EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110824/2019 (V)

Preliminary Hearing held by Kinly CVP on 19 August 2020

Employment Judge I McFatridge

Mr J McAuley	**Claimant** **Represented by:** **Mr Milne,** **Solicitor**
Lloyds Bank Plc	**Respondent** **Represented by:** **Mr McGuire,** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

1. The Tribunal has jurisdiction to hear those allegations alleging unlawful discrimination on various dates from 16 May 2019 until 6 June 2019 as set out in sections 3-15 of the Scott Schedule agreed between the parties.

2. The Tribunal does not have jurisdiction to hear those claims of discrimination which are alleged to have taken place on 18 March and 15 April 2019 as set out in sections 1 and 2 of the said Scott Schedule.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unlawfully discriminated against by the respondent by reason of disability. The respondent submitted a response in which they denied the claim. Initially, they indicated they did not accept that the claimant was disabled but subsequently this was conceded. They also indicated that they required further and better specification of the claim and made the preliminary point that many matters referred to would appear to be time barred. Subsequently the claimant, who had been unrepresented, instructed a solicitor and that solicitor lodged further and better particulars of the claim. Following a case management preliminary hearing an Employment Judge agreed that an open preliminary hearing would be fixed in order to deal with the issue of time bar. In advance of this the parties jointly prepared a Scott Schedule setting out the various matters which were said to constitute discriminatory acts. 15 such acts were numbered. In addition to this the claimant's position was that he also alleged that the manner in which his appeal against dismissal had been carried out was discriminatory and the parties were in agreement that this particular claim was submitted in time. At the preliminary hearing evidence was led on behalf of the claimant from his father Kevin James McAuley. The claimant also gave evidence on his own behalf. Both parties also lodged a joint bundle of productions. For the purposes of this hearing I proceeded on the basis that the claimant's factual allegations in relation to the alleged discrimination as set out in the further and better particulars and in the Scott Schedule were to be accepted at their highest and I made the following factual findings in relation to the issue of time bar on the basis of the evidence and the productions before me.

Findings in fact

2. The claimant was employed by the respondent from 8 May 2018. The claimant first worked at a branch in Kirkcaldy and then moved to Glenrothes branch. The claimant then had a period of sickness absence and following his return to work he moved to the respondent's Leven branch where he worked until he was dismissed on 6 June 2019.

3. The claimant lives with his father. He complained to his father about various aspects of his work in March and April 2019 which relate to the first two entries in the Scott Schedule. Neither the claimant nor his father took any steps to obtain advice at this point or explore whether there were any legal avenues open to him. It would have been possible for the claimant to obtain advice from his union representative. It would have been possible for the claimant's father to have obtained advice from a colleague at work who was a former solicitor.

4. The claimant had a meeting with Mandy Arnott a manager with the respondent on 16 May 2020. It is the claimant's position that various discriminatory acts took place at this meeting. The claimant's father accompanied him to the meeting. It is the claimant's position that during the course of this meeting the claimant was told that he would be invited to a further meeting at which there was a possibility he would be dismissed. The claimant's position is that his father asked if he could attend as the claimant's companion and was told that he could attend. Following this meeting the claimant received a letter from the respondent inviting him to a final meeting. As is standard the letter contained a paragraph to the effect that the claimant could be accompanied by a companion who could either be a trade union official or a colleague.

5. On 20 May the claimant contacted ACAS for advice. He received advice about employment law.

6. The formal meeting took place on 29 May. The claimant's position is that various discriminatory acts took place during and around this meeting. On 30 May the day following the meeting the claimant was advised by telephone that he had been dismissed. The effective date of termination was 6 June. The claimant considers that the manner in which he was advised of his dismissal was discriminatory. On that same day the claimant's father again contacted ACAS.

7. The claimant's dismissal took effect on 6 June 2019. That was the effective date of termination of his employment. It is the claimant's position that the dismissal was discriminatory.

8. According to the Scott Schedule 6 June was the last date of an alleged discriminatory act which the respondent considered to be out of time.

