



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

RESPONDENTS

DAFFYD ROBERTS

V NORTH WALES FIRE & RESCUE
SERVICE (1)
STUART MILLINGTON (2)
ROSLYN THOMAS (2)

HEARD REMOTELY AT: SWANSEA

ON: 9 MAY 2024

BEFORE: EMPLOYMENT JUDGE S POVEY

REPRESENTATION:

FOR THE CLAIMANT: MR WALKER (LITIGATION CONSULTANT)
FOR THE RESPONDENTS: MR WALTERS (COUNSEL)

JUDGMENT

1. The Respondents' application to have the claim struck out is allowed in part, as follows:
 - 1.1. The complaints of detriment on the grounds of trade union membership or activities (per section 146 of the Trade Union & Labour Relations (Consolidation) Act 1992) were presented out of time. It was reasonably practicable for them to have been presented in time. As such, the Tribunal has no jurisdiction to determine them, they have no reasonable prospects of success and they are struck out;
 - 1.2. The complaints of not permitting the Claimant to be accompanied (per section 11 of the Employment Relations Act 1999) and detriment on the grounds of exercising his right to be accompanied (per section 11 of the Employment Relations Act 1999) were presented out of time. It was reasonably practicable for them to have been presented in time. As such, the Tribunal has no jurisdiction to determine them, they have no reasonable prospects of success and they are struck out;

- 1.3. The complaint of harassment related to a philosophical belief (per section 26 of the Equality Act 2010) was presented out of time and not within such other period as was just and equitable. As such, the Tribunal has no jurisdiction to determine it, it has no reasonable prospects of success and it is struck out; and
- 1.4. The complaint of indirect discrimination (per section 19 of the Equality Act 2010) was presented out of time and not within such other period as was just and equitable. As such, the Tribunal has no jurisdiction to determine it, it has no reasonable prospects of success and it is struck out.
2. The First Respondent's application for the complaints of discrimination arising from disability to be struck on the grounds that they were presented out of time and therefore had no reasonable prospects of success was not made out and is dismissed.
3. The First Respondent's application for the complaints of discrimination arising from disability be subject to a deposit order on the grounds that they were presented out of time and therefore had little reasonable prospects of success was not made out and is dismissed.
4. The First Respondent's application for the complaint of harassment related to disability to be struck on the grounds that it was presented out of time and therefore had no reasonable prospects of success was not made out and is dismissed.
5. The First Respondent's application for the complaint of harassment related to disability be subject to a deposit order on the grounds that it was presented out of time and therefore had little reasonable prospects of success was not made out and is dismissed.
6. As such, only the following complaints may proceed:
 - 6.1. The complaints of discrimination arising from disability against the First Respondent; and
 - 6.2. The complaint of harassment related to disability against the First Respondent.

REASONS

1. The Claimant is employed by the First Respondent as a Watch Manager. The Second Respondent is employed by the First Respondent as Assistant Chief Fire Officer. The Third Respondent is employed as Head of Control.
2. Following periods of ACAS Early Conciliation (between 26 November to 28 November 2023 in respect of the First and Second Respondents and 28 November to 30 November 2023 in respect of the Third Respondent),

the Claimant presented his claim against them to the Tribunal on 4 December 2023.

3. The Claimant brings complaints of discrimination on grounds of disability and belief, detriments on the grounds of trade union activities, refusing to allow him to be accompanied to a disciplinary hearing and thereafter subjecting him to detriment for seeking to exercise that right.
4. The complaints are resisted in their entirety. In addition, both in the their Grounds of Resistance and by an application dated 2 February 2024, the Respondents applied to have the claim struck out on grounds that it has no reasonable prospects of success, as the complaints have all been presented outside of the permitted time limits. In the alternative, the Respondents contended that the complaints had little reasonable prospects of success (on the basis that had been presented out of time) and seek deposit orders.
5. At a case management hearing on 1 March 2024, Employment Judge Brace listed the case for a Public Preliminary Hearing to determine the Respondents' applications. She also made associated case management directions. That Public Preliminary Hearing took place on 9 May 2024, at the conclusion of which I reserved my decision.

