EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr P Lennox	**v**	London United Busways Limited

Heard at: Central London Employment Tribunal (by CVP) On: 22 March 2024

Before: Employment Judge Norris, sitting alone

Appearances
For the Claimant: In person
For the Respondent: Mr E Nuttman, Solicitor (Ward Hathaway)

RESERVED JUDGMENT – PRELIMINARY HEARING

The Tribunal's decision is as follows:

1. The Claimant's claim was submitted out of time.
2. It would not be just and equitable to extend time.
3. Accordingly, the Tribunal does not have jurisdiction to hear the claim and it is struck out.

WRITTEN REASONS

1 Background

1.1 The Claimant worked as a bus driver for the Respondent on several different occasions, either directly or through an agency:

a) He was employed by the Respondent at its Wandsworth garage from May until October 2021, at which point he resigned. In December 2021, he and the Respondent reached an agreement in relation to a potential Employment Tribunal claim relating to that period of employment. I refer to this as the "2021 dispute". The parties' agreement was recorded on an ACAS COT3 form.

b) There was a short further period when the Claimant worked at Westbourne Park garage via an agency. The Claimant says he was dismissed for not a wearing a regulation uniform shirt. This claim is not about what happened during or the termination of that period of work so I say no more about it.

c) The period of work with which this claim is concerned started on or around 11 April 2022 and ended on 27 June 2022. Again, the Claimant worked at Westbourne Park via an agency until he says a Traffic Manager, Mr Bhatt, told him not to return. The Respondent says it was Staff Manager Ms Edmonson who made the decision not to continue to engage the Claimant. I do not need to resolve this point because it is sufficient to say that the Claimant did not work for the Respondent after 27 June 2022.

1.2 In brief, on 25 February 2023, the Tribunal received a claim from the Claimant. It did not have a number for ACAS Early Conciliation (EC). The Claimant had ticked the box that said ACAS did not have power to conciliate on his claim. That claim was rejected by the Tribunal on 13 April 2023. On 18 April 2023, the Claimant sought reconsideration of the decision to reject his claim. That was in turn refused on 10 May 2023. I return to these points below.

1.3 On 6 July 2023 the Claimant contacted ACAS regarding EC and his certificate was issued on 10 July 2023. On 16 July 2023, the Claimant submitted the present claim. It is again a claim, on the face of it, for disability discrimination. That is what has been ticked at box 8.1 on the claim form. However, the Claimant also ticked the box at 10.1 to say that his claim consists of or includes a "whistleblowing" claim. He has not given any details in the body of the claim about making a protected disclosure or any treatment said to have arisen as a result.

1.4 The disability on which the Claimant relies is Generalised Anxiety Disorder (GAD). He says he has had this condition since the death from cancer of his wife in 2009. He says he also has "skin disabilities" (chronic urticaria) which I infer may be triggered by stress and/or are a side effect of his GAD, and asthma.

2 Conduct of the case and complaints pursued

2.1 A Preliminary Hearing (Case Management) (PHCM) took place by remote means before EJ Stewart on 28 November 2023. The Claimant represented himself and the Respondent was represented by a solicitor, Ms Darnley.

2.2 Since the matters that form the subject of this claim occurred, the Claimant has relocated to Thailand. He joined the PHCM from there. It was agreed before EJ Stewart that the Claimant would write to the Tribunal who would in turn contact the FCDO about whether he could give evidence from Thailand.

2.3 EJ Stewart noted that the case is one of disability discrimination. She clarified that the Claimant was not seeking to re-open the 2021 dispute as that had been compromised via the ACAS COT3 form in December 2021, and nor was he complaining about the first period of agency work. He was complaining about the second engagement that ended in June 2022.

2.4 The Respondent submitted that the Tribunal does not have jurisdiction to hear the claim because it was presented over a year after the last act complained of. There was no list of issues drawn up and the legal basis for the claims does not appear to have been explored in any depth because of the delay in presenting the claim.

