THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 1400/19FET

CLAIMANT: **Geoffrey Wilson**

RESPONDENT: **Mark Mason Employment Law Limited**

JUDGMENT ON A PRELIMINARY ISSUE

The judgment of the tribunal is as follows:

(1) The claimant's claim was lodged in the Tribunal office outside the statutory time limit.

(2) It is not just and equitable to extend the time limit to allow the claim to proceed.

(3) The claimant's claim is dismissed.

CONSTITUTION OF TRIBUNAL

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

APPEARANCES:

The claimant was self-represented.

The respondent was represented by Mr N Phillips, of Counsel, instructed by Worthingtons Solicitors.

REASONS

1. The judgement of the tribunal was given orally with reasons at the end of the preliminary hearing.

2. This Preliminary Hearing was arranged to consider the following:-

   (1) Was the claim lodged within the statutory time limit?

   (2) If not, should the time limit be extended to allow the matter to proceed?

3. The parties were ordered to exchange and lodge written submissions on the issues to be determined at the Preliminary Hearing no later than 19 May 2021. The tribunal is grateful for their respective written and oral submissions.

4. The claimant gave evidence under oath and was cross-examined.

BACKGROUND

5. The claimant presented his claim form to the tribunal on 22 October 2019 claiming age discrimination and discrimination on the grounds of religious belief/political opinion.

6. The respondent presented its response on 12 December 2019 resisting the claims.

7. This claim has been the subject of previous Preliminary Hearings for case management notably on 2 March 2020 at which hearing the present Preliminary Hearing was directed and on 17 November 2020 at which hearing the timetable for the lodgement of submissions and documentary evidence, to include medical evidence, were further ordered.

8. During the present hearing the claimant volunteered that, at some point in the past, he had appeared opposite me in the tribunal at a time when I was in practice at the Bar. I indicated that I had no recollection of this, as I have none. The claimant made no application for me to recuse myself. I did not consider that it would be appropriate to do so.

THE LAW

The Fair Employment and the Treatment (NI) Order 1998

9. The claimant alleges discrimination contrary to Article 3 of the 1998 Order. Article 38 places jurisdiction to consider such complaints in the context of employment with the Fair Employment tribunal. The relevant Article of the 1998 Order for the purposes of this judgement is article 46, which states, *inter alia*:-

> **"Period within which proceedings must be brought**
>
> **46.**—(1) Subject to paragraph (5), to Article 46A, and to any regulations under Article 22 of the Employment (Northern Ireland) Order 2003, the Tribunal shall not consider a complaint under Article 38 unless it is brought before whichever is the earlier of—
>
> (a) the end of the period of 3 months beginning with the day on which the complainant first had knowledge, or might reasonably be expected first to have had knowledge, of the act complained of;
>
> ….
>
> (5) A court or the Tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."

Just and Equitable Extension

10. A helpful summary of the approach to be taken by a Tribunal when seeking to exercise its' discretion on this point is found in Harvey on Industrial Relations and Employment Law in section PI.1.g:-