The public preliminary hearing

6. The hearing was conducted remotely by video. I heard oral evidence from the Claimant and the following witnesses, who all attended in support of the Claimant:
 - 6.1. Ruth Bateman (Brigade Organiser, Fire Brigades Union)
 - 6.2. Duncan Stewart-Ball (Regional Secretary, Fire Brigades Union)
 - 6.3. Gareth Tovey (Brigade Chair, Fire Brigades Union)
 - 6.4. Natasha Smith (the Claimant's partner)
7. Each witness provided and adopted their witness statement. I was provided with a bundle of documents ('the Bundle'), to which I was referred. I also received oral submissions from Mr Walters for the Respondents and from Mr Walker for the Claimant. I had regard to the documents, the witness statement and those submissions in reaching my decision.
8. At the outset of hearing (which was initially conducted in private, as it dealt with a number of case management issues), the Claimant withdrew the following complaints:
 - 8.1. The trade union detriment complaints against the Second and Third Respondents (Claims 1 & 2, at Paragraphs 2 & 3 in the List of Issues, at [106] – 107] of the Bundle);
 - 8.2. The allegation of detriment under section 146 of the Trade Union & Labour Relations (Consolidation) Act 1992 regarding sick pay against

the First Respondent (Paragraph 2.1.6 in the List of Issues, at [107] of the Bundle); and

8.3. The complaint of detriment under section 12 of the Employment Relations Act 1999 against the Second Respondent (Claim 8, at Paragraph 10 in the List of Issues, at [110] - [111] of the Bundle)

9. By a judgment dated 10 May 2024, those complaints were dismissed upon their withdrawal.

The applications

10. The Respondents' applications were pursued on the basis that all the complaints as pleaded, had been presented out of time and there was no or little reasonable prospects of the Claimant satisfying the Tribunal to the required standard that it should exercise its discretion and effectively extend time to permit the complaints to proceed (subject to the applicable statutory tests).

11. The Claimant accepts that most, if not all, of the complaints were presented out of time. He relies upon the Tribunal's power to extend time.

The applicable law

Strike out and deposit orders

12. The Tribunal's power to strike out a claim is contained in Rule 37 of Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Procedure Rules'). So far as relevant, Rule 37 provides as follows:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

...

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

13. The Tribunal's power to make a deposit order is contained in Rule 39 of Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Procedure Rules'). So far as relevant, Rule 39 provides as follows:

(1) Where at a preliminary hearing...the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to

pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

Time limits: reasonably practicable

14. The time limits for complaints under both the Trade Union & Labour Relations (Consolidation) Act 1992 ('TULR(C)A 1992') and the Employee Relations Act 1999 ('ERA 1999') is three months from the date of the detriment complained of, subject to the provisions regarding ACAS Early Conciliation (per section 147 of the TULR(C)A 1992 and section 11 of the ERA 1999).
15. If complaints are not presented within the requisite three month time limits, they can only proceed if the Claimant can show that they were presented within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
16. In effect, the Claimant must show that it was not reasonably practicable to present the complaints in time. If he cannot, the Tribunal has no jurisdiction to consider and determine those complaints. If he can, he must also show that the complaints were presented within a further period which in itself was reasonable.
17. In considering whether the test of reasonable practicability has been made out, the Tribunal should adopt a liberal interpretation in favour of the employee, regard should be had to what, if anything, the employee knew about the right to complain the Tribunal (including the time limits to do so) and also to what knowledge the employee should have had, had they acted reasonably in the circumstances (per Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470).
18. Whether illness is sufficient to make it not reasonably practicable to submit a claim in time will be a question of fact for the Tribunal. It may be relevant to consider what else the Claimant was able to do at the material time but each case will turn on its own facts and evidence (see, for example, Thorpe v Sainsbury's Supermarket Ltd [2023] EAT 20; Cygnnet Behavioural Health Ltd v Britton [2022] EAT 108; University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12).