2.5 Instead, orders were made for the claim to proceed to an open Preliminary Hearing (PH). The Claimant was to provide a witness statement setting out the evidence on which he relied in relation to the time point, addressing the reasons for the delay. The Respondent was ordered to compile a bundle for the PH.

3 Issues

The issues for the Tribunal to address at the PH were therefore:

a) whether or not the Tribunal has jurisdiction to consider the complaints of disability discrimination because they were presented outside the primary statutory time limit;
b) if they were presented outside the time limit, whether or not it would be just and equitable to extend time so as to allow the Tribunal to consider the complaints;
c) to make such further case management orders as may be appropriate.

4 The Preliminary Hearing

4.1 At the PH on 22 March 2024, the Claimant represented himself again and the Respondent was on this occasion represented by Mr Nuttman. The Respondent had produced a bundle of 138 pages for the PH. This included a ten-page email sent by the Claimant which was headed "witness statement". I had read all the documents before the PH started.

4.2 The Claimant experienced some initial difficulties in joining the PH using the online platform. We began the PH by discussing whether the Claimant could give evidence from Thailand and then the chronology of events about which he was complaining and (briefly) the question of his "whistleblowing" complaint. I return to each of these below.

4.3 After nearly an hour, the fact that there was a time lag in the connection meant that it was becoming too disjointed to continue the hearing. The Claimant thought he might be able to join by phone instead and we adjourned briefly for him to try to do so. Instead, he rejoined by video, apparently from a different room, and save for occasional interruptions when the connection was poor, we were able to hear and see each other. I am satisfied that the quality of the connection was adequate.

4.4 After we had agreed the scope of the hearing, the Tribunal heard oral submissions from Mr Nuttman, who referred to the main legal authorities underpinning the Tribunal's jurisdiction on time points, repeating one section which the Claimant was unable to hear properly the first time. I offered the Claimant an adjournment so that he could think about what Mr Nuttman had said and any submissions he wished to make but the Claimant declined on the basis that everything he wanted to say was in his emailed witness statement, though he did then make some very brief observations about what Mr Nuttman had said. As it was already midday in the UK and thus early evening in Bangkok, which is seven hours ahead, I explained that I proposed to reserve my judgment rather than requiring the parties to return later in the day. That was agreed.

<u>Giving evidence from overseas</u>

4.5 So far as the Claimant's location was concerned, he is right to say that he did what EJ Stewart required him to do, which is to write in the day after the PHCM and ask about giving evidence from Thailand. He told me he did not know whether the Tribunal had made an application on his behalf. I explained that the process is for an administrator at the Tribunal to notify the Foreign, Commonwealth and Development Office (FCDO) of the request and then the FCDO liaises with the relevant country embassy. However, since the pandemic, many such requests to

different countries have either taken a very long time to be answered or have not been answered at all. I had looked at the website earlier in the morning and there is no entry for Thailand. That means that while the Thai authorities have not refused permission, nor have they granted it, so the Claimant could not give oral evidence.

4.6 I also noted that more recently, the Claimant had emailed the Tribunal to say that if necessary and appropriate he could make his way to Indonesia. That is a country which has given permission for "residents and citizens" to give evidence remotely in the UK courts and tribunals. The Claimant is neither a resident nor a citizen of Indonesia, and in any case, he had remained in Thailand. It did not appear to me productive to explore further whether permission had been sought or where in the process the delay had occurred. I had the Claimant's evidence in the witness statement that he had been ordered to produce. So we did not hear oral evidence from him, but I have fully taken into account the contents of the witness statement that he had supplied and which was in the bundle. I return to that evidence below.

Chronology

4.7 The Claimant's claim makes reference to correspondence in January and February 2023 between him and the Respondent. The Claimant complains that two senior managers at the Respondent (Mr Davis, Head of Recruitment and Ms Guthrie, HR Director) did not reply to his very detailed complaint dated 21 February 2023. He says he believed this was because they thought he was a "problem" and that it was better to ignore him. He also felt that he was being victimised. However, in the discussions at the PH, it was clarified that the period of alleged discrimination with which the Tribunal is concerned was up to 27 June 2022.