> **"*(3) 'Just and equitable' extension***
>
> **(a) Wide discretion**
>
> **[277]**
>
> Under some jurisdictions, perhaps now most notably under the Equality Act 2010 s 123, a tribunal is empowered to grant an extension of time if it considers that it is 'just and equitable' to do so. Where these words appear it has been held that they give the tribunal 'a wide discretion to do what it thinks is just and equitable in the circumstances … they entitle the [employment] tribunal to take into account anything which it judges to be relevant': *Hutchison v Westward Television Ltd [1977] IRLR 69*, *[1977] ICR 279, EAT*. The discretion is broader than that given to tribunals under the 'not reasonably practicable' formula (which itself, as noted above, is to be given a 'liberal interpretation in favour of the employee', see para [193] ff): *Hawkins v Ball and Barclays Bank plc [1996] IRLR 258, EAT*; *British Coal Corpn v Keeble [1997] IRLR 336, EAT*; *Mills and Crown Prosecution Service v Marshall [1998] IRLR 494*, sub nom *DPP v Marshall [1998] ICR 518, EAT*.
>
> **(b) A question of fact for the tribunal**
>
> **[278]**
>
> If there is one matter on which the appellate authorities are united, it is that the exercise of the just and equitable discretion is one for the tribunal at first instance to exercise with only the rarest interference on appeal. As described by the Court of Appeal in *Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298*, *[2010] IRLR 327* (at [32]) it is 'a question of fact and judgment, to be answered by the tribunal of first instance which is empowered to answer it'. Thus in *Robertson v Bexley Community Centre [2003] EWCA Civ 576*, *[2003] IRLR 434*, the Court of Appeal stressed that it is not open to the EAT to interfere with a tribunal's exercise of discretion merely because it would have reached a different conclusion on the facts if it had been deciding the issue at first instance. An appeal can only succeed 'where the EAT can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect' (per Auld LJ). And in *Caston* Longmore LJ (at [29]) wished to: 'reiterate the importance that should be attached to the EJ's discretion. Appeals to the EAT should be rare; appeals to this court from a refusal to set aside the decision of the EJ should be rarer. Allowing such appeals should be rarer still'.

(c) No presumption of an extension

[279]

Notwithstanding the breadth of the discretion, it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can think of a reason not to extend: 'the exercise of discretion is the exception rather than the rule' (*Robertson v Bexley Community Centre [2003] EWCA Civ 576*, *[2003] IRLR 434, at para 25*, per Auld LJ); *Department of Constitutional Affairs v Jones [2007] EWCA Civ 894*, *[2008] IRLR 128, at paras 14–15*, per Pill LJ). However, in *Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298*, *[2010] IRLR 327* the Court of Appeal dismissed any suggestion that Auld LJ's comments in *Robertson* were to be read as encouraging tribunals to exercise their discretion in a restrictive manner, and it rejected an argument that the tribunal in *Caston*, by adopting what it had described as a 'liberal' approach, had erred in law. The use of such a term was, in the circumstances, an irrelevance. According to Sedley LJ: 'there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised' (at [31]). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it' (para 32).

(d) Burden on the claimant to persuade the tribunal it is just and equitable to extend time

[280]

The Court of Appeal in *Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298*, *[2010] IRLR 327* (at [26] per Wall LJ) held that 'Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour)' and in the same case Sedley LJ described (at [31]) that 'there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them'. However, as the EAT noted in *Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0320/15 (18 February 2016, unreported)* per HHJ Shanks at [25]), the burden is one of persuasion, it is not a burden of proof or evidence, as such. In *Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278* at [9] the EAT, HHJ Peter Clark, identified a proposition which would seem to follow from this burden of persuasion that 'if the claimant advances no case to support an extension of time, plainly, he is not entitled to one'."

11. In ***British Coal v Keeble*** **[1997] IRLR 336** the EAT confirmed that on the question of time limits and any extension of same, a tribunal would be assisted by the factors mentioned in Section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases.

"It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:-

(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 cooperated with any request for information;

(d) the promptness with which the plaintiff acted once her or she knew of the facts giving rise to the cause of action; and

(e) *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action*."

12. The decision to extend time limits is one for the discretion of the Industrial Tribunal and one which shall be based on the facts of each individual case, having regard to the "*overriding objective*", see below.

13. The tribunal notes the comments of Auld LJ in ***Robertson v Bexley Community Centre [2003]*** in the Court of Appeal:-

"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 just and equitable to extend time. So the exercise of discretion is the exception rather than the rule".

14. And the comments of Sedley LJ in ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR327***:-

"In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power that has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LK is not to be read as having said in ***Robertson*** *that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them.*

Whether a claim has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it".

(tribunal's emphasis)

THE MERITS OF THE CLAIM

15. As noted in Harvey, Division PI.1.G.(3):-

> "*Although there is no fixed checklist of factors that should be considered when a tribunal is asked to exercise its just and equitable discretion, certain issues will commonly be relevant to that decision. These factors, considered below, include: ….(3) the potential merits of the claim*."
>
> *[para 281.01]*
>
> *"(iv) The potential merits*
>
> *[285]*
>
> *In **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278, EAT**, Judge Peter Clark allowed an appeal and remitted the application for a just and equitable extension where a tribunal had failed to consider, amongst other relevant factors, the potential merits of the claim. However, an enquiry into the merits will necessarily be conducted at a high level and should not involve a trial within a trial*."