Time limits: just & equitable

19. The time limits for presenting in discrimination claims is in section 123(1) of the Equality Act 2010 ('the EqA'):
 - (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or

- (b) such other period as the employment tribunal thinks just and equitable.
20. If a complaint is presented out of time and not within another period which is just and equitable, the Tribunal has no power to consider it. However, for the purposes of calculating when the three month period begins to run, conduct extending over a period of time is treated as having been done at the end of the period (per section 123(3)(a) of the EqA 2010).
 21. The Tribunal has a wide discretion when considering whether it is just and equitable to extend time (Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576; Jones v Secretary of State for Health and Social Care [2024] EAT 2). When a claimant applies to extend time under section 123(1)(b), it is for them to show that the extension is just and equitable (Polystar Plastic Ltd v Liepa [2023] EAT 100).
 22. 'Just and equitable' includes consideration of why the claim was presented out of time and what the respective prejudice to the parties would be if time was or was not extended (such that the claim could or could not proceed). The discretion is wide enough to also include a consideration of the merits of the case being pursued (Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132).

Findings of fact

23. The Claimant was deemed unfit for work by his GP with effect from 28 March 2023, by reason of generalised anxiety disorder, with a diagnosis of work-related stress (per the Claimant's GP printout, at [169] of the Bundle).
24. On 5 April 2023, the Claimant attended a meeting with the Second and Third Respondents. On 8 April 2023, the Claimant submitted a grievance to the First Respondent, regarding concerns he had about the conduct of the Second Respondent. In his oral evidence, the Claimant confirmed that he drafted and submitted his grievance with the assistance of the Fire Brigades Union ('FBU'). As part of the investigation into his grievance, the Claimant attended an interview with the investigating officer (referred to in the report of Alison Brophy, at [147] and [149] – [150] of the Bundle). The Claimant confirmed in his oral evidence that the interview was on 20 July 2023, it was lengthy and he was sent a transcript of it to review and approve.
25. On 26 April 2023, the Claimant conducted a telephone consultation with occupational health ('OH'), following a referral by the First Respondent. The subsequent report included the following being reported by the Claimant (at [126]):

Since he has been off work, he is feeling better. He can manage to do all day-to-day activities of living.

26. In his oral evidence, the Claimant confirmed that he was well enough to attend a disciplinary investigatory meeting on 3 May 2023 (which I understood was part of the capability process).
27. On or around 22 May 2023, the Claimant asked his FBU representative to find out what was happening with his grievance (at [132] of the Bundle).
28. On 30 May 2023, the Claimant began ACAS Early Conciliation against the First Respondent, which concluded on 21 June 2023 (at [142] of the Bundle). The Claimant confirmed in his oral evidence that he did this with a view to bringing Tribunal proceedings. Around this time, the Claimant also enquired about legal assistance from Thompsons solicitors (at [131] of the Bundle), which, the Claimant confirmed, involved liaising with his FBU representative and completing necessary paperwork. Shortly afterwards, the Claimant was made aware that Thompsons would not be taking his case on. In addition, the Claimant confirmed that he was liaising with the ACAS conciliator.
29. It was not in issue that the Claimant did not subsequently start Tribunal proceedings on the basis of this period of ACAS Early Conciliation.
30. The Claimant confirmed in his oral evidence that on 2 October 2023, he submitted an injury on duty application form to the First Respondent. He was seeking compensation for loss of earnings because he alleged that the events of March 2023 (which form the basis of his claim to the Tribunal) had amounted to an injury on duty.
31. On 13 October 2023, the Claimant attended another telephone consultation with OH (at [166] – [167] of the Bundle). The Claimant reported that he was still suffering from anxiety, depression and low mood. He remained unfit for work. The report included the following opinion (regarding the Claimant's ability to return to work):

This is a work-related issue which needs to be resolved by management, and this is not a medical issue. No medical treatment will facilitate his return to work, and it needs to be amicably resolved between the employer and the employee...
32. On 8 November 2023, the Claimant attended a meeting with the First Respondent (and accompanied by his FBU representative, Mr Stewart-Bell), where he was informed of the outcome of his grievance.
33. The Claimant is director and sole shareholder of a cleaning company (Extreme Cleanz Limited). Invoices generated by the company were in evidence (at [174] – [200] of the Bundle). For the period from 3 April 2023 to 1 December 2023, the company carried out 23 separate jobs. The Claimant confirmed in his oral evidence that he was, in effect, a sole trader and undertook the cleaning jobs personally. In addition, the Claimant confirmed that during this period, he was liaising with the company's accountant, providing estimates for jobs, raising invoices and collecting income.

