



EMPLOYMENT TRIBUNALS

Claimant: Mr J Jeffery (administrator)
on behalf of the estate of Sarah-Jane Jeffery

Respondent: John Lewis PLC

Heard at: Watford (by CVP) **On:** 1 March 2024

Before: Employment Judge Maxwell

Appearances

For the claimant: in person
For the respondent: Ms Hicks, Counsel

RESERVED JUDGMENT

The Claimant's claim is not struck out, it was presented within such period of time as is just and equitable, pursuant to section 123(1)(b) of the **Equality Act 2010**.

REASONS

Background

First Claim

1. The Claimant contacted ACAS on 18 May 2022 and a certificate was issued on 9 June 2022. Proceedings were commenced on 19 July 2022. The Claimant sought to bring claims of his late sister against the Respondent for disability discrimination.
2. The claim form said the Claimant's sister had suffered paranoid schizophrenia in 2017 and the Respondent failed to make reasonable adjustments, in particular failing to take into account her mental health issues when taking disciplinary action. The Claimant says his late sister's paranoid schizophrenia was triggered by her overhearing managers at work discussing her losing her job. Because of her illness she did not understand the need to submit fit notes. Disciplinary action was commenced. This was only resolved when the Claimant obtained fit notes from her GP. He asked the Respondent to contact him if something of this

sort happened again. Following her tragic and untimely death in February 2022, he discovered the Respondent had commenced disciplinary action against his late sister, without involving him, when she experienced a further episode of paranoid schizophrenia in 2019. He believes the resultant stress contributed to her death. The Claimant says that his sister's health condition required "special measures to be taken" and the Respondent should have "adjusted their processes". He complains of a failure by the Respondent to disclose information about disciplinary action it took against his sister.

3. The Respondent entered a defence to the claims. It raised a jurisdictional question as to whether the Claimant had standing to bring the claims. Separately, the Respondent said the claims were out of time. The grounds of resistance also included a substantive defence to the claims. It contended that various adjustments had been made for the Claimant's late sister since April 2018. She had various periods of absence. The Respondent sought to obtain her permission for an occupational health referral, which was refused until November 2021. The Respondent having commenced its sickness absence procedure, in November 2021 the Claimant attended an occupational health referral. She was, however, only willing to discuss a knee injury. No reasonable adjustments could be recommended. Following a meeting on 21 November 2021, a Wellness and Reasonable Adjustments Action Plan was agreed with the Claimant's late sister, including various measures. She began a further period of absence on 1 December 2021. This continued beyond the expiry of her fit note. Attempts were made to contact her, without success. She was invited to a disciplinary meeting but did not attend this and was dismissed.
4. A case management order of 14 December 2022 made by EJ Lewis, required the Claimant to provide documentary evidence to show he was the Executor and Personal Representative of his late sister. The Claimant sent in various documents.
5. On 25 March 2023, notice of a preliminary hearing was sent to the parties, in particular to determine whether the proceedings were a nullity as it appeared they had been instituted before the Claimant was appointed as administrator.
6. The parties appeared before EJ Dick on 2 May 2023. He gave judgement dismissing the claims as a nullity because they were presented before the Claimant had been appointed as an administrator of the estate of his late sister. Although neither party requested written reasons, anticipating that another judge may in the future be assisted by knowing on what basis the claim had been dismissed, EJ Dick produced a Record of Hearing document, which included:

2. In summary, having considered a number of authorities referred to in counsel Ms Gould's helpful skeleton argument, I concluded that, in contrast with the situation where there is a will which names a person as an executor, where there is no will (as in this case) an action cannot be brought on a deceased person's behalf until letters of administration have been granted; any claim before that will be a nullity and on that point the Tribunal has no discretion. This would be the case even were I to take the view that there was nothing else that Mr Jeffrey could reasonably have done or even that it simply would not have been possible for the claim to have been correctly filed within the time limit imposed by the Equality Act 2010 given the time taken for letters of administration to be issued.

3. Once I had given my ruling, I explained to Mr Jeffery that, as in the case of *Fox v British Airways Pic* [2013] ICR 51, were he now to file a fresh claim form, the Tribunal would be able to consider whether to extend time limits applying the usual principles, at which point the Tribunal might consider some of the above points. Mr Jeffery understood that if he were to do so, the sooner the better. I made clear that I was expressing no views about the merits of an application to extend time, nor about the strength or otherwise of the claimant's case.