9. His father having received advice from ACAS, the claimant contacted John Dickinson the Assistant Secretary of Accord Scotland. Accord Scotland is the union of which the claimant was a member. Mr Dickinson was the claimant's union representative. The claimant's e-mail to Mr Dickinson is dated 12 June and was lodged (pages 42-43). This stated

> "I'm looking for some guidance here as believe you are my local Accord rep according to the Accord website.
> I was recently terminated from my role at Bank of Scotland. I had a final review meeting on 29 May and was dismissed via a one minute phone call the next morning but didn't receive my written letter until 6 June.
> I feel I was dismissed unfairly for a variety of reasons but two that stand out is I suffer from anxiety, Bank of Scotland are aware of this and returned mid-March having been absent for a period of ill health.
> Secondly, during the final review I took a panic attack and the meeting was adjourned without me giving all my views and evidence but my line manager still took the decision to terminate me without concluding the meeting within policy guidelines.
> Looking for some help here but I am about to post my appeal letter.
> I do have another request I'm 18 years old soon 19 and find it difficult with my anxiety to open up to strangers and would like to request as this would help me that I give you permission to speak to my dad on this matter here is his e-mail …..
> He has helped me through this process thus far as has some experience but advised I should maybe contact you."

10. At around this time the claimant's father was also in contact with a colleague at work. This colleague was the company's Data Protection Officer and had previously been a practising lawyer in England. The claimant spoke to her and showed her the draft of a letter of appeal which the claimant's father had prepared on his behalf. She gave the claimant's father advice in relation to the appeal letter. She suggested that the claimant and his father may wish to look at various websites which could

provide them with assistance. She also gave him general advice as to the likely timescale for an appeal. She spoke in general terms about employment tribunals and indicated that the claimant might have several different claims. She advised the claimant's father that there may be preliminary hearings in addition to a main hearing.

11. Mr Dickinson also provided advice to the claimant's father regarding the letter of appeal. It was sent to Mr Dickinson under cover of an e-mail on 13 June (page 45). When he sent this to Mr Dickinson the claimant's father stated

> "I've had this viewed by a lawyer at my work as seeking guidance but not in any legal representation just for guidance which I am glad I did as was going to end up writing War and Peace."

12. The letter was submitted and the claimant's appeal was heard on 12 July 2019. The claimant's father waited for the claimant in an adjacent restaurant and the claimant advised his father that things appeared to have gone well. The claimant was accompanied to the appeal meeting by Mr Dickinson. Mr Dickinson also spoke to the claimant's father at the restaurant after the meeting. He spoke in general terms about what would happen if the claimant's appeal was not successful and about how to proceed with a tribunal claim. He gave advice about the time limit for lodging such a claim at tribunal.

13. On 25 July 2019 the claimant was told that his appeal was not upheld by the respondent. The claimant's father e-mailed Mr Dickinson regarding this at 12:08 on 25 July (his email was lodged [page 46]).

> "It also states that there is no further avenue to appeal, I assume that internally within the bank itself. It further adds that if they don't hear from Jamie by 31 July this is the record that will go on file – not sure what that means if honest.
>
> Anyway, what's next steps Jamie keen to push this on further.
>
> Can you advise what is required now."

14. Mr Dickinson responded to the claimant's father less than half an hour later. He stated

> "That's a disappointing outcome given the tone of the meeting. If you could let me have a copy of the letter I will have a read and think about what we might be able to do next.
> The internal process has finished and Jamie's length of services prevents us going to an employment tribunal for unfair dismissal. I will speak to our solicitor and ask whether a discrimination claim would be possible and if so what the prospect of success would be. His advice will be the deciding factor as to whether we would support a case with legal support."

15. The claimant's father contacted Mr Dickinson on 26 July and on 31 July asking if he had made any progress. Mr Dickinson advised on 31 July that it would take a few days to get a legal opinion. The claimant's father also sent a further reminder to Mr Dickinson after this.

16. On 13 August 2019 Mr Dickinson wrote to the claimant's father. A redacted copy of the e-mail was lodged (page 52). He set out the advice received from the solicitor which has been redacted. He also said that the union were not prepared to support the claimant with an employment tribunal claim. This part of the email is also redacted. He went on to state

> "Sorry that this isn't the answer you would want but it is based on legal advice. Jamie can of course take the matter to an ET himself,
> If he decides to do so he will first need to go through the ACAS early conciliation process in the first instance and the form can be found here by following the link. This needs to be submitted at the latest three months less one day following the date of dismissal."

17. The position on 13 August was therefore that the claimant and his father were aware that the next stage was to raise employment tribunal proceedings. They had been advised that before they could do this they required to go through ACAS early conciliation. They had been advised in writing by Mr Dickinson that the claimant required to raise his claim within three months (less one day) of the date of dismissal.