OVERRIDING OBJECTIVE

16. The overriding objective is contained in Rule 2 of Schedule 1 to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020:-

> *"The overriding objective of these Rules is to enable tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable:-*
>
> *(a) Ensuring that the parties are on an equal footing.*
>
> *(b) Dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) Avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) Saving expense.*
>
> *The tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it, by these Rules. The parties and their representatives shall assist the tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the tribunal."*

In exercising my discretion I have taken into account these matters together with the submissions of the parties and relevant case law.

FINDINGS OF FACT

17. It is common case that the respondent published a job advertisement on 21 May 2019. This was for the post of "*Employment Lawyer*" and required as an essential criterion for appointment that the applicant was "*a qualified solicitor/barrister*". There is no dispute that the claimant has neither qualification. Notwithstanding this, the claimant lodged an application in person at the respondent's premises on 14 June 2019. Along with his application form he attached copies of decisions in a case he had acted in some years previously which made its way to the Court of Appeal in Northern Ireland and a newspaper cutting relating to another case in which he had represented a claimant.

18. By way email sent on **19 June 2019** the respondent informed the claimant that he had been unsuccessful in his application. On **20 June 2019,** the claimant sent an email asking for an explanation of the reasons for his failing to be shortlisted.

19. The respondent sent the claimant an email of the same date at 11.15 pm advising him "*having qualified as a solicitor or barrister was an essential criterion for the role and you did not demonstrate that you met that criterion*".

20. The next communication from the claimant to the respondent was an email on **18 July 2019** at 18:04. Within that email the claimant made a number of statements relevant to consideration of this application. In particular:-

> *"Also stated clearly on the application form I have tribunal advocacy experience dating back to 2003".*
>
> *"I fully understand that you may not have wanted to consider someone older and more experienced – and that was the real reason for not being shortlisted?"*
>
> *"I also must raise the possibility that you may have let yourself be prejudiced by the enclosure, (in my application) of that newsletter article re the case against the Bible College?"*
>
> *"I say so as it is clear from your website that you are keen to "help people of faith" (I am sure you are aware of the concept of unconscious discrimination when it comes to recruitment – indeed it probably happens more at this stage of the employment process than at any other stage)".*
>
> *"I am originally from a strong evangelical background and have many evangelical friends and relatives – and I actually agree that people of faith are being both legally and politically marginalised – even in NI. So I think I may have been – possibly – the discriminated against."*

21. The respondent replied to this email on **23 July 2019** repeating that the reason he was not shortlisted was because he did not meet the personnel's specification in

respect of having had the appropriate legal qualification.

22. The claimant confirmed and the tribunal finds, in answer to questions from the tribunal, that he was very familiar with the time limits in relation to the bringing of claims before the tribunal, including claims of discrimination. He accepted that the act of discrimination complained of in these proceedings was the decision not to shortlist him, and further agreed that this act had taken place no later than **19 June 2019**, when he received the email informing him that he had not be successful in his application.

The claimant's contentions

23. The claimant contends that it was at the point that the belief that he had been the victim of discrimination "crystallised" in his mind, the **23rd of July 2019**, that time started to run for the purposes of the statutory time limit.

24. In a series of emails sent to the tribunal on 19 May 2021, which are the claimant's submissions in respect of this application, he describes himself thus:-

> *"As an independent Legal Consultant specialising in employment and discrimination law of some 20 years' experience (including winning a case at Court of Appeal level - ."*

25. The claimant relies upon three explanations for the failure to lodge within the statutory time limit. These are:-

(1) He believed that the three month time limit to bring these proceedings only began to run once the matter had crystallised in his mind on 23 July 2019 and, if this is correct, then in fact the claim was brought in time.

