EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104204/2023

Held in Glasgow by Cloud Video Platform (CVP) on 15 January 2024

Employment Judge L Murphy

Mr S McCaffrey	**Claimant** **Represented by:** **Mr J Lawson - Solicitor**
The Chief Constable of the Police Service of Scotland	**Respondent** **Represented by:** **Ms A Irvine - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that it lacks jurisdiction to hear the claim, the claim having been brought outside the time limit in section 123(1)(a) of the Equality Act 2020 ("EA"), and it not being just and equitable to grant the extension necessary for it to be brought under s.123(1)(b) of EA. The claim is, therefore, dismissed.

REASONS

Introduction

1. The claimant brings complaints under sections 13, 15, 19 and 20 of EA under claim number 4104204/2023. The claimant avers he was at the material times a disabled person for the purposes of EA and the respondent concedes this to be so. All of the claimant's complaints arise from the respondent's withdrawal of a provisional offer of appointment as a probationary police constable. The provisional offer was made on 18 October 2019 and was withdrawn by letter dated 19 February 2020. The parties accept that the withdrawal is the act (or the last of the acts) complained of and that time began to run from that date (at the latest) for the purposes of applying relevant time limits.

2. ACAS received an Early Conciliation notification on 4 August 2023 and issued an Early Conciliation Certificate on the same date. The claim was also presented to the Tribunal on 4 August 2023. It is uncontroversial that this was more than three years and two months after the expiry of the three-month time limit specified in s.123(1)(a) of EA.

3. At a substantive preliminary hearing on 15 January 2023 on the issue of time bar, I heard evidence from the claimant and from the respondent's Sgt Allison. A joint inventory of productions running to 152 pages was referred to during the evidence. I am grateful to both Ms Irvine and Mr Lawson for their assistance to the Tribunal with the case.

Issue to be decided

4. Prior to hearing evidence, I agreed with Mr Lawson and Ms Irvine the issue to be decided is as set out below. (Mr Lawson agreed that, in this case, the claimant makes no assertion that there was conduct extending over a period which ended later than 19 February 2020.)

Time bar

(i) Given the date the claim form was presented and the dates relating to early conciliation, any complaint about something that happened before 5 May 2023 may not have been brought in time.

(ii) Were the discrimination complaints made within the time limit in section 123(1)(b) of the Equality Act 2010? The Tribunal will decide:

i. Were the claims made within a further period (beyond the three month time limit in s.123(1)(a)) that the Tribunal thinks is just and equitable? The Tribunal will decide:

i. Why were the complaints not made to the Tribunal in time?

ii. In any event, is it just and equitable in all the circumstances to extend time?

Findings in Fact

5. After careful consideration of the evidence, the following facts, and any further facts found in the 'discussion and decision' section, were found to be proved on the balance of probabilities.

Findings in fact relevant to time bar

6. The claimant is a member of police staff engaged on a contract of employment by the Scottish Police Authority ("SPA"). He has been so employed for approximately 16 years. He has worked in his current role as a Controller for around 11 years. That role can be a pressurized one. It entails receiving incidents from the Contact Centre, assessing the response grading and allocating the most appropriate police resource. The claimant is not a Police Constable but the respondent has Police Constables who are assigned to carry out the same or materially similar duties to those carried out by the claimant in his Controller role. Police Constables may also be deployed to different roles of which the claimant does not have experience, including roles involving frontline response policing.

7. In or around 2016, following a succession of bereavements, the claimant experienced low mood and consulted his GP. He was prescribed 20 mg of Citalopram daily. Before that, he had no history of any mental health condition. He reduced his dosage to 10 mg a day and at some point, around February 2019, he tried to wean off the medication all together. However, he experienced withdrawal symptoms and the low mood returned so he remained on the medication at that time. The claimant did not experience any problems at his work as a result of his mental health symptoms or treatment.

8. In 2019, the claimant made an application to be appointed by the respondent as a Probationary Police Constable and participated in the respondent's recruitment process. The claimant was a motivated candidate with relevant experience of aspects of Police work and he spent considerable time undertaking online research to prepare for the respondent's assessment process. This included interrogating the Police Scotland website for information he believed was likely to be the subject of interview questions. The claimant suspected a question on equality

issues may come up at the interview and his research included aspects of the Equality Act 2010 which were relevant to policing and criminal law.