18. However, I also accepted on the evidence that the claimant's father erroneously believed, for some reason, that the date of dismissal would be taken as the date on which the claimant had been told that his appeal

had not been upheld since up to that point the dismissal was not "final". This belief led the claimant and his father to simply ignore Mr Dickinson's clear statement in his letter of 13 August.

19. The claimant's father contacted ACAS on 14 August 2019 and notified them in terms of the early conciliation rules on that date. The claimant discussed the matter with an ACAS conciliator on that date. He understood the advice from the ACAS conciliator to be that the next stage would be for him to sit down with representatives of the bank with a view to trying to resolve matters. The claimant was not keen on this as he felt that he had already had a number of meetings with the bank which had not resolved issues. As a result of him telling the ACAS conciliator this the ACAS conciliator would appear to have decided simply to issue the early conciliation certificate so as to enable the claimant to take the matter to a tribunal. The ACAS early conciliation certificate was issued on 14 August 2019 (page 54).

20. Following receipt of the early conciliation certificate the claimant's father contacted ACAS by telephone on several occasions on 19 August. A screenshot of his calls to ACAS over the period was lodged (page 40-41).

21. During this period the claimant and his father were consulting various websites in order to find out what required to be included in the claim. He understood that there was no requirement for a solicitor to be involved in drafting the claim. The claimant's father was googling a lot to try to get some understanding of the process.

22. The claimant's father wrote the ET1. It is not clear the exact process which he adopted however it would seem that at this point he did not seek to lodge the form online but appears to have saved a pdf of the completed form. On Friday 13 September the claimant's father e-mailed the pdf of the ET1 to an e-mail address for ACAS which he had obtained from their website. The e-mail address was "complaints@acas.org.uk". He e-mailed it to that address at 13:04 on 13 September 2019. I accepted on the evidence that he sent this to ACAS out of a genuine confusion as to the relationship between ACAS and the Employment Tribunal Service. His e-mails stated

> "Not sure where this is to go but can this be forwarded to the correct department as I couldn't find an e-mail address.
> Attached is my son's tribunal form along with supporting documents.
> If you require further information please don't hesitate to contact either Jamie or me his parent."

23. The ACAS complaints department responded by e-mail with commendable speed at 15:22 that afternoon (13 September). They advised

> "Unfortunately it is not possible for ACAS to forward on these documents for you. ACAS is a completely separate organisation to the Employment Tribunals and is also impartial and so cannot act on behalf of any of the parties to a dispute.
> Information on how to submit a tribunal claim can be found on the Employment Tribunal website ….. or call the Employment Tribunal on …."

24. On the afternoon of 13 September the claimant was travelling to a dog show in England. He did not receive the e-mail on Friday afternoon. He became aware of the contents of the e-mail at some point over the weekend. At 8:46 am on 16 September he successfully submitted his claim form online to the Employment Tribunal Service using their online form. The online form is the only way that an ET1 claim form can be submitted electronically to the Employment Tribunals other than by fax. An ET1 cannot be accepted by e-mail.

25. The parties were in agreement that if the ET1 had been received by the Tribunal on Friday 13 September then the last thirteen elements of the claim would be in time. By 16 September when the ET1 was finally lodged they were two days out of time.

Matters arising from the evidence

26. I considered that both the claimant and his father were attempting to assist the Tribunal by giving truthful evidence as they saw it. I had some doubts over the reliability of their evidence largely because both of them appeared to have difficulty recalling the precise order of events and also because it

was clear that at various points the claimant and his father had completely misinterpreted what was being told to them and what was abundantly clear from the documentary evidence. For example the claimant's father gave evidence to the effect that when he and Mr Dickinson met with his father in the restaurant just after the appeal hearing Mr Dickinson told both of them that the ET1 claim form required to be lodged within three months of the date of the final appeal decision. Both were quite adamant on this point. At the end of the day I felt that on the balance of probabilities I was not prepared to accept that Mr Dickinson had given this erroneous advice to them because

(1) Mr Dickinson was not called to give evidence on the matter,
(2) it would be very strange for an experienced trade union official to give completely wrong advice,
(3) Mr Dickinson has given the correct advice (at least in relation to claims based on dismissal) in his e-mail of 13 August,
(4) the claimant and his father appear to have completely misinterpreted this written advice and added an unjustified gloss to it to the effect that although Mr Dickinson mentions the date of dismissal what he actually means is the date that the appeal is dismissed, and
(5) limited corroboration of the fact that the claimant's father genuinely believed that date of dismissal meant the date the appeal was dismissed was found from the fact that he has stated the date of dismissal to be 25 July 2019 (the date the appeal was dismissed) in the relevant section of the ET1.