(2) He suffered a heart attack in August of 2019 required hospitalisation and surgery and thereafter was advised to rest by his medical advisors. The claimant provided the tribunal with a Discharge Note from the Royal Victoria Hospital dated 20th of August 2019. This records an admission of the claimant on the 18th of August with:-

> "*…chest pain associated with nausea, sweats and palpitations…He underwent a coronary angiogram and subsequently had PCI* (insertion of a stent*) performed to diagonal 1….he will be followed up by the cardiac rehabilitation team in due course*."

The Note further records that no further tests or investigations were required, that no action was required by his GP and that he was safe to drive. In evidence the claimant further asserted that he had been advised to "*take it easy*" for a few weeks by his doctors. This was the extent of the medical evidence provided to the tribunal.

(3) His time was taken up preparing for the presentation of a hearing before the Court of Appeal.

The respondent contended, in summary, that time ran from the date of knowledge of the alleged discrimination, the 19th of June 2019, that this was not displaced by

the alleged "crystallisation" in July and that the claimant had not presented evidence sufficient to extend the statutory time limit. Further, the claimant's application for the position was not made in good faith as he was aware that he did not possess the requisite qualifications for the post. These proceedings were, therefore, opportunistic.

CONCLUSIONS

26. In exercising the tribunals' discretion to extend the time limit for bringing a claim on the grounds of justice and equity it is important to note that each case must be judged on its own merits and facts.

When exercising its discretion the tribunal must consider the reasons why this situation has arisen and then consider the balance of prejudice as between the parties if the time limit is extended. A further important issue to note is that the onus is upon the claimant to persuade the tribunal that it is appropriate for the statutory time limits to be set aside

27. In respect of the "crystallised" argument advanced by the claimant, the claimant relies on the case of ***Clarke v Hampshire Electro-Plating Co Ltd*** **(1991) EAT IRLR 420.** This case relates to a specific situation where the claimant persuaded the Court to extend the time for the presentation of a claim on the basis that the discriminatory act had not "crystallised", meaning that it had not been completed until a later point in time, thus the time for presentation of a claim was extended, time starting to "run" once the act was complete. That is not the case here, the act took place no later than 19 June, was complete, and was communicated to the claimant at that time.

Similarly, the case of **Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220** does not assist the claimant as the circumstances of that case were, particular to the facts, that the claimant was unaware and could not have known of the act of discrimination until he accessed his personnel records some several years after the discrimination took place. This does not apply in this case.

28. Adopting the numbered approach set out in the decision in ***British Coal Corporation v Keeble,*** the tribunal concludes as follows:-

(1) **What was the length of and the reasons for the delay?**

The length of the delay was slightly more than one month.

What were the reasons for the delay?

The claimant relies on three reasons. The claimant's primary reason and the one he wishes the tribunal to consider first is in relation to his argument about "crystallising" knowledge and that, having decided that he may have been the victim of discrimination he then had three months from the date of this realisation to present his claim. The tribunal finds this to be an argument which is unsupported by case law. The **Clarke** case relied on by the claimant does not deal with crystallisation within the mind of the claimant but rather crystallisation within the act of discrimination as noted above. The

tribunal therefore rejects this argument.

The second reason given is that the claimant was ill as a result of problems with his heart during the period being considered. The tribunal notes that the claimant has been aware of this hearing for 15 months and was specifically directed in relation to the provision of medical evidence, if he intended to rely on same, at a case management hearing in November of 2020, some seven months ago. The claimant has provided the tribunal with brief medical notes, which are unclear as to what impact, if any, it may have had on his health beyond the two days during which he was hospitalised, the period 18-20 August 2020. The claimant therefore does not have any medical evidence to show why it would not have been possible for the claimant to bring the proceedings in time and how, or in what manner, that hospitalisation may have impacted his abilities over any period of time under consideration. The tribunal also notes that the claimant is not suggesting he had health problems before 18 August 2020 which means there was a period of at least four weeks when he could have brought proceedings after 23 July 2020. Further there is no medical evidence in relation to the claimant's health after his release from hospital or through the month of September and up to 21 October 2020. The claimant has therefore not presented the tribunal with evidence upon which it could conclude that his health materially impacted upon his ability to bring the claim in time.