Whistleblowing complaint

4.8 The Claimant had, as noted above, also ticked on his claim form that he wished the claim to be referred to a relevant regulator because it was wholly or partly about whistleblowing. He acknowledged that perhaps he had not expressly referred to or set out the full details of such a complaint in the body of the claim form. He referred to the claim that while driving his bus for the Respondent, he had been physically abused by a motorist who also spat at him. He felt this was an issue of health and safety and that the Respondent had failed to support him. He had also been told by Ms Edmonson, he said, that agency drivers are not allowed support for a disciplinary hearing.

4.9 In short, the Claimant agreed that even though the detail was not in the claim form, we were still talking about the same period when he was an agency driver, i.e. no later than 27 June 2022. The Respondent's position is that the claim was one of disability discrimination only. Whether or not the claim form would require amendment was, it seemed to me, a secondary question to whether the claim itself was in time. Given it is likely to be harder for the Claimant to show that time should be extended in relation to a whistleblowing complaint (because the test is whether it was "not reasonably practicable" for him to have brought the claim in time and whether it was brought within a reasonable period thereafter if so) than in relation to a discrimination complaint, I decided to deal with the discrimination jurisdiction point first and then, if that was decided in the Claimant's favour, I could have invited him to make a formal application to amend the claim if required. As I set out below

however, my decision is against him on the time point, and accordingly there is nothing before the Tribunal to amend.

5 Law

Time limits – discrimination

5.1 The Equality Act 2010 ("EqA") requires complaints to be lodged with the Tribunal (in practical terms, for a prospective claimant to enter EC) within three months of the act complained of or, where there has been continuing discriminatory conduct, within three months of that conduct ceasing. That three-month period is known as the "primary time limit". EC ends with the issuing by ACAS of the EC certificate, which bears the number that has to be inserted in the box on the claim form. Provided the EC process is begun before the primary time limit expires, it has the effect of extending the primary time limit for submission of the claim to no less than a month from the date that ACAS issues the EC certificate. However, if a claimant does not start the EC process before the primary time limit has expired, there is no extension of time.

5.2 The EqA provides a broad "just and equitable" discretion to a Tribunal when considering whether to extend time in discrimination cases compared to those such as unfair dismissal and whistleblowing detriment which are subject to the "not reasonably practicable" formula. Notwithstanding this, the authorities confirm that there is no presumption that a Tribunal should extend time by using its discretion; the exercise of discretion indeed remains the exception rather than the rule and the onus is on the Claimant to convince the Tribunal that it should be exercised[1]. This has been described as a burden of "persuasion" rather than a burden of proof or evidence as such (*Abertawe Bro Morgannwg University Local Health Board v Morgan*[2]).

5.3 There is no principle of law dictating how generously or sparingly the discretion should be exercised[3]. However, in *Morgan*, Langstaff J noted that a litigant can hardly hope to satisfy the burden unless they provide an answer to two questions: why the primary time-limit has not been met and, in so far as it is distinct, the reason why after the expiry of the primary time-limit, the claim was not brought sooner than it was. In other words, the Tribunal should try to identify the cause of the Claimant's failure to bring a claim in time. It is entitled to consider any material before it which will enable it to form a proper conclusion, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical records or certificates or inferences to be drawn from undisputed facts or contemporary documents.

5.4 It is also often suggested that the Tribunal should consider the factors under section 33 Limitation Act 1980, as confirmed in the case of *British Coal Corporation v Keeble*[4] and others. It has been held that these factors form a useful checklist although there is no legal requirement for the Tribunal to go through the list in each

[1] *Robertson v Bexley Community Centre* [2003] IRLR 434; *Department of Constitutional Affairs v Jones* [2008] IRLR 128; both Court of Appeal authorities
[2] UKEAT/0305/13
[3] *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 (CA)
[4] [1997] IRLR 336

case, save that no significant factor should be left out of account. These 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 cooperated with any requests for information;

d) the promptness with which the Claimant acted once they knew of the facts giving rise to the cause of action and

e) the steps taken by the Claimant to obtain professional advice once they knew of the possibility of taking action.