Discussion and decision

27. Both parties made full submissions which I found to be helpful. The claimant's submissions were made in writing. Both parties were in substantial agreement as to the relevant law which had to be applied. For this reason I can see little benefit in simply reciting their submissions and no doubt failing to do justice to them. I will however refer to their submissions where appropriate in the discussion below.

Discussion and decision

Issues

28. This open preliminary hearing was fixed on 16 March 2020. The sole issue to be determined was whether or not all or part of the claims were time barred. At the outset of the hearing the parties agreed that the relevant claims which I had to consider were the 15 matters set out in the Scott Schedule agreed between the parties. An issue, however, arose in that the claimant's representative indicated that it was the claimant's position that there was a 16th matter which the parties were agreed was not time barred. The respondent's representative confirmed that this was also his understanding of the position in that the claimant claimed that the way he had been treated during the appeal process was discriminatory and the claim had been submitted within three months of that. The claimant's representative then went on to state that the claimant wished to reserve his position as to whether or not the 15 claims set out in the Scott Schedule were a continuing act along with the 16th claim. If this were the case then these claims would have been submitted in time and the Tribunal would not require to consider whether or not it was just and equitable to extend the time limit. The respondent's representative made it clear that this was something which the respondent did not accept.

29. I observe that at the preliminary hearing on 16 March 2020 it is recorded that the respondent's representative indicated that it was the respondent's position that the entirety of the claimant's claims were out of time and the claimant's representative is stated to have indicated that he accepted that on the face of it the claims were out of time but that it would be just and equitable for the Tribunal to consider the claims nonetheless relating as he did to disability discrimination. It appeared to me that the reason that the Tribunal had allowed a preliminary hearing on the issue of time bar in this case was primarily as a result of the claimant's concession that the claims were out of time and that the claimant would require to rely on the just and equitable extension. It appeared to me that if the claimant had indicated on 16 March that his position was as he stated it to be at the beginning of the open preliminary hearing then the open preliminary hearing would not have been fixed. The above having been said I

considered that it was as well to proceed with the open preliminary hearing and that the sole question which I would be required to determine would be that if the 15 claims were out of time whether or not it would be just and equitable to extend the time limit in order to allow them in. I made no ruling as to whether, given the terms of the claimant's concession, it is possible for the claimant to now argue that the claims are in time because they are part of a continuing act which extended into the period of three months prior to the claim being lodged. If the claimant does wish to make this argument it will require to be made at a later stage and it may well be that the Tribunal would require to consider the precise terms of what was said at the preliminary hearing on 16 March and the extent of the concession which was made on that date.

Relevant law

30. Both parties referred me to section 123 of the Equality Act which provides that

> "Proceedings on a complaint under 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."

31. Both parties referred to various well known authorities including ***Bexley Community Centre v Robertson [2003] EWCA Civ 576*** and the more recent case of ***Rathakrishnan v Pizza Express (Restaurants) Limited [2016] ICR***.

32. In general terms I am required to adopt a multi-factorial approach to the issue of whether or not to exercise my discretion to extend time. All matters are relevant but I should certainly be looking at the length of the delay, the reason for the delay, any effects of the delay on the cogency of the evidence and the ability to conduct a fair hearing and the balance of prejudice.

33. With regard to the first point I noted that in this case the period by which the first claim was out of time was 91 days, the period by which the second claim was out of time was 64 days and the period within which the remaining 13 claims were out of time was only two days.

34. I agreed with the claimant's representative that the delay of two days was not a particularly significant period of time in the circumstances however I disagreed with him in that I felt the delay of 91 days in respect of the first claim which I note is the same more or less as the period within which the claim would have had to have been submitted and the period of 64 days in respect of the second claim are relatively significant periods of delay. Time limits in employment tribunals are tight because the aim of the system is to provide speedy justice.