4. I did consider whether a pragmatic approach might be to treat the first claim form as having been re-submitted at this hearing and to go on to decide the application for an extension of time. However I took the view that it would be inappropriate to bypass the usual procedures in this manner. I also considered whether any future application should be reserved to me since I was now familiar with the issues, but took the view that this would be inappropriate given that there was not actually a fresh claim yet before the Tribunal.

Second Claim

7. The Claimant presented a further claim on 3 May 2023. This was in similar terms to the first claim, although it now included unfair dismissal.
8. The Respondent entered a defence to the claim, the grounds of resistance covering much the same ground as had been the case previously and denying unfair dismissal. The response also said the unfair dismissal claim should be struck out as having no reasonable prospect of success.
9. In an email of 7 August 2023, the Claimant said there were two reasons for the lateness of the claim: firstly, emotional distress as a result of his late sister's untimely death; secondly, having being encouraged to delay proceedings by the Respondent. Somewhat surprisingly, the email also included "we have at no point claimed that Sarah was unfairly dismissed".
10. On 15 August 2023, EJ Quill required the Claimant to provide information to establish his standing to bring the claims. On 29 August 2023, the Claimant replied saying he did not understand the request and had already provided the information sought. He went on to refer to the earlier claim dismissed by EJ Dick.
11. On 30 August 2023, the Respondent wrote to the Claimant explaining the reason why information had also been sought by the Tribunal in connection with unfair dismissal (i.e. because he had ticked that box). He replied later that day, saying it had been in error on his part.
12. EJ Quill directed a further letter on 17 January 2024. He explained that when his earlier letter had been sent to the parties, he had been unaware of the Claimant's previous claim. EJ Quill authorised the Claimant to pursue the claim on behalf of the estate of his late sister. He also directed that a preliminary hearing be held to determine:

There will be a 3 hour preliminary hearing, in public, which will consider whether the claim should be struck out. If not struck out, that hearing will be used to clarify the issues in dispute, and to make arrangements for

future hearings. Parties must attend the hearing with full details of dates to avoid for all witnesses.

13. The Claimant wrote to the Tribunal 5 February 2024. This included:
 - 13.1 he was unaware time limits when he presented the claim;
 - 13.2 his belief [now] is that as his sister had died on 6 February 2022, he had until 5 May 2022, in which to bring a claim;
 - 13.3 the claim was presented on 18 May 2022 and was less than 2 weeks late;
 - 13.4 he made the Respondent aware of his concerns about their treatment of his late sister within days of her death but was persuaded by them not to take things further at that time;
 - 13.5 although he was told his questions would be answered the Respondent refused to disclose relevant information, citing data protection;
 - 13.6 :

We were heartbroken and shocked at my sisters unexpected death and we were not working to timescales. During the 3 months before we started to bring the claim, we were busy arranging my sisters' funeral and looking after my (at the time nearly 90-year mother) who was devastated by the loss and has never recovered from it
 - 13.7 EJ Dick conceded it would have been impossible for him to bring the claim in time.
14. I pause to note, EJ Dick made no ruling whatsoever on the question of whether or not it was possible for the Claimant to have presented the claim in time. Helpfully, EJ Dick appreciating it may be important at a later stage for a judge to know what was and was not decided, I have the benefits of his note.

Hearing Today

Clarification

15. The Claimant's claims were clarified today. He pursues a complaint of a failure by the Respondent to make reasonable adjustments for his late sister:
 - 15.1 the provision, criterion practice ("PCP) was:
 - 15.1.1 the application by the Respondent of its sickness absence management procedure, including the requirement to submit fit notes;
 - 15.2 the disadvantage to the Claimant's sister as a disabled person was:
 - 15.2.1 her inability to appreciate the need to comply with the procedure, which would tend to bring its application upon her (i.e. she would be progressed through it to a disciplinary hearing);
 - 15.2.2 being subject this procedure would add to her stress and anxiety.