34. The Claimant is an FBU representative. However, in his oral evidence, he denied that he was aware of Tribunal time limits until May 2023 (when he first engaged with ACAS). Following the grievance outcome meeting on 8 November 2023, the Claimant contacted the Free Speech Union, who put him in touch with Mr Walker. Thereafter, with Mr Walker's assistance, the Claimant commenced the current round of Early Conciliation and presented his claim on 4 December 2023.
35. In addition to the Claimant's oral and written evidence, I had sight of his disability impact statement (at [170] – [173] of the Bundle). The Claimant's partner, Ms Smith, also provided further details of the Claimant's mental health at the relevant time in her written and oral evidence.
36. Prior to the start of the public hearing, I enquired of Mr Walker what the relevance of the statements of Ms Bateman, Mr Stewart-Ball and Mr Tovey were to question of time limits. Whilst he conceded that the majority of each statement was not relevant, he maintained that they all had elements of relevance to them. On that basis, and in the interest of fairness, I agreed to hear evidence from all three witnesses. I appreciate their time in attending and answering the questions asked of them. However, I could find little in their evidence which was relevant to what I had to decide at the hearing. As such, and with respect, I have had minimal regard to their evidence.
37. At the conclusion of the Respondent's oral submissions, Mr Walker claimed that the List of Issues was incorrect to record that the harassment because of disability complaint related to the application of the capability procedure (Paragraph 8.1.1 at [110] of the Bundle). He relied upon an email of 5 March 2024 which he sent to the Tribunal, following receipt of Employment Judge Brace's case management order. The email was copied to the Respondent's solicitors and, as promised during the hearing, I have seen it and had full regard to it.
38. Mr Walker was correct in his recollection. His email of 5 March 2024 did clarify that the complaint of harassment related to disability was "*the minimisation of the Claimant's condition and denial of the full pay he would be entitled to if, for example, they believed it was PTSD or of a similar nature*", not the application of the capability procedure, as recorded by Employment Judge Brace.
39. To be fair to the Claimant, that was also consistent with the Particulars of Claim, which included the following under the heading 'Disability' (Paragraph 24 at [17] of the Bundle):

The respondent's denial that the claimant's condition would be sufficiently serious to attract full pay is unwanted conduct that creates a hostile and humiliating environment.

40. The requirement for the Claimant to provide further information did not extend to this allegation. As such, Mr Walker asked for permission to “*further particularise when (to the degree possible) such conversations/denials took place, what was said, who said it, in what way it was hostile and humiliating, etc*” (per his email of 5 March 2024).
41. The Claimant’s further information was provided on or around 22 March 2024, the Respondent was afforded permission to file and serve amended Grounds of Resistance (which it did) and the parties were directed to agree an updated List of Issues by 26 April 2024. There was no reference by the Claimant to the denial of full pay as an act of harassment in his further information.
42. Upon making further enquiries, it appears that the Claimant’s request for permission to provide further information pertaining to the issue of full pay was not referred to an employment judge or actioned by the Tribunal. If correct, that was an error and I apologize to the parties on behalf of the Tribunal. It should have actioned and a decision should have been made on the Claimant’s request.
43. However, the actual complaint does appear within the List of Issues, albeit under a different head of claim, namely discrimination arising from disability, which includes the following alleged unfavourable treatment (at Paragraph 7.1.2, at [109] of the Bundle):

Placing the Claimant on half pay on 8 October 2023 (§22 Particulars of Claim)

44. Paragraph 22 - 24 of the Particulars of Claim relate to both the discrimination arising from disability and the harassment complaints (at [16] – 17] of the Bundle). It is clear that the reduction of the Claimant’s pay to half pay from 8 October 2022 is also relied upon as the alleged act of harassment.
45. What that meant was two-fold:
 - 45.1. First, I am able to deal with the real basis of the harassment complaint, as the relevant factual allegation is already included within the claim. As such, the parties were on notice of it and able to address me on it in the course of this application; and
 - 45.2. Second, the date of the act of harassment was 8 October 2022.
46. The Claimant also provided further information about the capability procedure, albeit this was being pursued solely as a complaint of discrimination arising from disability against the First Respondent, per Paragraph 7.1.1 of the List of Issues, at [109] of the Bundle and Paragraph 7 of the Further Information, at [92], as follows:

In respect of...“the date it is asserted that the respondent decided to invite... the claimant to a stage III/IV capability meeting”, it is impossible for the claimant to know precisely when that decision was taken, and it is that

decision that is relied upon as the relevant act. However, it had been made clear to the claimant verbally prior to the issuance of the claim form that they would be proceeding with the stage III/IV phase of the capability procedure. Following the issuance of the claim form, an invitation to a meeting was issued on 11th December, 2023. Due to the claimant's ill-health, a postponement was sought and agreed, and he attended that meeting in January.

47. Based on the above, I concluded that, whenever the decision was taken, the capability process was on-going at or shortly after the Claimant presented his claim to the Tribunal. It was reasonable to conclude that it was a continuing act, with some, if not all, of that act taking place in time. By reason of section 123(3)(a) of the EqA 2010, that rendered the entire complaint as being presented in time.
48. In conclusion, the acts complained of by the Claimant occurred, on his case, in March and April 2023 and from 8 October 2023. On the basis of the ACAS Early Conciliation of November 2023 and the presentation of his claim on 4 December 2023:
 - 48.1. The complaints arising in March and April 2023 were presented out of time; but
 - 48.2. The complaints arising from 8 October 2023 were presented in time (as acts of discrimination arising from disability and harassment related to disability) , and
 - 48.3. The complaint of subjecting the Claimant to the capability procedure was presented in time (as an act of discrimination arising from disability).

The parties submissions

49. I set out below the parties respective submissions in summary terms only. I made a full note of those submissions and had regard to them in their entirety.
50. Mr Walters for the Respondents invited me to have particular regard to what the Claimant was capable of doing from April 2023 until he presented his claim in December 2023. There was evidence of him engaging with the First Respondent (by way of his grievance, the disciplinary interview and the injury at work application). There was evidence of him actively considering Tribunal proceedings as early as May 2023 (wherein he started ACAS Early Conciliation and sought assistance from both the FBU and, albeit unsuccessfully, Thompsons solicitors). There was evidence of him running his cleaning business.
51. In addition, the medical evidence was also consistent with the Claimant's ability to undertake normal, day to day activities (per the OH report of 26 April 2023) and Ms Smith attested to the Claimant's symptoms fluctuating.

52. Mr Walters contended that, on any view, the Claimant was capable of starting Tribunal proceedings before he did. He invited me to reject any suggestion that the delay in presenting the claim was caused by the Claimant's health or his ignorance of the applicable time limits. In his submissions, those arguments were not supported by the evidence.
53. For those reasons, it was submitted that the Claimant had no reasonable prospects of extending time and the claim should be struck out.
54. Mr Walker for the Claimant submitted that there was a clear and credible reason of the delay in presenting the claim, namely the Claimant's mental health (as evidenced by his impact statement, the medical evidence and the evidence of Ms Smith). In particular, whilst the Claimant was able to undertake other tasks during this time, it was the impact upon him of engaging with work-related issues which triggered his mental health symptoms (as specifically referenced at Paragraphs 4 – 6 & 8 of the Claimant's impact statement, at [170] – [173] of the Bundle). Support for that was also to found in the OH reports (which referenced, variously, to work-related stressors and a resolution of the workplace issues being pivotal to the Claimant's return to work).
55. Mr Walker also confirmed that reliance was not being placed on the Claimant's lack of knowledge about Tribunal time limits. Rather, it was averred that the Claimant was medically incapable of presenting his claim until someone was able to take on its conduct (in this case, Mr Walker himself) and that what he was able to do during the relevant time was not indicative or supportive of a finding that he was well enough to present his claim either in time or any earlier than he in fact did.
56. Finally, Mr Walker suggested that if it was not reasonably practicable for the Claimant to present his TULR(C)R 1992 and ERA 1999 complaints in time, it followed that it would also be just and equitable to extend time for his discrimination claims to proceed.