9. He successfully passed an initial written test which assessed literacy and other competencies and was invited to an assessment centre which took place on 17 October 2019. He also passed the assessment centre and, on 18 October 2019, the respondent wrote to him in the following terms (so far as relevant):

Dear Mr McCaffrey

Probationary Police Constable – Provisional Offer of Appointment

I refer to your application and I'm pleased to inform you that you have passed the Assessment Centre Stage.

However your application remains subject to satisfactory completion of all ongoing vetting checks.

On this basis I hereby confirm that your application will now be progressed through the final stages of the recruitment process with a view to appointing you as a probationary chief constable.

This provisional offer of appointment is conditional on the following factors:

a) you are granted vetting clearance.

b) that you are certified by a registered medical practitioner approved by the police authority to be fit both physically and mentally to perform the duties of a police officer in terms of Regulation 6(c) of the Police Service of Scotland Regulations 2013

c) …

10. The letter bore Sgt L Allison's name at the foot in print. However, she was not the signatory. All letters from the recruitment department at the material time were prepopulated with Sgt Allison's name at the bottom. The practice, however, was that the officer in the recruitment department who was working on the particular application process would usually *pp* the letter on Sgt Allison's behalf. Sgt Allison had no involvement with the

claimant's application process. Lynne Campbell *pp'd* the claimant's provisional offer of appointment letter dated 18 October 2019 and Sgt Allison believes that L Campbell had involvement in his application.

11. The claimant was pleased and excited to receive this provisional offer. He had felt confident he would get through the process, given his experience and careful preparation. He had previously attended a medical check with a nurse in connection with the application. After he told her about the medication he was taking, she had told him that they were likely to ask him to attend another medical.

12. The claimant was invited to attend a further medical assessment with Dr S Ahmed of Optima Health on or about 11 February 2020. At that appointment, he told Dr Ahmed about his history and that he continued to take a low dose of Citalopram. He said he was keen to remain on the medication for the foreseeable future given the withdrawal symptoms he had experienced and the return of low mood when he had tried to come off the drug. He also gave Dr Ahmed information about his employment as a Controller with the SPA and what this involved.

13. At some point between 11 February and 19 February, Dr Ahmed discussed the claimant's case with his peers (other Force Medical Advisors) before taking a final view on his medical assessment of the claimant. In the note he prepared beforehand for his colleagues to inform their discussion, he narrated the safety-critical work the claimant had been carrying out for the police for the past 12-13 years and recorded an apparent initial view that the claimant had demonstrated sufficient psychological resistance over a prolonged period without becoming ill (albeit on treatment).

14. In or about the first week in February 2019, the claimant got engaged to his partner. They lived together and, at that time, she worked in the entertainment industry.

15. On or about 20 February 2020, the claimant received a letter from Dr Ahmed of Optima Health dated 19 February 2020. It was in the following terms (so far as relevant):

Dear Mr McCaffrey

I write in my capacity as Force Medical Advisor with Optima Health, which provides occupational health services to Police Scotland, in relation to your application for the post of Police Constable. Thank you for coming to meet me and for engaging in the process.

It is our normal practice where there is doubt about an individual's suitability for the post to discuss cases with other Force Medical Advisor colleagues on an anonymous basis. Your medical circumstances were discussed in that way and the consensus opinion was obtained from discussion with several Force Medical Advisors.

The consensus opinion was that it would be prudent that a two year period of good mental health with no treatment, while living a normally stressful lifestyle is required before an individual would be considered suitable for the post of Police Constable. This is to demonstrate a period of ongoing stability prior to starting what is recognised to be a psychologically and emotionally challenging job. It was felt that in terms of psychological challenge the two roles you have had in Police Scotland were not equivalent to the role of a Police Officer. Also, the fact that you attempted unsuccessfully to come off medication and had not only withdrawal symptoms but also a recurrence of low mood suggests that there is a residual psychological vulnerability.

Police Scotland has a responsibility to the applicants but also potentially their colleagues and members of the public who may be put at risk in the event of deterioration of an officer's mental wellbeing.

…

At the end of the discussion process, the Force Medical Advisor provides a medical opinion to the Force which then makes the final decision on whether to accept or decline an individual.