- 15.3 The matters contended for by the Claimant as being steps it was reasonable for the Respondent to have to take are:
- 15.3.1 contacting the Claimant directly, when the Respondent failed to get a response from his late sister;
 - 15.3.2 attempting to contact the Claimant's sister by visiting her at her home;
 - 15.3.3 using kinder language in correspondence;
 - 15.3.4 seeking expert advice on how to deal with the Claimant, in light of her disability of paranoid schizophrenia;
 - 15.3.5 extending the trigger points at which disciplinary proceedings were instigated.

Evidence

16. The Claimant gave evidence and was briefly cross-examined. In the absence of a direction for a witness statement be prepared, I invited him to adopt the content of the various emails and letters he had sent to the Tribunal in connection with the Respondent's application to strike out the claim. The Claimant confirmed the content of these various documents was true.

Facts

17. The Claimant was distraught following the tragic and untimely death of his late sister. He discovered letters from the Respondent in her handbag, relating to her absence from work and relevant formal procedures. He believed this was wholly inappropriate, it must have added to her anguish and indeed, contributed to her death.
18. The Claimant had been involved with the Respondent some years previously, when his sister had got into difficulty because of a failure to comply with the attendance management procedure then, in particular by failing to provide fit notes from her GP. At that time, he went about getting the required fit notes himself. The diagnosis was paranoid schizophrenia.
19. The Claimant's recollection is that he asked the Respondent to contact him in the event of a similar occurrence in the future and this was agreed. I make no finding as to the accuracy of his recollection in this regard. If the claim proceeds, that may be a relevant question at the final hearing. In any event, his recollection of what had happened before contributed to his sense of grievance on discovering the Respondent was progressing his sister through the attendance management procedure again, in the period prior to her death and notwithstanding her lack of engagement in the same.
20. The Claimant contacted the Respondent about the letters he had found. It is likely that part of the response he received, was an encouragement in general terms to grieve and revert to the Respondent subsequently, if he needed to.
21. I have heard no evidence from the individual named by the Claimant in his evidence as the employee of the Respondent who he believes encouraged him

to delay. Further detail of the Claimant's recollection about their conversation, emerged in response to my questions.

22. I do not make a finding that the Claimant was deliberately encouraged to delay, so as to thwart him in bringing a claim. The Claimant did not tell the person he was speaking to that her intended to commence proceedings and this would be a most unusual scenario. Whilst Tribunal claims are sometimes pursued by the estate of a deceased employee, almost always the individual commenced proceedings during their lifetime and the matter is carried on thereafter by their family. This particular claim has been devised entirely by the Claimant, the brother of the Respondent's employee. He had no instructions from his late sister in this regard. That the Respondent would anticipate this course of events and deliberately seek to thwart Mr Jeffrey by encouraging him to grieve seems most unlikely. Both parties agreed this would be reasonable advice (at least if absent some devious intent). I would need something more than the Claimant's supposition in this regard to be satisfied.
23. Subsequently, the Claimant sought further information from the Respondent. He was dissatisfied with the response, in particular the citing of data protection as a reason for the Respondent not being more forthcoming. Thereafter, he commenced ACAS conciliation and then Tribunal proceedings.

Law

24. Where a claim is presented outwith the primary limitation period, the Tribunal has a discretion to extend time, where it is just and equitable to do so.
25. Separately, where a series of discriminatory acts are found by the Tribunal to constitute a single continuing act of discrimination, the claim will be in time where the last part of the act was within the 3-month period.
26. 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.

27. An Employment Tribunal applying section 123 has a broad discretion. A helpful summary of the case law and multifactorial approach was given by the EAT in **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283** per HHJ Peter Clark:

11. A useful starting point is the judgment of Smith J in **British Coal Corpn v Keeble [1997] IRLR 336**. That was a case concerned with the just and equitable extension of time question in the context of a sex discrimination claim. Smith J, sitting with members, in allowing the employers' appeal and remitting the just and equitable extension question to the employment tribunal, suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980, the provision for extension of time in personal injury cases. The first of those factors, as Mr Peacock emphasised in the present appeal, is the length of and reasons for the delay in bringing that claim.