5.5 When considering the prejudice to the parties, it is sometimes noted that the Respondent may suffer two types of prejudice if the limitation period is extended. Forensic prejudice is caused when the limitation period is extended by many months or even years so that memories fade, documents are lost and/or witnesses can no longer be contacted. Forensic prejudice is often crucially relevant against the exercise of the Tribunal's discretion. However, this is not necessarily the case where forensic prejudice does not exist and the only prejudice suffered by the Respondent is that it will have to meet a claim which would otherwise have been defeated by a limitation defence[5].

6 Facts and chronology

6.1 The Claimant explains in his witness statement that he had not wanted to bring a claim at all. He had wanted to resolve matters through the internal grievance process and he put the Respondent fully on notice of that at the time, i.e. in 2022. He contended at the PH that the Respondent should therefore have preserved any evidence and retained notes, and should not be able to argue that the cogency of that evidence has been diminished by the delay. So far as the Claimant is aware, the Respondent still employs the people who are the subject of his claim.

6.2 In his witness statement, the Claimant explains that his GAD impacts him on a daily basis. He describes being on "auto pilot" and how on some days he finds himself inexplicably tearful. He lists the medication he takes. He then describes the impact of the Respondent's alleged conduct on his mental health, which he says caused him sleeplessness, weight loss, attacks of urticaria and asthma, headaches and tearfulness. In submissions, Mr Nuttman indicated that the symptoms the Claimant describes are consistent with those that Mr Nuttman himself has found on the internet as being associated with a GAD diagnosis.

6.3 The bundle contains professional confirmation of the Claimant's condition in the form of a letter To Whom it May Concern from Dr Iram Zaidi of Trinity Medical Centre in Balham, dated 9 January 2023. Dr Zaidi says that the Claimant has a long history of GAD which has been managed by his GP and specialists. However, Dr Zaidi indicates that although the Claimant has seen specialists, including

[5] *Miller v Ministry of Justice* UKEAT/0003/15

psychiatrists, it has been difficult to manage the disorder. Other than that brief letter, there is no medical evidence before the Tribunal.

6.4 I find in the circumstances that the Claimant does have the disorder claimed and that at the relevant time it had the impact described in his statement.

6.5 The bundle also contains email correspondence between the Claimant and the Respondent from the relevant period. I gather that from August 2022 onwards, the Claimant was in communication with members of the HR department by email and by phone, requesting information connected to his engagement. He raised a complaint, which he pursued with the Respondent, about an incident on 29 May 2022 and in late 2022 made at least three Subject Access requests of the Respondent ("my SAR no 2 and my SAR no 3 have been received…").

6.6 In December 2022, the Claimant chased up his complaint with the Respondent's HR department and indicated that if a response was not forthcoming, he would escalate the matter to Ms Guthrie.

6.7 On 8 February 2023 the Claimant made what I infer was a fourth Subject Access Request.

6.8 In a very detailed email headed "without prejudice save as to costs" the Claimant wrote on 21 February to Ms Patel in the Respondent's HR department. He began by summarising the 2021 dispute, referring to the Employment Rights Act 1996 and stated, "In concluding to involve ACAS the resultant outcome I was awarded a four-figure sum in damages against the Company". He contended that both Mr Davis and Ms Guthrie had been made aware of his disabilities in March and June 2022 respectively and that when he left the Respondent in 2021, a manager Mr Saiyad had produced a report that set out some of his disabilities which the Claimant says led to the Respondent making reasonable adjustments under the EqA. The Claimant referred in that email to his intention to adhere to the "pre-action protocols and practice direction".

6.9 Separately, it appears, the Claimant emailed Ms Patel, again on 21 February 2023, to inform her that the Respondent would in due course receive his ET1 from the Tribunal.