35. I agreed with the respondent's representative that it was appropriate in this case to look at the first two claims separate from the other 13. As well as the length of time being much more significant with these it appeared to me that the reason for the delay was different in the case of the first two claims from the remaining 13. The claimant's representative made it clear that the principal reason for delay in this case was the claimant's ignorance of time limits and his ignorance of the way the Tribunal system operated compounded by the fact that he relied on his father for assistance and his father was also understandably ignorant of the way that the Tribunal system worked and the appropriate time limits. In respect of the first two claims however it appears to me that the reason they were not lodged in time was because the claimant did not wish to make a claim. The claimant alleges he was being treated in a discriminatory manner at work. It was clear that the claimant had access to advice from his trade union representative, Mr Dickinson, and he could have contacted Mr Dickinson at any time after either of these two incidents asking him for advice on making a discrimination claim. It would appear that the claimant was in general terms aware that he could claim disability discrimination. He did not do so. It appeared to me that in respect of the first two claims there was an element of choice in this. It was only once the claimant was dismissed that he decided to lump together the first two matters with the other parts of his claim.

36. With regard to the remaining 13 claims I observed that although the delay was only two days the ***Bexley Community Centre*** case makes it clear that time limits are there to be respected and that the discretion to extend should be exercised by way of exception rather than as a rule. I therefore required to look carefully at the reasons for delay.

37. As noted above I considered that it was established on the evidence that the ignorance of both the claimant and his father was genuine. The claimant appears to rely considerably on his father for assistance in respect of a number of aspects of his life and it was clear that he did so in this case. The claimant's father had no experience of employment tribunals but sought advice in order to be able to assist his son. He obtained advice from a work colleague and spoke directly with Mr Dickinson who is a trade union official. The claimant's father also consulted various websites and spoke to ACAS on various occasions. As noted above it appeared to me that on the balance of probabilities the claimant's father totally misunderstood the advice he was given by Mr Dickinson. He also appears to have totally misunderstood the information which was available to him from ACAS both on the telephone and also on their website. He also appears to have totally misunderstood the mechanics of making a claim to the Employment Tribunal despite having clearly gone on to the Employment Tribunal website to download the ET1 form. It is within judicial knowledge that considerable time and effort is spent both by ACAS and by the Employment Tribunal administration to design their website so as to provide relevant accessible information to members of the public and clear guidance as to the mechanics of how to submit a claim. It is somewhat depressing that in this case the claimant and his father appear to have completely misunderstood the guidance which they received however I accept that this is what happened. It appears that in downloading the form as a pdf and then completing it and e-mailing it the claimant's father actually took much more trouble and effort than he would have expended had he followed the guidance on the site and submitted it online as he did the following Monday morning. Nevertheless, it appeared to me that the immediate and approximate cause of the delay in respect of the 13 claims was the failure of the claimant and his father to understand the mechanics

of how to submit the form. If, instead of e-mailing it to ACAS on the Friday, they had pressed the button to submit it online then the 13 claims would have been in time.

38. The respondent's representative was somewhat critical of the detail of the claimant's evidence regarding the precise sequence of events over the weekend. I agree that the claimant was not particularly clear in his statement as to when it was that he received the e-mail from ACAS (sent with commendable speed) advising him that he had submitted his claim form to the wrong body. It did give me a moment's pause as to the reliability of the claimant's father's evidence given that this was a fairly key point. That having been said, I did accept that the claimant's father had been en route to a dog show on the Friday afternoon and that at some point over the weekend he had read the e-mail from ACAS and had then gone online to lodge the document on the Monday morning fairly early.

39. I am required to consider the balance of prejudice in this case. The respondent's representative fairly conceded that there would be no substantial effect on the cogency of the evidence as a result of the delay. The prejudice to the claimant if his claims are not accepted will be high. If his claims are well-founded then he will have suffered discrimination without leaving any redress for this because his father misinterpreted how to lodge his claim with the Tribunal. If I decide in favour of the claimant the respondent will simply lose the windfall benefit of not having to substantively defend a claim as a result of the same error.

40. Taking all of the above matters into account I consider that it would be just and equitable to extend time so that the claims in respect of the 13 claims which arose on various dates from 16 May 2019 onwards can proceed. With regard to the previous two claims I consider that applying the balancing exercise which I am required to do, the interests of justice mean that I should not exercise my discretion to extend time.

41. The case shall now proceed to a final hearing. As noted above I have made no ruling as to whether the first two matters in the Scott Schedule were part of a continuing act along with the other claims over which the Tribunal does have jurisdiction. I also make no ruling as to whether, in

light of the concession which appears to have been made by the claimant on 16 March, it is still competent for the claimant to argue that this is the case. This will be a matter which will require to be dealt with at the final hearing.

Employment Judge:	**Ian McFatridge**
Date of Judgment:	**09 September 2020**
Date sent to parties:	**09 September 2020**