12. However, as the Court of Appeal made clear in **Southwark London Borough Council v Afolabi [2003] ICR 800**, in deciding the just and equitable extension question, a tribunal is not required to go through the matters listed in section 33(3) of the Limitation Act 1980, provided that no significant factor is omitted. That principle was more recently reinforced in a different context by the Court of Appeal in **Neary v Governing Body of St Albans Girls' School [2010] ICR 473**, where the leading judgment was given by Smith LJ. There, it was held that a line of appeal tribunal authority requiring a tribunal to consider the factors in the CPR, rule 3.9(1), as it then was, when deciding whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect. Following **Afolabi** it is sufficient that all relevant factors are considered.

13. Section 33(3) of the 1980 Act does not in terms refer to the balance of prejudice between the parties in granting or refusing an extension of time. However, Smith J referred to the balance of prejudice in **Keeble**, para 8, to which Mr Peacock has referred me. That, it seems to me, is consistent with the approach of the Court of Appeal in the section 33 personal injury case of **Dale v British Coal Corpn**, where Stuart-Smith LJ opined that, although not mentioned in section 33(3), it is relevant to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. That passage neatly brings together the two factors which, Mr Dutton submits, were not, but ought to have been, considered by this tribunal in the proper exercise of its discretion: prejudice and merits. I shall return to those factors in due course.

14. What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see **Hutchison v Westward Television Ltd [1977] ICR 279**) involves a multi-factorial approach. No single factor is determinative.

15. Returning to the balance of prejudice, this concept arises elsewhere in our jurisdiction. For example, in deciding applications to amend the form ET1, the Selkent principle: **Selkent Bus Co Ltd v Moore [1996] ICR 836**.

28. Importantly, there is 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. [...]

29. The Court of Appeal considered the exercise of this discretion again 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).

30. 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

Length of Delay

31. Given the death of the Claimant's sister on 6 February 2022, any claim she had must have crystallised no later than that date. Accordingly, the Claimant had until 5 May 2022, in which to commence ACAS conciliation and then present a claim within the period of extension.
32. The Claimant contacted ACAS on 18 May 2022.
33. The Claimant's first claim was presented on 19 July 2022.
34. Because the primary limitation period had already expired, ACAS conciliation did not extend the period in which to present a claim at all. The claim was, therefore, more than 2 months late.
35. EJ Dick gave judgement dismissing the claim on 2 May 2023.
36. The Claimant presented a second claim on 3 May 2023. This was very nearly one year late.

Reasons for Delay

37. The initial delay occurred because the Claimant was grieving for his sister. Whilst concerned about what he had found in her handbag, he was primarily occupied with the tragic loss his family suffered.
38. Subsequently, the Claimant sought to obtain further information from the Respondent about the sickness absence management and disciplinary processes it had been following. He was dissatisfied by the Respondent's response to his enquiry and this appears to have contributed to a belief that his sister had been wronged. The Claimant sought to further pursue this matter through a data subject access request.
39. As at May 2022, the Claimant was contemplating Tribunal proceedings. There is, however, no evidence of him doing any research into the time limits for bringing a claim. Notably, even after the conclusion of ACAS conciliation on 9 June 2022, he did not present the first claim until more than a month thereafter.
40. Whilst I accept the cost of seeking legal advice from a solicitor may have been prohibitive, there is a great deal of information available freely online, which it is not difficult to find. The Claimant has himself been a line manager and ought, therefore, to have been aware of the possibility of Tribunal proceedings. A simple internet search would quickly have taken him to helpful material produced by the government and ACAS. This deals with time limits and the Claimant could have sought it out.
41. I am not satisfied the Claimant's delay in this matter can be explained very much, if at all, by the Respondent's suggestion that he take some time to grieve.

His attempt to rely upon that factor now, to explain his own lack of timely enquiry into when and how a Tribunal claim might be brought, is unpersuasive and does him little credit. The same applies to his suggestion this was all part of a devious strategy to thwart him. The Respondent was under no obligation to encourage the Claimant and give him advice about how to pursue a claim against it.