I know this will be disappointing for you. …

16. It is Sgt Allison's belief that, in the application of the 'two-year treatment-free' policy, the respondent applied what she called a 'case-by-case element'. No finding of fact is made with regard to whether or not that is

accurate. It is found, however, that this is Sgt Allison's understanding of the approach followed in the respondent's recruitment department.

17. The claimant was devastated to read this news. Until receipt of the letter, he had felt confident he would be appointed. He felt a requirement for two years' good mental health without treatment didn't seem just and he felt aggrieved. He felt something was not right about the decision though he didn't feel entirely sure whether he had a claim against the respondent. The claimant was aware of the Equality Act 2010 and had familiarity with the legislation insofar as it was relevant to aspects of criminal law and procedure which he came into contact with as a result of his employment.

18. He was not familiar with the employment law provisions in the Act. He was not aware of the normal three-month time limit for bringing a discrimination complaint. He was not aware that any time limit existed for the bringing of complaints. His assumption, based on his knowledge of criminal law, was that there were no time limits on the bringing of an employment law related claim. Nor was he aware at that time that his mental health condition might be a protected characteristic under the EA. Nevertheless, it was in his consciousness that some sort of legal challenge may be a possibility and that taking legal advice on the matter to better understand his position was an option.

19. Within the next week or so, the claimant sought advice from some of his supervisors at work who were Police Officers of different ranks who had, in their roles, had some experience of the respondent's recruitment department. They didn't have any pointers for the claimant, other than to suggest he contact the respondent's recruitment department, which he did. He spoke to a sergeant there who told him she was unable to help because the decision had been made by Optima Health, not them. The claimant established that the respondent offered no 'internal' appeal process against the recruitment decision.

20. He did some internet research regarding depression and looked to see if anyone else had been rejected in their application to join the Force by reason of being on anti-depressant medication. At the time he found no information about anyone in Scotland in the same situation but came

across an article about a similar issue in New Zealand. At the time the claimant considered he may have a claim of some kind against the respondent and he didn't think time was an issue. He didn't do any internet research on time limits because he thought he knew that there were no time limits. He was unaware of the existence of ACAS so did not seek any advice from them or look at their website.

21. The claimant wasn't aware that it was possible to bring a claim in the Employment Tribunal as an unrepresented individual but thought it was necessary to seek legal representation with the associated financial implications. In any event, even if he had known about the possibility of bringing a claim without legal representation, he was of the view that to proceed without a solicitor would not be an intelligent course of conduct. He was aware of sources of potentially free legal advice such as the Citizens Advice Bureau. He did not make contact with them as he didn't believe that they would provide the support or representation he believed he required to submit Tribunal proceedings.

22. Soon after the claimant received the letter dated 19 February, the Covid pandemic struck and the first lockdown began in March 2020. The claimant's partner had no income through the lockdown and this caused a strain on the household finances which preoccupied the claimant. The claimant continued to work as normal through the lockdowns. He and his partner had to defer their wedding plans because of the impact on their finances.

23. The claimant pushed the issue of any possible claim against the respondent to the back of his mind, believing time was no issue. He knew that any professional legal advice would come at a potentially significant cost which he felt he could ill afford at the time. He also did not wish to involve himself in the stress of potentially pursuing a legal claim while dealing with the stress of the Covid epidemic, including the financial pressures it brought.

24. After the Covid lockdowns, the claimant's partner retrained as a healthcare worker but, as a household, they did not recover from the strain the

pandemic had put on their finances for some time after the restrictions ended.

25. On 28 July 2023, the claimant read an article in the Herald newspaper by journalist, Caroline Wilson. The article reported that Police Scotland were being sued by another candidate for appointment as a Probationary Constable. The article named an individual called Laura MacKenzie, who – according to the article - had similarly had an offer withdrawn because she was taking anti-depressants. The claimant emailed the Herald journalist who reported on Ms MacKenzie's case the same day. He said he hoped she would be able to provide him with some advice "*or the details of the legal agency that is currently pursuing the case on her behalf*". As well as outlining his own experience of the matter, he told Ms Wilson in his email:

I have not sought legal advice in relation to this although I did consider it I did not wish to involve myself in the stress of the scenario whilst trying to deal with the subsequent COVID epidemic. Since reading your article however I feel that this may be worthwhile as I still am infuriated by the decision.