6.10 As I have noted briefly above, the Tribunal received an ET1 from the Claimant on 25 February 2023. It was given case number 2201719/2023. The Claimant gave a London postal address. The claim was not served on the Respondent because it was rejected since it did not bear an EC number. The Claimant had ticked that ACAS did not have the power to conciliate on some or all of his claim. An Employment Judge noted that the claim was for disability discrimination and therefore that ACAS did have such a power. The decision was emailed to the Claimant on 12 April 2023 (although the letter of rejection itself bears the date 13 April).

6.11 In an email to the Tribunal dated 18 April 2023, the Claimant indicated that he thought he had until 27 April to submit his claim. On 27 April 2023, he emailed the Tribunal seeking reconsideration of the decision to reject the claim. Again, the Respondent has not seen this document and so I set out in full the relevant paragraphs here, which were the Claimant's explanation for the absence of an EC number:

"before i completed the application form i contacted ACAS. in fact it states on the application form 'for help and advice call Acas...'. when talking with them explaining my position of which i was unsure particularly about being out of time of which the ACAS helpline worker said they could not say themselves but see a solicitor as it can be complicated. this was due to the fact the bus company had taken so long to deal with my situation. i told ACAS as a disabled pensioner i did not have the means to see a solicitor. it was then said to me to put the claim form into the tribunal and explain the reason you do not have a certificate number

in taking the advice from ACAS i wrote out the application form and filled out the parts of the form as best i could. but there was not a section on the form to explain to the tribunal the reasons for not having a certificate number. at 2.3 on the form there are 4 boxes. now i had to tick one box as if you do not you cannot move onto the next page. so i believed i was doing the right thing in ensuring my application was sent in to the tribunal as i was not sure about the cut off and neither was ACAS

i understood that conciliation could be conducted after my application form was submitted to the tribunal. but as i was advised there are strict deadlines. i only wanted to protect my claim. but now the tribunal pointed out the matter perhaps if i had written on the form a brief explanation or perhaps provided a covering letter my claim may not have been rejected".

6.12 The Claimant was informed of the rejection of his reconsideration by post in a letter dated 10 May 2023. By that time, I infer, he had moved to Thailand; a postal address in Bangkok was given on the most recent claim form that is the subject of this decision. In any event, he did not immediately receive that letter rejecting his reconsideration application. A further copy was emailed to him on 26 June 2023.

7 Conclusions

7.1 In this case, the parties agree that the Claimant's date of termination was 27 June 2022. Therefore, he had until 26 September 2022 to start his claim by approaching ACAS in relation to matters continuing until and including the termination date, but he did not do so until 6 July 2023, eight months and ten days late. The EC certificate was issued four days later on 10 July 2023. The claim was presented six days later again, on 16 July 2023.

7.2 Since the primary time-limit had already expired when the Claimant started EC, he does not benefit from any extension of time and accordingly his claim was submitted nine months and 20 days late. That is a significant delay, particularly when one considers that the primary time limit is just three months.

7.3 Taking the authorities as my starting point I remind myself that while there is a wide discretion available to me to extend time, it does remain the exception and that I first need to identify why the primary time limit has not been met; once I have done so, if there is a different reason, reach a decision as to why the claim was not brought sooner than it was.

7.4 I was unable to identify with any degree of certainty the reason why the Claimant did not meet the primary time limit. The Claimant has not suggested that he was ignorant of the time limit or that he had misunderstood any of the requirements. He had, as Mr Nuttman submitted, previously approached ACAS to resolve the 2021 dispute and the certificate for that period of Early Conciliation is in the bundle.

While that dispute was resolved without the Claimant lodging a claim, he clearly was aware of the requirement to approach ACAS. He did so again in or around February 2023 before lodging the claim that was rejected.

7.5 The Claimant also does not suggest that there were particular medical reasons for the delay in contacting ACAS on this occasion, though I take into account that he has an anxiety disorder and that this may have an adverse effect (according to Mr Nuttman's research) on concentration. I have not seen evidence that the Claimant's concentration was significantly adversely affected, however. I have noted above that on many occasions during the relevant period, he was able to send lengthy emails to the Respondent, including those in February 2023 which set out his belief that his conditions amount to a disability and referred to the applicable legislation. By 21 February 2023, it is clear that the Claimant was intending to (and, four days later, did) submit a claim to the Employment Tribunal.