42. Thereafter, the first claim proceeded. The Tribunal requested information to establish the Claimant's standing and a hearing was listed in this regard.
43. Because the Claimant already had a claim before the Tribunal, it did not appear to him as being necessary to present a further claim.
44. The Respondent contends that by reason of the position it adopted on the Claimant's lack of standing (namely the proceedings were a nullity because the claim was presented when he had no standing to do so) and / or the listing of a hearing to determine that issue, the Claimant ought to have appreciated the need to submit a further protective claim. I am not persuaded. Whilst I accept the point would (or should) have occurred to a solicitor, an unrepresented party was unlikely to recognise the need for such a step. Information about presenting claims and time limits is widely and freely available. The same is not true on the question of legal standing to bring a claim on behalf of the estate of a deceased person, nor of the notion that a further (protective) claim might be necessary where the other party in legal proceedings has challenged the validity (as opposed to the merits) of the original claim. These are relatively obscure technical points. To put it another way, it was reasonable for the Claimant not to understand the need to present a protective claim. He believed he had his claim and was waiting to see what the Tribunal did with it.
45. At the hearing before EJ Dick, the Claimant became aware not only that his original claim would be dismissed as a nullity because he lacked standing at the point of presenting it, but also that he might be able to remedy that situation by presenting the claim again. This he did the following day.
46. In summary, whilst I am somewhat critical of the Claimant's initial delay, his failure present a second claim before the Tribunal had dismissed his first one is understandable.

Merits

47. Given the Claimant was not a witness to events in the employment of his late sister in the period after 2018 and has no instructions from her about such matters, necessarily he will be at a distinct disadvantage in advancing claims that, ordinarily, would have been for her to consider and / or pursue.
48. That said, it may be that arguable claims emerge from and can be made out on the basis of the documentary evidence. The Claimant can say the Respondent was aware of his sister suffering from paranoid schizophrenia and that this had contributed to an earlier failure on her part to engage in and comply with its sickness absence management procedures. He contends both that he asked the Respondent to contact him if there was a repeat occurrence and that this was agreed to. The Claimant might also complain of the rapidity of the progress

toward dismissal, all set against the backdrop of what the Respondent knew about her prior health and the manifestation of this in her lack of compliance.

49. The Respondent did not advance an argument on substantive merits in connection with this application and I am not satisfied this is an appropriate case for that to be a significant factor in the exercise of discretion.

Prejudice

50. There is little to suggest the Respondent would be prejudiced in responding to the claim by reason of delay.
51. ACAS conciliation was commenced shortly after the expiry of the primary limitation period. Whilst this was not effective to extend time, it would have put the Respondent on notice that a claim from the Claimant was in prospect. To the extent it had not already (i.e. as a result of prior communications and the Claimant's request for information and documents) sought to preserve evidence and identify those involved in the sickness absence management or disciplinary proceedings, the Respondent would have reason to take this step as a result of ACAS becoming involved. The Claimant's first claim was two months late. Whilst this is a significant delay when set against a 3-month primary limitation period, an additional two months would seem unlikely to have a significant impact upon the availability or cogency of evidence.
52. The first claim was ongoing until dismissed by EJ Dick on 2 May 2023. The second claim was commenced on 3 May 2023. I note it took until 26 June 2023 for the Tribunal to send notice of that second claim to the Respondent. It would, however, be wrong in principal for the Claimant to be penalised for a delay caused by the Tribunal administration and I did not understand Ms Hicks to take that point. Furthermore, I note the prospect of a second claim being presented immediately was discussed at the hearing before EJ Dick and the Respondent cannot have been surprised when it arrived.
53. Whilst the Respondent asserts that it would suffer prejudice from the lateness of the claim, no specific prejudice has been identified. The Respondent does not say that material witnesses are no longer available or documentary evidence had been lost.
54. If time were not extended, the Claimant would be severely prejudiced, as he would have no claim at all.

Continuing Act

55. I make no finding on the question of when any failure to act occurred or whether there was conduct extending over a period, save to note I am satisfied it is at least arguable that a cause of action was extant on 6 February 2022. These would be issues for the Tribunal at a final hearing if the matter proceeds.

Conclusion

56. Notwithstanding some initial blameworthy delay, the period of this was modest and there is little to suggest the Respondent will be hindered as a result in defending the claim. In the most unusual circumstances of this claim, I am

satisfied the balance of prejudice and interests of justice favour extending time for the presentation of the Claimant's claim to 3 May 2023.

57. I am very grateful to Ms Hicks for the discharge of her duty to the Tribunal as an officer of the court, reflected in her careful and fair presentation of the Respondent's application.

EJ Maxwell

Date: 4 March 2024

Sent to the parties on:
6 March 2024

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For the Tribunal Office:

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