26. Ms Wilson replied on 30 July 2023. She provided details of the lawyers representing Ms MacKenzie. The claimant emailed the firm of solicitors MML Law on that date and arranged a call with a solicitor on 4 August 2023. During that call, the solicitor provided the claimant with legal advice, including advising him about the position with respect to time limits in the Employment Tribunal for discrimination claims. This was the first time the claimant became aware of the time limit. He instructed his solicitors to initiate the Early Conciliation process with ACAS and to lodge a claim in the employment Tribunal. His solicitor did both the same day (4th August 2023).

27. At some time between 19 February 2020 and 4 August 2023, Lynne Campbell, who *pp'd* the claimant's provisional offer of appointment letter, left the Force. She is no longer a serving officer.

28. At the end of any recruitment process, after a candidate is rejected, the respondent's practice was and is to "weed" the individual's recruitment file.

This meant certain documents would be removed and destroyed whereas others would be retained in the paper file. This process was carried out according to internal Data Protection guidlines which contained two lists: a "Keep" list and a "Destroy" list. The weeding was generally carried out as soon as possible after an application had been rejected. There was no practice of waiting 3 months or any other specified period before weeding a rejected candidate's recruitment file. By the time of the preliminary hearing on 15 January 2024, all and any of the documents meeting the description of items listed in the "Destroy" column of the respondent's DP guidlines had been destroyed.

29. The destroyed documents included items like copies of the claimant's ID and bank mandate forms. The documents in the "Destroy" column may well have been destroyed by 18 May 2020; Sgt Allison was unable to say exactly when the weeding of the claimant's file happened. The date of this action would have been on a previous system called Empower to which the respondent no longer has access. The "Destroy" column included 'Recruiting Letters'. No such letters are available in the respondent's paper file (or electronically on the respondent's systems). The claimant has, however, retained a copy of the provisional offer of appointment and of the letter withdrawing the offer (or has procured copies from Optima Health). He has shared copies with the respondent and they were produced in the PH bundle.

30. Some of the documents in the "Keep" list in the respondent's guidelines do not appear to be contained in the paper recruitment file the respondent holds for the claimant in its present form. The 'Keep' list includes 'File Notes'. None are contained in the weeded file. It is possible that this is simply because none were ever made. Sgt Allison would have expected a file note to be prepared to record any contact by the claimant after his rejection to raise concerns about the medical, which he says he did. It is unknown whether a file note for this call was ever created or whether it was created but later destroyed. If one was created and later destroyed by the respondent in the weeding process (or otherwise), then that destruction did not comply with the respondent's Data Protection guidelines on document retention.

31. Fitness screening results were listed in the 'Keep' column but none are on the weeded paper file. 'Recruiting letters of note' are also listed under 'Keep' but none are available in the weeded file. There were no documents in the category of 'Letters of Complaint or Responses' which are also listed under 'Keep' in the respondent's guidance. However, the claimant does not allege he wrote any letters of complaint, so no such letters would have been in the file prior to the weeding, in any event.

32. A search in the Microsoft Bing search engine using the search term "discrimination claims time limits" has been shown, in a recent search screenshotted by Ms Irvine, to bring up in the top results reference to 'three months' and links to information about the Equality Act 2010 section 123 as well as to further information about time limits and about discrimination.

Observations on the evidence

33. I found both witnesses gave their evidence in an honest and straightforward manner. There was no material dispute as to the relevant facts.

Relevant Law

Time Bar

34. Section 123 of the EA deals with time limits for bringing discrimination and harassment claims and provides:

"s.123 ***Time limits***

(1) subject to section 140A and 140B proceedings on a complaint within section 120 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 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."

35. Where a complaint is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (**Roberson v Bexley Community Centre** [2003] IRLR 434). Parliament has chosen to give the Tribunal wide discretion in determining whether it is just and equitable to extend time, having regard to the language of the provisions (**Adeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23.)

36. S.140B of the EA provides for an extension to the three-month time limit in certain circumstances. In effect, s140B(3) of ERA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'Day A' and 'Day B' as defined in the legislation. This 'stop the clock' provision only has effect if the early conciliation process is commenced before the expiry of the statutory time limit. Where a limitation period has already expired before the conciliation commences, there is no extension (**Pearce v Bank of America Merrill Lynch** UKEAT/0067/19).

37. In **Miller and Ors v The Ministry of Justice** [2016] UKEAT/003/15, the EAT cited five points relevant to the test for extending time in discrimination claims which were relevant to the appeal in that case, as follows:

(i) The discretion to extend time is a wide one: **Robertson v Bexley Community Centre** …

(ii) Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule ...