7.6 The Claimant himself has indicated that even with that February claim, he had received an indication from ACAS that he had missed the deadline. The contents of the email that I have set out in italics above suggest that the Claimant himself already had concerns that he was out of time ("…*my position of which i was unsure particularly about being out of time…")*, and those concerns were only reinforced when he spoke to ACAS. Therefore it is all the more puzzling that the Claimant did not go back to ACAS when he received the letter rejecting this claim or even immediately he received the rejection of his reconsideration.

7.7 Even if the Claimant did genuinely but mistakenly believe he had until 27 April 2023 to lodge the claim, his further delay between receiving the rejection of his reconsideration application on 26 June and starting EC on 6 July is inexplicable, as is the fact that he delayed another six days after receiving the certificate on 10 July 2023 before he put in his application.

7.8 I accept the Claimant's submission that the cogency of the evidence is not likely to have been affected to any significant extent by the delay. From what I have seen of the correspondence and without making any findings on the facts of the termination of the Claimant's engagement in 2022, it appears the Respondent had documents relating to and CCTV footage of the incidents in question which it is likely to have kept. Mr Nuttman did not make any submissions to the contrary. Nonetheless, when litigation is about the reasons why managers acted as they did in early 2022, it is fair to conclude that memories will have faded somewhat more with the delay than they would have done if the claim had been brought in time, and that would be prejudicial to the Respondent if the burden of proof passed for the Respondent to disprove any conduct contrary to the EqA.

7.9 The Claimant also made multiple Subject Access Requests during the period before the time limit expired. The correspondence shows, as I have said above, that he had received at least the documents sought from the second and third requests, and it is evident from that correspondence that he had also been sent the audio files and redacted CCTV from the incident in May 2022. It cannot be said that the Respondent failed to co-operate with the enquiries made of it, although the Claimant did not like the answers he received about the reasons for the termination of his engagement and took issue with them. By 21 February 2023, he was in a position to set out his case "without prejudice save as to costs". It does not appear that the Claimant sought professional advice. That said, it is not a

requirement for him to do so and there is no criticism of him for pursuing the claim as a litigant in person, as he is entitled to do.

7.10 According to the authorities, the fact that the Claimant himself has not specifically identified any reason (or any good reason) for the delay does not automatically mean that time cannot be extended. I infer that the reason was likely to have been related to the fact that the Claimant did not particularly want to embark on litigation, against the background of his medical disorder, and thus he allowed the time limits to pass. At the same time however I find that he was able to communicate with the Respondent in correspondence that showed litigation was in his contemplation at or around the time when the deadline was expiring. I therefore conclude that he would have been similarly capable of contacting ACAS and putting in his claim within the time limit.

7.11 Even if that is wrong, the Claimant could and did contact ACAS in February 2023 at the latest and, knowing that he was already out of time (and on learning from the Employment Tribunal in April that he required the certificate number to proceed) still delayed until July to revert to ACAS and to lodge his claim. I find that that further delay was unreasonable.

7.12 Finally, I look at the balance of prejudice between the parties. There is a degree of forensic prejudice for the reasons I have set out above, but perhaps the greater prejudice to the Respondent is in having to meet a claim which would otherwise be defeated by the limitation defence and whilst that is of lesser import, I do not disregard it entirely.

7.13 My conclusion as to why the primary time-limit has not been met is that it was through the Claimant's error, which cannot be laid at anyone else's door but his own and which was not reasonable. Similarly, I can see no logical or otherwise satisfactory reason, such as would enable me to exercise my just and equitable discretion, for why the Claimant submitted the claim when he did, and not sooner.

7.14 In the circumstances, I decline to exercise that discretion. The claim is struck out because the Tribunal does not have jurisdiction to hear it and time is not extended for this purpose. There can also be no consideration of any application to amend the claim in relation to complaints about whistleblowing detriment or dismissal.

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Employment Judge Norris
24 March 2024
Sent to the parties on:

4 April 2024

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For the Tribunal:

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