply the Limitation Act checklist or any other check list under the discretion afforded tribunals by s123(1), although it was often useful to do so. The only requirement is not to leave a significant factor out of account (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account (paragraph 25). Nevertheless, it is important not to lose sight of the fact that the burden is on the claimant to persuade the tribunal to extend time.

20. The relative prejudice to the parties must always be considered in exercising judicial discretion. The Tribunal must consider whether it is possible to have a fair trial of the issues raised by the claimant and if a fair trial is possible despite the delay, it cannot be said that it would be unjust or inequitable to extend time (DPP v Marshall 1998 IRLR 494).

21. In Chief Constable of Lincolnshire v Caston [2010] IRLR 327 it was emphasised that the discretion to extend time in which to bring Tribunal proceedings has remained a question of fact and judgment for individual Tribunals, on a case-by-case basis.

22. Where a tribunal is unable to properly establish the date of the discriminatory act and, in particular, whether the act is part of a continuing act or continuing state of affairs, in the absence of evidence from the parties that would have to be presented at a full hearing, it is wrong for it to make a decision to strike out the claim on the basis that it is time-barred (Kaur v Edinburgh City Council 2013 CSIH 32, Ct Sess (Inner House).

23. Galilee v the Commissioner of Police of the Metropolis [2018] ICR 634 held that amendments take effect for the purposes of limitation at the time permission to amend is given and do not "relate back" to the time when the original proceedings were commenced.

24. In Serco Ltd v Wells EAT 2016 ICR 768, the EAT held that an employment judge should be sparing in the exercise of the power under rule 29 to vary or revoke judicial orders and decisions. The question of whether it is 'necessary in the interests of justice' should be considered carefully. If there has been a material change of circumstances, or if the order was based on a material omission or misstatement, a variation or revocation may be appropriate.

25. Rule 37 of the Rules of Procedure provides (so far as is relevant):

> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> ...

26. When considering whether to strike out a claim, the Tribunal must first consider whether the grounds set out in rule 37 have been established; and then decide whether to exercise its discretion to order strike-out.

27. Key principles were summarised by Mitting J in Mechkarov v Citibank NA [2016] ICR 1121 as follows:

> "(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

Submissions

28. I heard detailed submissions from Counsel for each party and I received a written skeleton argument from Counsel for the claimant. I have not repeated their submissions in full here but have set out a summary of the main points.

29. Counsel for the claimant argued that the appeal was part of a continuing act with the dismissal and therefore the claims were in time. He submitted that an argument can be had at the final hearing about whether there was conduct extending over a period. A finding on whether there was conduct extending over a period is fact sensitive. At a preliminary hearing the claimant only has to show that it is reasonably arguable.

30. Counsel for the respondent accepted that the claim for reasonable adjustments could be in time if found to be part of a course of conduct which terminated with the appeal hearing. He conceded that should be left to the final hearing to decide. He focused his submissions on the claims under s.

15 and s. 27 EqA 2010. These claims have been permitted as a late amendment and are clearly out of time. He argued that the claimant's disability was not so severe that the claimant could not have obtained legal representation before February 2024 and sought to amend the Particulars of Claim before 18 March 2024.

Discussion and Conclusions

31. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 2 November 2022 may not have been brought in time.

32. The events relied on by the claimant (paragraphs 7 to 9 above) occurred before 2 November 2022, save for the letter rejecting his appeal, which was posted to him on 2 November 2022. If the claimant can establish that the events prior to the appeal rejection were part of a continuing act of discrimination culminating with the appeal rejection, the claim for reasonable adjustments will have been brought in time.

33. Different considerations apply to the claims under s. 15 and s. 27 EqA 2020 as the permitted amendments take effect from the date the amendments are allowed. They are clearly out of time even if they formed part of the continuing act of discrimination.

34. The Order of EJ Henderson directs the Tribunal to consider whether the Tribunal should exercise its discretion (on a just and equitable basis) to extend the time limit to allow the claim to proceed. The Tribunal is also directed to consider the respondent's application for a strike out of the whole claim which is predicated on the basis that the claim is out of time.

35. Since that direction, and the strike out application, the claimant has applied to amend the claim, which I have allowed. Specifically, the amendments add in a further event (the appeal outcome on 2 November 2022), that could bring the claim for reasonable adjustments in time if the claimant is able to establish a continuing act of discrimination. That is a material change in circumstances since the order of EJ Henderson.

36. I have considered whether it is now in the interests of justice to delay to the final hearing the determination of the substantive issue of whether it is just and equitable to extend time. This will enable evidence to be heard on whether there was a continuing act of discrimination. I have decided that having heard evidence on the reasons for the delay, I can determine the substantive issue of whether it is just and equitable to extend time at this stage in the proceedings.

37. In reaching that decision, I have considered that even if there was not a continuing act of discrimination, the delay in issuing the reasonable adjustments claim is only around 4 weeks. In respect of s.15 and s.27 claims there is a considerably longer delay but I have heard evidence which is relevant to the reason for the delay. I have heard submissions from both parties on the degree of prejudice of allowing or refusing the extension.

38. I found that the reason the claimant was late in issuing the claim was that he relied on advice from the appeal manager that he needed to go through internal procedures first. Subsequently he thought that the ACAS process would automatically roll over to the Employment Tribunal process. He was hindered in his ability to research and understand the relevant law and procedure because of his disability. His inability to understand and articulate his claim for s.15 and s.27 at the case management hearings before he was legally represented was understandable, particularly in view of his disability.

39. In any event the main point for the Tribunal to decide in exercising discretion to extend time is the relative prejudice to the parties of allowing the application to extend time. I did not hear any submissions from Counsel for the respondent to persuade me that the cogency of the respondent's evidence was likely to be affected by the delay or that a fair trial would not be possible. The Agenda submitted for the case management hearing indicated that the respondent intends to call all the witnesses referred to in the claimant's amended case and it is reasonable to assume that they are still available to give evidence. Although the respondent may assert that memories will have faded, the events about which they will give evidence, including the appeal, are events which it was clear from the original claim form are relevant to the claim. In contrast the claimant will suffer prejudice if he is not able to pursue his claims.

40. In summary I am satisfied that there is a prima case that the complaint for reasonable adjustments has been presented in time, because the complaint may be found to be part of a continuing act of discrimination culminating in the appeal. Even if that is not the case, I find that it is just and equitable to extend time because the balance of prejudice favours the claimant.

41. The claims under s.15 and s.27 EqA 2010 have been issued out of time as the amendments do not take effect until the date they are permitted. However, I accept that the claimant was unable to understand and articulate his claims until he was legally represented, in part because of his disability. He sought legal representation following the first case management hearing, once he appreciated the difficulties. More importantly, as I found when deciding to allow the amendments, the balance of prejudice favours the claimant in exercising discretion to extend time on a just and equitable basis.

42. Accordingly, it is just and equitable to extend time, so far as is necessary for the claimant to bring all his discrimination claims. The application to strike out the claimant's claims is dismissed.

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Employment Judge **S. Matthews**

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Date 31 May 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
3 June 2024

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