(iii) If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into

account irrelevant factors, or made a decision which was not based on the evidence…

(iv) What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET …

(v) The ET may find the checklist of factors in s 33 of the Limitation Act 1980 ("the 1980 Act") helpful (**British Coal Corporation v Keeble** [1997] IRLR 336 …) … This is not a requirement, however, and an ET will only err in law if it omits something significant.

38. In the **Keeble** case, the EAT referred to the list of factors which appear in the Limitation Act 1980 s.33 which provides for the Courts' discretion to exclude the time limit in England and Wales in actions in respect of personal injuries or death. The Court of Appeal ("CA") has made clear that the Tribunal is not required to go through such a list. With that said, the CA has also observed that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and the reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or prohibiting it from investigating the claim while matters were fresh) (**Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] IRLR 1050).

39. It is not necessarily wrong to consider and assess the merits of a proposed claim and to weigh these in the balance when considering whether to extend time, even if the Tribunal is not in a position to say the claim is so weak as to have no reasonable prospects of success. Even if the merits are assessed as better than no reasonable prospect, or even if found meritorious at a final hearing , subject to a reserved time bar point, it does not follow that time will always in such a case be extended because that factor may be outweighed by other considerations, including possible considerations of prejudice in favour of the respondent **(Kumari v Greater Manchester Mental Health NHS Foundation Trust** [2022] EAT 132 at para 58 and 59).

40. The question of whether ignorance on the part of the claimant is reasonable has been cited as relevant in the context of the time limit

provisions in unfair dismissal cases (which are different to discrimination cases and involve a test of reasonable practicability). Thus, in **Wall's Meat v Khan** [1979] ICR 52, Brandon LJ said "…*Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly have been found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it*." The dicta on the matter of claimant ignorance has been found to be relevant also in the context of the test in discrimination cases, requiring the Tribunal to decide what is just and equitable (**Averns v Stagecoach in Warwickshire** [2008] UKEAT/0065/08, **Bowden v Ministry of Justice** UKEAT/0018/17/LA).

Submissions

41. Both Mr Lawson and Ms Irvine gave oral submissions**.**

42. Mr Lawson cited the cases of **Miller** and **Keeble**. He noted that regard will be had regard to the factors mentioned in **Keeble** but they are not to be treated as a checklist. He noted the discretion is wide and that the weight to be given to the factors is for the Tribunal.

43. Mr Lawson said the reason for the delay was that the claimant put it to the back of his mind because he was not aware of time limits. He said it was important that it was reasonable for the claimant not to be aware, having regard to his looking at things 'through a criminal law lens'. He referred to the financial implications of Covid for the claimant's household and submitted that those implications extended well beyond the end of the lockdown restrictions. The overarching factor, according to Mr Lawson was that the claimant perceived himself to be under no time constraints. This explained his omission to undertake any research. Mr Lawson invited me to have regard to the promptness with which the claimant acted once he knew about the possibility of taking legal action (after he read the Herald article). He said the reasons for the delay justified its length.

44. In Mr Lawson's submission, other than the obvious prejudice of requiring to defend a claim if the time limit should be extended, the respondent would suffer little prejudice. There was minimal impact on the cogency of the evidence. The Data Protection weeding of the paper file would have happened even if the claim had been brought in time. Mr Lawson said that

Sgt Allison appeared to acknowledge during cross examination that the documents removed in that process would not, in any event, have been relevant to the issues to be decided at a final hearing. Although certain letters were missing, the key letters were held by the claimant and available. Mr Lawson submitted that the key focus would be on Dr Ahmed's reasons for the view he ultimately took, and the doctor could be called by the respondent to speak to this.

45. Mr Lawson pointed out that the two-year medication-free policy at the heart of the claim continues to be operated by the respondent today so the justification for it at the time of the claimant's rejection would be the same as the justification for it now. The respondent should, he said, be able to supply a witness who could speak to the reasons for their continuing recruitment policy.

46. He also invited the Tribunal to give weight to the merits of the claim. He cited the case of **Kumari** as authority for the proposition that a Tribunal can look at the merits when deciding whether to extend the time limit. He said that only a provisional assessment is required. Mr Lawson said the reason for the claimant's rejection was known and he reminded me that the respondent concedes disability status. He opined there was merit to the claim and that the issues were triable. This, he said, should weigh in the claimant's favour.

