EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: 4104367/2020**

Preliminary Hearing held at Dundee on 31 March 2021

Employment Judge McFatridge

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Mr J Edens	**Claimant** **In person**
Tayside Public Transport Company Limited t/a Xplore Dundee	**Respondent** **Represented by:** **Mr Boyle,** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that

(One) The Tribunal does not have jurisdiction to hear the claimant's claims of 30 unlawful discrimination on grounds of sexual orientation in so far as these relate to matters which took place prior to 5 May 2020 and as the same are listed in paragraphs 1-18 of the claimant's further and better particulars.

(Two) A preliminary hearing shall be fixed for case management purposes to make arrangements for the hearing of the claimant's remaining claims of 35 discrimination and unfair dismissal.

(Three) For the avoidance of doubt the claimant's application to amend so as to include a claim of unfair constructive dismissal is accepted.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unlawfully discriminated against on grounds of sexual orientation. The respondent lodged a response in which they denied the claims. They made the preliminary point that many of the matters raised by the claimant were time barred. A preliminary hearing for case management purposes took place on 27 October 2020 following which various orders were made in order to bring the case to a hearing. The claimant subsequently submitted further and better particulars of his claim. The respondent lodged further and better particulars of their response in which they once again made the point that many of the matters raised by the claimant were alleged to have taken place more than three months before the claimant began early conciliation and accordingly the Tribunal had no jurisdiction to hear them. The claimant lodged a further written response in which, amongst other things, he indicated that he considered that it would be just and equitable for the Tribunal to extend time.

2. The claimant had been in the employment of the respondent at the time his initial claim had been submitted. He subsequently resigned. At the preliminary hearing he indicated that he was intending to amend his claim so as to include a claim of unfair constructive dismissal. The claimant confirmed in his further and better particulars that he wished to do this. The respondent indicated that they did not object to this amendment.

3. A preliminary hearing took place on 31 March with a view to determining whether or not the Tribunal had jurisdiction to hear those parts of the claim which the respondent considered to be time barred. In advance of the hearing the respondent confirmed that they considered the matters set out in paragraphs 1-18 of the claimant's further and better particulars to have been submitted out of time. At the hearing the claimant gave evidence on his own behalf. A joint bundle of productions was lodged. On the basis of the evidence and the productions I found the following matters relevant to the issue which I had to determine to be proved or agreed.

Findings in fact

4. The claimant commenced employment with the respondent in 2014. The claimant experienced mental health difficulties following the death of his grandmother on 8 May 2015. The claimant was unaware of the deterioration in his mental health at the time. He was not in a mental state to seek help and with the benefit of hindsight he considers that he was suffering from severe depression which went undiagnosed over a period of four years. During this period the claimant had a number of interactions with his employers which he now considers to amount to discrimination on grounds of his sexual orientation. The claimant describes his mental state during this period as very low. He was crying himself to sleep at night. He would take a knife to bed. He had disturbance to his sleep pattern which led to various absences from work. The claimant was in a relationship and the claimant's mental state caused difficulties in that relationship. Eventually, matters reached the stage where his partner advised him that he required to seek help.

5. The claimant consulted his GP and on or about 5 August 2019 his GP diagnosed him as suffering from depression. The claimant was prescribed Sertraline, an antidepressant. The claimant's GP advised the claimant that he should advise his employers of his diagnosis. The claimant completed a manager's report a copy of which was lodged (p97). The report stated

> "Yesterday (5/8/19) I had a doctor appointment. On attending I was diagnosed with depression and placed on medication. I was told I had to inform you to arrange a meeting."

The claimant attached to this a copy of his prescription for Sertraline. It was the claimant's position that no meeting to discuss his diagnosis was ever arranged by his employers.

6. Although the claimant had been prescribed Sertraline and arranged for the prescription to be renewed he did not in fact start taking Sertraline immediately. The claimant had been advised that one of the possible side effects of Sertraline was increased appetite. The claimant has concerns

about his body image and did not wish to risk putting on additional weight. In addition he had the intention of stock piling the drugs with a view to taking an overdose at some future date. As a result the claimant's depression remained untreated until the beginning of 2020. The claimant started taking his antidepressant at the beginning of 2020 and after around six weeks he started noticing the benefits of this.

7. In the meantime in September 2019 the claimant had been required to attend a sickness absence meeting. The claimant was a member of his trade union during the whole period of his employment. He requested that he be allowed to take his union representative in to the meeting and it is his position that this was refused by his manager. In any event it is his position that he raised various matters relating to his treatment with his manager at that meeting.

8. The claimant was also involved in disciplinary process in November 2019 following an incident at work. Further incidents took place. During this period the claimant was aware in general terms of his right to raise Tribunal proceedings. He felt unhappy about doing this as he felt that it might impact negatively on his employment. His managers would often use the phrase that people were 'on their radar'. He did not wish to be any more 'on their radar' than he already was. He also had financial issues and did not wish to risk losing his job and being unemployed.