(2) The third ground is that he was, at some time and in some way, prevented from bringing a claim because of his preparations for appearing before the Court of Appeal in October 2019. The tribunal has not been directed to any authority which supports the argument that being particularly busy with any one task, whether it be a court hearing or some other business undertaking, is good grounds for the failure to abide by statutory time limits. The tribunal observes that this argument would run contrary to common sense as, in any situation, a party would be free to avoid having to comply with the time limits by simply asserting that they were too busy with other business matters.

(3) **The extent to which the cogency of the evidence is likely to be affected by the delay.**

This argument was not advanced by either party and the tribunal concludes that, in all the circumstances, it could not be argued that the cogency of any potential evidence has been impacted by the claimant's delay.

(4) **The extent to which the parties had co-operated with any request for information.**

It is apparent from the time-line and consideration of the communications from the respondent that the respondent replied to the claimant very promptly on every occasion and in clear terms.

(5) **The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.**

The claimant did not act promptly at any stage. He was aware of the alleged act of discrimination within one day of it having taken place and chose not to

act. At some point prior to sending the email on 18 July 2019 he concluded that he may be the victim of unlawful discrimination, an area of law with which he is, by his own account, very experienced. He set out in the email of 18 July detailed allegations of two specific forms of discrimination, going so far as to note the concept of "*unconscious bias*". Despite this he chose not to issue proceedings at that time or indeed for the next three months, thus allowing the time limit to expire.

(6) **The steps taken by plaintiff to obtain appropriate professional advice once he knew of the possibility of taking action.**

It is not alleged by the claimant in this case that he required any such professional advice and indeed, given the claimant's own characterisation of his legal knowledge, it would be highly unusual if he did.

29. The tribunal has to consider the balance of prejudice between the parties in exercising its' discretion on whether to extend the statutory time limit. For the claimant this means that his claim may not proceed, for the respondent it means that they may have to defend a claim that otherwise they would not have to defend due to the effect of the statutory time limits.

The potential merits of the claim are a factor. If the claim appears to be devoid of merit the potential prejudice to the claimant is that much less and to the respondent that much greater - incurring legal expense and expending resources and time in defending an apparently unmeritorious claim. This is a claim where the impugned criterion is objectively justifiable and it is common case that it was not met by the claimant. The claimant's personal opinion of his own professional expertise cannot, on any rational view, be regarded as a proper metric for the respondent to have assessed his eligibility for the advertised professional role. I therefore conclude that this is a speculative claim.

30. The tribunal notes that the starting point in the exercise of its' discretion, having taken into account all of the matters set out above, is that the time limits are set out by statute and, without more, are there to be obeyed. It is for the claimant to discharge the onus of persuading the tribunal that, in all the circumstances, it is just and equitable that the time limits should be set aside.

31. As per the comments of Auld LJ in ***Robertson*** set out above ***"****A tribunal cannot hear a complaint unless the applicant convinces it that it just and equitable to extend time. So the exercise of discretion is the exception rather than the rule" and* Sedley LJ in ***Chief Constable of Lincolnshire Police "****limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them"*

32. The claimant has not discharged his duty to persuade the tribunal that it is just and equitable to extend the statutory time limits. The claimant is a self-described "*expert*" in this field of law and was aware both of the right to bring proceedings before this tribunal and the manner and time in which that should be done. Despite this he chose not to issue proceedings in time. The explanations given for the delay are entirely unsatisfactory. Therefore I conclude that he has not provided the tribunal with grounds upon which it could find that it is just and equitable to extend time.

33. Accordingly, the tribunal finds that:-

(1) These proceedings were presented outside the statutory time limits.

(2) It is not appropriate to extend the time limits in all the circumstances of the case.

(3) The claimant's claims are therefore dismissed.

Employment Judge: 

Date and place of hearing: 2nd of June 2021, Belfast.

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