47. Overall, Mr Lawson submitted that the prejudice to the claimant in being deprived of the chance to litigate the case would outweigh to prejudice to the respondent.

48. Ms Irvine reminded the Tribunal of the relevant timeline and pointed out the claim was over three years late. She said that although the claimant provided reasons for the delay, these didn't justify the period of delay. She pointed out that the respondent's offer of appointment was provisional and was subject to satisfying the requirements for physical and mental fitness.

49. Ms Irvine observed that the claimant was an intelligent man who could easily have acquainted himself with the time limits by a simple internet search. With respect to the Covid / financial explanation, she noted that this could not account for the totality of the period of delay. She noted the

claimant was aware from receipt of the letter of the facts giving rise to his claim and of the potential for a pursuable claim. His reading of the newspaper articles in July 2023 did not, in Ms Irvine's submission, detract from the fact that the claimant was already aware of the facts giving rise to his claim.

50. Ms Irvine submitted the respondent would be prejudiced by the delay. She referred to the claimant's paper file having been weeded. She said key documents like file notes wouldn't be available. She also raised a concern that the respondent didn't have a witness in the Recruitment Department who could speak to the claimant's application process. Although Mr Lawson suggested the doctor's evidence would be the key focus, Ms Irvine referred to Sgt Allison's statement in evidence that, in the application of the two-year policy, there was a "case by case element".

51. Ms Irvine cited the **Robertson v Bexley** and **Miller** cases. She reminded the Tribunal that the exercise of discretion to extend was the exception, not the rule. She argued the circumstances in the present case don't merit an exception. She cited **Adedeji** in which the CA observed that rigid adherence to **Keeble** factors as a checklist can lead to a mechanistic approach and that the best approach is to assess all factors in the particular case which the Tribunal considers relevant to whether it is just and equitable to extend time, including, in particular, the length of and reasons for the delay. She said that prejudice to the respondent was customarily relevant in the exercise and may well be decisive.

52. With respect to the claimant's asserted ignorance of the time limit, Ms Irvine referred to **Bowden** and noted that, relevant in applying the 'just and equitable' test, is the question of whether the claimant was reasonably unaware of matters. She also cited **Hunwicks v Royal Mail Group plc** UKEAT/0003/07/ZT where the EAT considered an appeal from a tribunal where an extension had been refused. Underhill J said "*The fact that a Claimant may have been unaware of relevant time limits does not necessarily make it just and equitable to extend them, particularly where, as here, the Claimant is a person of some intelligence and some education with access to legal advice. It will frequently be fair to hold Claimants bound by time limits which they could, had they taken reasonable steps, have*

discovered." Ms Irvine said the claimant in the present case could easily have established the time limit.

53. She also cautioned that it would be premature to assess the merits of Mr McCaffrey's case, given the complexity of the legal arguments.

54. Overall, Ms Irvine said the claimant could have pursued his claim much sooner and that the prejudice to the respondent in allowing the case to be brought would outweigh the prejudice to the claimant in refusing the extension.

Discussion and Decision

55. I do not understand there to be a material dispute regarding the date of expiry of the s.123(1)(a) three-month time limit in this case. There is generally no need to communicate a discriminatory act to the prospective claimant for time to start running; it starts to run on the date of the alleged discriminatory act which, in this case, is the decision to reject the claimant's application / withdraw the provisional offer. This took place (at the latest) on 19 February 2020 when the letter was written and sent. The three-month time limit, therefore, expired on 18 May 2020. Once or twice during the hearing, Mr Lawson suggested that time limit may have expired a day later because the claimant did not receive the letter of withdrawal until the day after it was written, but, quite sensibly, he did not pursue this point in any meaningful way.

56. The claim was, therefore brought over three years and two months outside the normal time limit.

57. As to the reasons for the delay, the only reason put forward which remained pertinent throughout the entirety of the three year plus delay was the claimant's ignorance of the time limit. As Mr Lawson put it in his submission, this ignorance was the 'overarching factor'. Had he been aware of the time limit, he would have acted sooner. As soon as he became aware of the time limit on 4 August 2023, he and his advisor acted very promptly. I do not suggest that other factors which were more short-lived are to be ignored or discounted, but the claimant's enduring ignorance seems to me to be a particularly significant issue in this case as

it is the factor that contributed more than any other to the extended length of the delay.