9. In January 2020 the claimant indicated in a Facebook message to a friend that he considered that the respondent were unlawfully discriminating and that he intended to complain. He refers to contacting the respondent's HR department in Birmingham and goes on to say "I'm fighting this fucker all the way here" (p89). This was about an alleged comment made to the claimant in November by another driver who said that there were too many queers. He said in another Facebook post (p88) that he would be "going to the press and beyond". The claimant was fully aware of his right not to be discriminated against at work on grounds of sexual orientation. He was not aware of the detail of time bar. The claimant took no steps to find out whether there were any time limits applicable to lodging a claim. The claimant was a member of his union and was in contact with

representatives of his union on a very regular basis. The claimant was familiar with company processes. The claimant has access to the internet and has a mobile phone and is on Facebook. He uses the internet and social media. He did not do any research as to whether there were time limits applicable to Tribunal processes. He did not take any steps to find out how to do this until around July 2020 when he spoke to a friend down south who had a relative who was a lawyer. The claimant did not contact the lawyer direct but his friend obtained advice on his behalf. The claimant was told to contact ACAS and thereafter submit his application to the Tribunal as soon as possible. The claimant understood at the time that he had to go through the inhouse procedure first.

10. The claimant decided in July 2020 to lodge an official grievance and having done this started early conciliation with ACAS on 4 August 2020. The ACAS Early Conciliation Certificate was issued the same day and the claimant lodged his application with the Tribunal on 17 August 2020. In his application he refers to a substantial number of incidents naming a large number of present and former employees of the respondent. The earliest incident referred to dates from 2014. With the benefit of hindsight the claimant is extremely irritated with himself that he did not raise Tribunal proceedings before he did.

11. Despite his diagnosis of depression from August 2019 onwards the claimant was able to attend work and had no absences relating to depression. Apart from the initial report to his employers he did not raise the subject with them. The claimant felt that his mental health only started to improve around six weeks after the beginning of 2020 when he started taking his medication. At no time did he advise his employers that he was not taking his medication prior to this.

12. Of the individuals mentioned by the claimant in his claim Mark Allison, Mark Hutcheson, Andy Shaw, Mark Sandeman, Yvonne Douglas, Steve Briggs and Fergus (paragraph 15) are no longer employed by the respondent.

Matters arising from the evidence

13. In general terms I accepted the claimant's evidence regarding the history of his mental ill health. I accepted his evidence in relation to the fact that he had no detailed knowledge of the time limits applicable to tribunal proceedings but it was my view that he was well aware of the possibility of making a claim well before he actually took any steps to do this. He accepted that not only had he been a member of the union throughout his employment but he had regular contact with his union representatives and over the years had been heavily involved in various workplace processes and would have been well aware of how to obtain advice had he wished to.

Discussion and decision

14. The respondent's representative made a full legal submission referring to the various well-known legal authorities on the subject namely ***Robertson v Bexley Heath Community Centre*** [2003] IRLR 434, ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** UKEAT0305/13, ***British Coal Corporation v Keeble*** [1997] IRLR 536 and ***Averns v Stagecoach in Warwickshire*** EAT0065/08. The claimant gave a shorter submission in which he referred to the various points made in his evidence. Rather than repeat the submissions at length I will refer to them where appropriate in the discussion below.

15. Section 123 of the Equality Act 2010 sets out the time limits applicable to the raising of Tribunal proceedings. Generally proceedings may not be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other periods that the Employment Tribunal thinks just and equitable.

16. Section 123(3) provides

> "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…."

17. In this case the claimant has helpfully set out the various matters of which he complains in chronological order in his further and better particulars of claim. The first question which I had to determine was the date from which the statutory period of three months required to run. I required to do this on the basis of the claimant's pleadings taken at their highest. What that means is that I required to assume that matters happened exactly as the claimant said they did. Although the matter was not raised by the claimant I required to consider whether it could be said that there was conduct extending over a period which required to be treated as if it had been done at the end of that period. I considered that on the basis of the claimant's pleadings what is alleged is not conduct extending over a period but a series of disparate acts committed by a large number of individuals who occupied various roles within the respondent. The claimant alleges a common thread of homophobia and unlawful discrimination but it was quite clear to me that there was no single course of conduct. What is alleged are a number of separate incidents and it was my view that the three month period in respect of each of these incidents expired three months after that specific incident took place. It was therefore my view that the pleadings had been brought after the end of the period of three months starting with the date of the act which the complaint relates in respect of all of these matters referred to in paragraph 1-18 of the claimant's further and better particulars. Accordingly, I then required to determine whether or not it was just and equitable to extend time. As noted above I was referred to the well-known case of Robertson v Bexley Heath Community Centre. It is noted that there is no presumption that Tribunals should extend time and that indeed that the exercise of the discretion to extend time should be the exception rather than the rule. The onus is on the claimant to show that it is just and equitable.

18. In considering matter of justice and equity it is important to consider matters in the round and a multi-factorial approach is required. The Tribunal requires to consider the balance of prejudice. It is not simply a question of saying that if the claimant has been discriminated against it is just and equitable that he has the opportunity of vindicating his claims. I also require to consider the issue of what is just and equitable to the respondent. In this, as in many cases, there will be a prejudice to one

party or the other no matter what is decided. One of the matters I therefore require to consider is the balance of prejudice. Whilst there is a clear prejudice to the claimant if a potentially valid claim cannot be heard I am also required to take into account the prejudice to the respondent if they are required to answer claims which are rooted far in the past and where they may have quite properly anticipated that any issues had been dealt with long ago.