The determination of the application

57. The alleged complaints that occurred in March and April 2023 were presented out of time. That was, in effect, all of the complaints, save for the complaint of placing the Claimant on half pay from 8 October 2023 and subjecting the Claimant to the capability procedure, which were presented in time (and were relied upon as acts of discrimination arising from disability and harassment related to disability, both of which are only pursued against the First Respondent).
58. Self-evidently, the Claimant did not require permission to proceed with those specific complaints against the First Respondent. It therefore could not be said, on the basis of the applications as pursued by the First Respondent, that they had no or little reasonable prospects of success (since the applications were premised upon the complaints being presented out of time).

59. In respect of those specific complaints, the First Respondent's applications for strike out or deposit orders was not made and are dismissed.
60. However, it left the Claimant reliant upon the discretion of the Tribunal to be able to proceed with the rest of his complaints, applying the applicable statutory tests. I began by considering why those complaints were presented late.

The reason for delay

61. As submitted by Mr Walker, this was not a case which turned on the Claimant's knowledge or otherwise of the applicable time limits. Rather, the reason for the Claimant not presenting his complaints in time was solely because of his mental health. As Mr Walker submitted, the Claimant was medically incapable of presenting his claim any sooner than he did (and only then because of the intervention of an advocate).
62. To the extent that it was being contended that the Claimant's mental health incapacitated him in general from presenting his claim before December 2023, there was, in my judgment, insufficient evidence upon which to conclude, on balance, that that was the case. Whilst the Claimant was undoubtedly suffering for stress and anxiety, it could not be said that he was incapacitated or unable to function. As detailed above, the Claimant continued to run his business, was able to engage in various appointments and activities (whether with his own GP, the OH doctor, the FBU or the First Respondent) and actively consider and take the first steps towards Tribunal proceedings (by engaging in ACAS Early Conciliation in May 2023).
63. The medical evidence relied upon also fell short of supporting a finding that the Claimant was generally incapable of functioning or engaging with the sort of activities necessary to bring Tribunal proceedings. His mental health issues were being treated conservatively. He was prescribed Phenergan (an antihistamine used for short term insomnia, as he was reporting sleeplessness to his GP (per [168] – [169] of the Bundle). The OH reports recorded what the Claimant was sharing as to his symptoms, consistently recommending that the resolution of his work-place issues would likely resolve those symptoms.
64. As I understood the Claimant's submissions and evidence, whilst he was able to undertake a range of other activities during the relevant period and notwithstanding his mental health, it was the direct link between starting Tribunal proceedings and the issues he was complaining about (regarding the alleged conduct of the Respondents) that he found debilitating. That was why he had been unable to present his claim earlier than he did. It was, in effect, only when a third party (in this case, Mr Walker) intervened, that progress was able to be made and the claim finally presented.
65. That submission was consistent with the Claimant's own evidence, not least in his disability impact statement and also the evidence of Ms

Smith. It was also reflected in what the Claimant was reporting to his GP as the cause of his stress (and his GP's diagnosis of work-related stress) and what the Claimant was telling the OH.

66. However, the notion that the Claimant's mental health rendered him incapable of engaging in issues which involved the Respondents (most notably, the current claim) was undermined by the following:

66.1. From April 2023, the Claimant submitted, pursued and actively engaged in a grievance process which was, to a material extent, premised on the same or similar allegations which he makes in these proceedings and which did not conclude until November 2023;

66.2. The Claimant began ACAS Early Conciliation in May 2023, with the clear intent of pursuing complaints against the First Respondent to Tribunal. It was not suggested that those complaints were materially different from the ones eventually presented in December 2023. The Claimant engaged with the FBU in that process and explored obtaining legal representation. In his written evidence, the Claimant contended that he had not taken the matter further because "*[I]t would have required me to intensely focus on, and articulate at length in writing, things that have been the most distressing to me*" (at Paragraph 7 of the Claimant's witness statement). However, that appeared to be at odds with the Claimant's ability to engage in the grievance process, referred to above, which involved a similar focus and articulation of the concerns and complaints he was making;

66.3. The Claimant also submitted a claim for injury on duty to the First Respondent, premised again on the same or similar complaints being pursued now. The fact that the Claimant chose to and was able to submit such a claim (wherein he would have to explain not just what he alleged had occurred but also how it had impacted his mental health) was also at odds with his evidence now that he was incapable of bringing his claim earlier, because of the challenges of focus and articulation.