58. I accept that the claimant was genuinely unaware of the time limits applying to discrimination claims in the Employment Tribunal and that he genuinely believed until 4 August 2023 that he was not constrained by any pressure of time. Yet, this is not a case where the claimant was entirely ignorant of any possibility of legal recourse at the time of, or soon after, the alleged discriminatory act. The circumstances giving rise to a potential claim were fully known to him around the 20 February 2020. He did not know whether anyone else in Scotland had ever litigated against the respondent on the basis of the same or similar facts. However, that might describe the situation of many, perhaps even most, potential claimants contemplating a possible legal claim based on an employment or recruitment decision.

59. The claimant was not familiar with the employment provisions of the Equality Act 2010 and was not aware whether his personal circumstances might be covered. That too, is perhaps unsurprising and unremarkable.

60. Although the specifics of any rights and remedies available to him were not known to the claimant, I have found that he was aware of the potential of some sort of legal claim or at least of the possibility of exploring that potential with a legal advisor. His evidence was that he felt that something was not right but was not entirely sure whether it would ‘fall into a claim’. His evidence about pushing it to the back of his mind because of financial pressures and being aware that advice would come at a cost only makes sense in the context of his having some understanding or suspicion that there might be some legal right or option upon which to take advice.

61. He knew about that possibility, but he undertook no steps to explore this further within the original three-month time limit or at all in the three years that followed. His omission to do so was explained not just by ignorance of the applicable time limit but by a mistaken belief that there was no time limit. It was also explicable in part by the additional mistaken belief that it was not possible to bring an employment claim without engaging the

services of a solicitor. I accept the claimant genuinely held both these mistaken beliefs.

62. I am not persuaded, however, by Mr Lawson's submission that the claimant's belief that there were no time limits in relation to employment claims was a reasonable one. The reason he gave for holding the belief was that he has some experience with criminal law in the context of his work and, to his knowledge and understanding, there are no time limits in criminal law. I accept this was his understanding of the aspects of criminal law of which he had experience. I further accept that the claimant's experience in the criminal law domain contributed to his misconception that time limits did not arise in employment law.

63. Nonetheless, I cannot agree that the fact his mistaken belief was shaped by his particular work-based knowledge, rendered it a reasonable one for him to hold. The claimant struck me as an intelligent and resourceful individual. He successfully passed all elements of the respondent's extensive assessment processes (subject to the medical). He had internet research skills which enabled him to prepare meticulously for the respondent's interview process. This included undertaking research on legal matters and even specifically in relation to the Equality Act 2010 which he rightly anticipated would come up in the interview (albeit, I appreciate, from a criminal / police perspective).

64. The claimant readily acknowledged in evidence his own lack of expertise in employment law and that his legal knowledge was confined to criminal matters. I believe that if he, a man of intelligence and resourcefulness, had directed his mind, even fleetingly, to the question of whether it might be an unwarranted leap for him to assume that no time limits applied to any kind of claim based on his personal experience of one strand of the legal system, it would have given him pause. Had he applied his mind to the matter, I am satisfied that he would have identified the possibility that such a general assumption might not be safe, and that the position was at least worth double-checking. I find that it would have been reasonable for the claimant, having regard to his attributes and circumstances, to have applied his mind to this question and to have checked the position.

65. If the claimant had sought to check his assumption, his misconception would have been readily dispelled by simply typing a basic question or two into a search engine.

66. I accept that the claimant's mistaken beliefs about time limits and the need for legal representation were not the only factors. His financial constraints and the general stress of the Covid pandemic also contributed to his failure to take any steps at an earlier time. These though alleviated at some stage in the months before August 2023.

67. With respect to the merits of the claim, only a provisional and limited assessment is appropriate based on the information and evidence before me at the preliminary hearing. Based on that information and evidence (and subject to time bar), I conclude that this does not appear to be a claim which lacks any reasonable prospects of success, such that – if allowed to be brought – it would be vulnerable to strike out. The claim discloses issues that seem to me to be triable.

68. With respect to the cogency of the evidence, I am not persuaded by Ms Irvine's suggestion that the respondent has been materially prejudiced by delay as a result of the weeding of the claimant's paper recruitment file. It was not at all clear, to the extent any papers were destroyed or missing, that those papers would not have equally been destroyed or missing if the claim had been brought by 18 May 2020. Mr Lawson pointed out that, on the face of it, the critical documents were all available, when account was taken of those that the claimant was able to provide.