19. Although I agree entirely with the respondent's agent that the list of matters which required to be taken into account set out in the ***Keeble*** case is not to be regarded as a checklist I do consider that it is a helpful aide memoir in assisting me to look at the various factors.

20. With regard to the length of and reason for the delay I would agree with the respondent that the delay in this case is lengthy. The most recent matter contained in the claimant's first 18 paragraphs took place in February 2020. Given the date that the claimant commenced early conciliation anything that happened prior to 5 May 2020 happened outwith the three month period. It follows that the most recent matter which the claimant seeks to extend time for is out of time by around 80 days. This is in the context of a three month time limit set out in the statute. This is a very significant delay. The other matters raised are much older. With regard to the reason for delay the claimant refers to his ignorance of time limits.

21. We would agree with the respondent that the law requires such ignorance to be reasonable. It is clear that the claimant has the opportunity of taking advice and had that opportunity throughout the whole period of his employment. Not only was he a member of the union but it is clear from the matters set out in his further and better particulars that he was in regular contact with union officials. It would have been easy for him to ascertain the matter. In this case I consider that the claimant's ignorance of the time limit was not in any way reasonable. It also appeared to me that, on the basis of the evidence, the claimant had formed the intention by at least January 2020 of taking matters further. It is clear to me from his own statement that he was well aware of the law on discrimination prior

to this and that he could have taken matters to the Tribunal much earlier had he wished.

22. I am mindful that the claimant refers to his health and the debilitating effects of depression however the claimant was undergoing medical treatment from his GP from August 2019 onwards. On his own evidence he did not take the prescribed medication until the beginning of 2020 but even then his evidence is that by around six weeks later he was seeing the benefits of this. It is clear that by the time he sent the Facebook posts in January he was well aware of the possibility of taking matters "all the way". I did not consider that either of the reasons put forward by the claimant for delay were particularly convincing or particularly strong. The claimant was well aware of his right to raise tribunal proceedings if he felt he was being discriminated on grounds of his sexual orientation. He did not take any steps to raise proceedings prior to when he did essentially because he chose not to do so. Although the claimant had mental health difficulties these were not causing him to be absent from work and there was no evidence that these were having any specific effect on his ability to make this sort of decision.

23. I am also required to take into account the extent to which the cogency of the evidence has been affected by the delay. It is noteworthy that in this case a substantial number of the individuals involved no longer work for the respondent. It is unclear whether or not they will be traceable. If the claims are allowed to proceed then the respondent may well find themselves in the position of having to defend historic allegations in circumstances where it is difficult for them to trace witnesses and where witnesses they are able to trace are unable to recall the detail of matters which they considered to be long since closed.

24. With regard to the issue of the promptness with which the claimant has acted it is clear that in this case the claimant has not acted with any promptness at all. Nor did he make prompt steps to obtain advice. It did not appear to me that any issues arose in relation to any requests for information made of the respondent by the claimant.

25. With regard to the balance of prejudice I note that even if I rule against the claimant in respect of the first 18 paragraphs of his further and better particulars he still has a number of other claims of discrimination which there is no doubt were submitted in time and which the Tribunal will be able to adjudicate upon. He will also be able to obtain a hearing of his claim of unfair constructive dismissal. I take on board the respondent's point that if these claims are extended so as to include the historic matters contained in the first 18 paragraphs then any such hearing is likely to be much longer and more complex. I also considered there is a danger of real unfairness to the respondent. It is clear that there had been a number of issues in the claimant's employment over the years which, from the respondent's point of view, have been dealt with within their procedure. I note that this included mediation with a former manager albeit it is now the claimant's position that this was not successful.

26. At the end of the day I considered that the balance of prejudice in this case comes down firmly in favour of not granting the claimant the extension of time which he seeks. I considered that approaching the matter in terms of the multi-factorial approach suggested in ***Keeble*** the overwhelming balance is that justice and equity in this case means not extending the three month time limit. Accordingly, I am not prepared to grant this extension and those parts of the claimant's claim which relate to matters which occurred prior to 5 May 2020 are time barred. I confirm that these amount to those matters set out in the first 18 paragraphs of his further and better particulars.

27. The parties were agreed that once my judgment was known it would be appropriate to hold a further closed preliminary hearing by telephone in order to discuss case management of the remaining claims. This should be listed as soon as possible. It can take place before any Employment Judge.

28. I also note that whilst the claimant sought to amend his claim in order to include a claim of unfair constructive dismissal and whilst the respondent confirmed that they had no objection to such amendment I am unaware of any formal order by the Tribunal accepting the amendment. For the

avoidance of doubt I have therefore included such an order in this judgment.

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Employment Judge: **Ian McFatridge**
Date of Judgment: **08 April 2021**
15 **Date sent to parties:** **09 April 2021**