67. Having regard to all the evidence and the factors noted above, I was unable to find that, on balance, the Claimant's mental health had rendered him incapable of presenting his claim earlier than he did.

68. For the sake of completeness, I also considered another possible reason for the delay. Mr Walker alluded to the complexity of the case and that it was only with representation that the Claimant was capable of presenting his claim. The difficulty with that submission were clear from the evidence:

68.1. The Claimant was clearly of the view that he had major issues with how he had been treated by the Respondents from as early as April 2023 and had been able to articulate those concerns by way of his grievance;

- 68.2. The Claimant had then been able to explain his concerns and complaints to the FBU, who assisted him in starting ACAS Early Conciliation and exploring a referral to solicitors;
- 68.3. The Claimant had liaised with the ACAS conciliator and been able to adequately communicate his concerns and complaints and
- 68.4. The Claimant had been able to formulate and submit an injury on duty claim, premised again on the very concerns and complaints he pursues now.
69. Whatever complexities existed within the Claimant's case, he demonstrated a keen understanding of it within a number of different arenas and did so without any legal support or assistance. As such, I was unable to conclude that the nature or complexity of the complaints now being pursued prevented the Claimant from presenting his claim earlier than he did.
70. Where, as here, complaints are presented out of time, it is for the Claimant to explain why. For all the reasons detailed above, the Claimant failed to adequately explain the reason or reasons for the delay in presenting the current claim.
71. I went on to consider the applicable statutory tests for deciding whether or not to allow those various complaints to proceed.

Reasonably practicable

72. The Claimant has failed to adequately explain why he presented his claim out of time. In contrast, at the relevant time, he was, variously, being assisted by the FBU, engaging with ACAS and pursuing his complaints with the First Respondent via both a grievance and an injury on duty claim.
73. Neither the Claimant's health nor the lack of legal representation adequately explained why it was not reasonably practicable for him to have completed and submitted his form ET1 to the Tribunal by the requisite time limit (which, based upon the first round of ACAS Early Conciliation and the complaints he is raising, was 26 July 2023). At the same time, the Claimant was engaging in activities which required him to detail and communicate his concerns and complaints and the impact they were having on him (whether in his grievance, his injury on duty claim, with bodies such as ACAS and the FBU or medical professionals, such as the OH and his own GP).
74. For all those reasons, it was reasonably practical for the Claimant to present the complaints under the TULR(C)A 1992 and ERA 1999 before the expiry of three months from the date of the alleged detriments.

Further reasonable period

75. In the alternative, even if it was not reasonably practicable to present those complaints within the three month time limit because of the Claimant's mental health (or lack of legal representation), the complaints were not presented within a further reasonable period.
76. Once the Claimant started ACAS Early Conciliation in May 2023, the deadline for these complaints as against the First Respondent was 26 July 2023. The deadline for presenting these complaints against the Second and Third Respondents did not have the extensions to time occasioned by the Early Conciliation provisions (as the Claimant did not engage in Early Conciliation with them at that time). Instead, those deadlines ran, at best, from the last of the alleged detriments, thereby expiring in early July 2023.
77. These complaints were eventually presented on 4 December 2023, between four and five months out of time. As detailed above, the reasons advanced and relied upon by the Claimant for the delay was found to be inadequate. In the absence of any reasonable explanation to the contrary, these complaints were not presented within a further period after the end of the three month time limit which was reasonable.
78. For all those reason, time cannot be extended and, by operation of the TULR(C)A 1992 and ERA 1999, the Tribunal does not have jurisdiction to consider and determine them. It follows that the complaints have no reasonable prospects of success and are struck out.