69. It was likewise unclear when Lynne Campbell left the service and whether she had already done so by the expiry of the three-month limit on 18 May 2020. It is not possible to say, therefore, whether the delay has resulted in the specific prejudice that the respondent would have had access to a serving officer as one of its key witnesses if the case had been brought in time. It may be that even if the claim had been brought by 18 May 2020, Lynne Campbell would not have been available to the respondent as a serving officer by the time the respondent received notice of the claim or, potentially, by the time the case progressed to a hearing.

70. With that said, I am not persuaded that it can be confidently asserted that the delay in bringing the claim would have no or minimal impact on the cogency of the evidence. Even assuming both Lynne Campbell and Dr Ahmed can both be located and called to give evidence at a final hearing, it is reasonable to suppose that their recollections of the detail of the claimant's application and medical circumstances would be less fresh than they would have been if the case had been brought to a hearing three years earlier. Memories fade with the passage of time; it is one of the reasons for having time limits in place.

71. Ultimately, I considered all relevant factors to determine whether it would be just and equitable to extend time to 4 August 2023 to allow the claim to proceed.

72. Factors which weighed in favour of extending time to that date included:-

(i) that the disadvantage to the claimant if the extension is refused is substantial in that he will be deprived of the opportunity to litigate the complaints under sections 13, 15, 19 and 20 of the EA and to have these judicially determined.

(ii) that the claim discloses triable issues and is not devoid of prospects.

(iii) that the claimant contacted the respondent soon after receiving the letter to raise concerns and to see if a resolution could be achieved under the respondent's internal processes.

(iv) that the claimant genuinely but mistakenly believed that no time limits applied to claims to the employment tribunal, albeit I have found that this belief was not reasonable in the circumstances.

(v) that the claimant genuinely but mistakenly believed that he required legal representation with the associated solicitor's costs in order to pursue a claim in the employment tribunal.

(vi) that in the period following shortly after the alleged discriminatory act, and for some years thereafter the claimant's financial position was negatively affected by his partner's circumstances during the Covid pandemic and lockdowns and for some time after.

(vii) that, during that period, the claimant was also experiencing the stresses brought by the pandemic more generally which he continued to work through.

(viii) that it appears that most if not all of the key documentary evidence relevant to the claimant's claim has been preserved and would be available to be produced at a final hearing on the merits.

(ix) that the policy at the heart of the claimant's complaint is still a live one operated by the respondent so that one would expect the respondent to be able to field a witness to speak to the justification for the continuing 'two-year treatment-free' requirement.

(x) that the claimant and his advisor acted very promptly when the claimant was made aware of the time limit.

73. However, having carefully considered all relevant matters, the following factors weighed more heavily in my deliberation:

(i) that the disadvantage to the respondent of permitting the extension is significant in that an extension means the claims against it will be judicially determined.

(ii) that time limits are designed to ensure compliance with the principle of legal certainty.

(iii) that the period of delay in this case was very substantial, exceeding three years and two months.

(iv) that the issue of the claimant's financial pressures had been alleviated to some extent a number of months before a claim was ultimately brought, during which time no inquiries were made or advice taken until prompted by the chance reading of a newspaper article about someone else bringing a similar case.

(v) that the claimant's mistaken belief in the absence of time limits which was a significant determinant in the delay was not a reasonable one for a man of the claimant's intelligence and resourcefulness to hold.

(vi) that, although there was a two-year policy, it appears from Dr Ahmed's note to his peers and from Sgt Allison's evidence that there

may have been some nuance to its application, albeit any flexibility was not exercised in the claimant's favour on this occasion. The relevant witnesses for the respondent appear to be capable of identification, but it is reasonable to suppose that their memories of the particular circumstances and reasoning in the claimant's case will be more faded than if the case had been pursued some three years earlier. To that extent, there is a credible risk that the cogency of the evidence will be adversely affected by the delay.

74. I conclude that, on the facts and circumstances of this case, it would not be just and equitable to extend the time for receiving of the claimant's claim to 4 August 2023.

L Murphy

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Employment Judge

17 January 2024

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Date

Date sent to parties **18 January 2024**

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