Just & equitable

79. In his submission, Mr Walker asked that his submissions on reasonable practicability be applied to those discrimination complaints presented out of time (under the 'just and equitable' rubric of section 123 of the EqA 2010).
80. In addition, he submitted that if I found that it had not been reasonably practicable for the Claimant to present his complaints in time, it must follow that it was just and equitable to allow them to proceed.
81. For the reasons set out above, I found that it was reasonably practicable for the Claimant to have presented the TULR(C)A 1992 and ERA 1999 complaints in time. In so doing, I also found that the Claimant had not provided an adequate reason for why his complaints were presented out of time.
82. The Claimant repeats those submissions in respect of his out of time discrimination complaints. It follows that he continued to advance no adequate reason for why those discrimination complaints were presented out of time.
83. The discretion afforded to the Tribunal under section 123 of the EqA 2010 is wide (and more generous than that the test of reasonable practicability). However, I found force in Mr Walters submissions that the failure to provide an adequate explanation for why the complaints were presented out of time is a significant factor. The test is whether they

were presented within such other period of time as the Tribunal considers just and equitable. Inherent in that exercise is an understanding of why the original, statutory time limit was missed. The Claimant has failed to provide a satisfactory answer to that aspect of the exercise.

84. It is for the Claimant to explain the delay and to show that it is, in effect, just and equitable to extend time and allow the complaints to proceed. By simply repeating his submissions on reasonable practicability, Mr Walker was asking me to conclude that, because the Claimant had been unable to present his claim any sooner than 4 December 2022, by reason of his health and the lack of legal representation, he had presented his claim in a period which was, in the circumstances, just and equitable.
85. I repeat my primary finding. The Claimant was not prevented from presenting his claim in time or at any time before 4 December 2022 because of his mental health or because of the lack of legal representation.
86. Although not expressly addressed on it, I went on to consider the relative prejudice to the parties of allowing and refusing these discrimination complaints to proceed.
87. Refusing to allow them to proceed would deprive the Claimant of the opportunity to have his allegations considered and determined by the Tribunal. It was not suggested that there was any other prejudice to the Claimant, over and above that.
88. Allowing them to proceed would require the Respondents to answer allegations which, to a degree, they were entitled to consider had been addressed and resolved by way of the grievance procedure. In the alternative, the Claimant had been pursuing his complaints by way of the injury on duty procedure. Either way, the Respondents were under the reasonable impression, at least until late November 2023, that the Claimant was not proposing to pursue his complaints by way of legal proceedings but rather was seeking to resolve them via internal mechanisms.
89. That conclusion was all the more so given that the Claimant had engaged in ACAS Early Conciliation in May and June 2023 but thereafter not started proceedings within the requisite time limits.
90. In my judgment, the balance of prejudice fell in favour of the Respondents. The explanation for why the Claimant did not bring these complaints in time was unsatisfactory. The Respondents were entitled to conclude that they were not being pursued via the Tribunal, both by the Claimant's failure to act (especially after the Early Conciliation of May to June 2023) and his decision to pursue internal sources of redress.
91. For all those reasons, these discrimination complaints were presented out of time and not presented within a further period which was just and

equitable, having regard particularly to the reasons for them being out of time and the relative prejudice to both parties of allowing and refusing the extension of time application.

92. It follows that Tribunal has no jurisdiction to consider them, they have no reasonable prospects of success and they are struck out.

Conclusions

93. The following complaints have not been struck out and can proceed:

93.1. The complaints of discrimination arising from disability against the First Respondent (per Paragraph 7 of the List of Issues, at [109] – [110] of the Bundle); and

93.2. The complaint of harassment related to disability against the First Respondent (per Paragraph 8 of the List of Issues, at [110], as amended by the email of 5 March 2024).

94. All the other remaining complaints are struck out. In particular, there are no complaints proceeding against the Second and Third Respondents.

Postscript

95. The Claimant has issued two further claims, as follows:

95.1. On 10 April 2024, against the First Respondent and Deborah Docx, alleging indirect discrimination on grounds of disability (case reference 1600977/2024); and

95.2. On 14 April 2024, against the First & Second Respondents, alleging victimisation for bringing the current claim (case reference 1601003/2024).

96. Both claims are resisted in their entirety.

97. A private preliminary hearing will be listed for the case management of all three claims. The parties will be notified of the date and time of the hearing in due course.

EMPLOYMENT JUDGE S POVEY

Dated: 19 June 2024

Order posted to the parties on 20 June 2024

For Secretary of the Tribunals Mr N Roche