IN THE EMPLOYMENT TRIBUNAL

CASE NO. 30 of 2020

BETWEEN:

BRIAN PETER MANASCO

Complainant

-and-

(1) HER MAJESTY'S GOVERNMENT OF GIBRALTAR
(2) GIBRALTAR FIRE AND RESCUE SERVICE
(3) MICHAEL CROME

Respondents

DECISION

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1. The Complainant was employed by Her Majesty's Government of Gibraltar ("**HMGOG**" or "**the First Respondent**") and served the Gibraltar Fire and Rescue Service ("**GFRS**") between 1 January 1986 and 1 August 2018. On 8 September 2020, the Complainant filed a Claim Form claiming discrimination under the Equal Opportunities Act 2006 ("**the Act**"). The Claim relates to events that took place between March 2015 and September 2015.

2. HMGOG filed a Response Form on 30 September 2020 indicating that it intended to Defend the Claim. It also contended that, as a preliminary issue, the Claim should be struck out and dismissed for want of jurisdiction on the grounds that the Claim had been filed after the time prescribed by the Act ("**the Preliminary Issue**").

3. At a directions hearing held on 24 March 2022 I ordered that there be a preliminary hearing to determine the Preliminary Issue. As the Complainant is unrepresented and is conducting this claim without the assistance of legal advice I explained to him the nature of the application being made by the HMGOG (including details of the applicable test) and provided him with an opportunity to file evidence in order to support an argument that it would be just and equitable to extend the time for the filing of his Claim Form. The Complainant filed his submissions together with supporting evidence on or around 4 May 2022 in accordance with the terms of order (as amended).

4. The Preliminary Hearing took place on 30 October 2022.

Factual Background

5. In or around early 2015, vacancies arose within the GFRS for (i) the Chief Fire Officer ("**CFO**"); (ii) Deputy Chief Fire Officer ("**DCFO**"); and (iii) Divisional Officer ("**DO**").

6. According to the evidence before me, the GFRS is modelled on the British Fire Service and has accordingly adopted the same rank structure (albeit with slight differences in terminology) as well as the system of rank progression in single steps from one rank to the next, commonly known as the "Single Tier" system. The GFRS Rank Structure is as follows:

   - Firefighter
   - Leading Firefighter
   - Sub Officer
   - Station Officer
   - Divisional Officer Operations and Training
   - Deputy Chief Fire Officer
   - Chief Fire Officer

7. The rationale behind the Single Tier system, as it has been explained in evidence, is that the experience / qualifications (Incident Command) required for a one rank promotion can generally only have been acquired by an individual who served in and undertaken the work in the rank immediately below. Thus, individuals more than one rank below a post are generally ineligible to apply for lack of necessary experience and qualifications.

8. Mr Gonzalez, who retired as the DCFO of the GFRS on 25 June 2015 having been a member of the GFRS since 23 April 1979, confirms in his evidence that on no occasion since he was responsible for any promotions as DCFO within the GFRS (or indeed, as he recalls, since he joined the GFRS) has the Single Tier system not been applied. Mr Gonzalez refers in his evidence to an independent review of the GFRS conducted by Sir Ken Knight, CBE, QFSM DL, Chief Fire and Rescue Adviser in April 2013. Mr Gonzalez states that no mention of any changes to the Single Tier system were made in the sixteen recommendations made by Sir Ken.

9. The vacancy for the Chief Fire Officer was filled on 1 April 2015. Shortly thereafter, on 10 April 2015, the vacancy for the post of DO was advertised with applications required to be submitted by 28 April 2015. The Complainant held the rank of Station Officer meaning that he was one rank below the post of DO.

10. The Complainant says in his evidence that when he met with the new CFO shortly after his promotion to congratulate him on his appointment, he was informed by the new CFO of his plans to promote two other Station Officers to the posts of DCFO and DO i.e. that the Complainant would be unsuccessful in his application for promotion. However, despite having been told this by the new CFO, the Complainant decided to maintain his application for the post which already been filed by him.

11. The Complainant says that on the closing date for applications, one of the Station Officers who the new CFO had earmarked for one of the vacant posts decided not to apply for the post and so the Complainant felt that he was now in with an opportunity for promotion given that there were now two other Station Officers (in addition to the Complainant) eligible to apply for the two vacant posts.

12. As the position for DO was vacant pending determination of the applications, the Complainant took up the role of "Acting DO". The Complainant avers that the two previous CFOs had a policy of not allowing Station Officers to act as DO but the new CFO introduced this on his appointment. The Complainant avers that in the first week of his time as acting DO, the new CFO called the Complainant to read the report that he was going to submit to the PSC Board in relation to the Complainant's application. It is said that the new CFO was only going to "recommend" the Complainant for the post (as opposed to the "highly recommend" given to the other Station Officers). The Complainant alleges that during this conversation the new CFO informed him that it was his intention to promote the now only other two Station Officers (and not the Complainant) to the posts of DCFO and DO. This had a negative impact on the Complainant's mental well-being.

13. On 29 June 2015, the Complainant avers that he received a telephone call from the new CFO informing him that the applications for promotion had been returned to him and that the vacancy had been reopened requiring applications to be re-submitted by 13 July 2015.

14. The newly re-advertised vacancy lowered the threshold of those eligible to apply from Station Officers to Sub-Officers and it also lowered qualifications from Incident Command Level 3 to Incident Command Level 2, thereby clearly disregarding and not applying the Single Tier policy. This is the crux of the Complainant's complaint, namely, that the vacancy (as re-advertised) with lower requirements was discriminatory in that it allowed lower-ranked officers to apply for the position for which they would not otherwise have been eligible.

15. The Complainant avers that when he approached the CFO on the lowered requirements the new CFO had said that this was done on the instructions of HM Government of Gibraltar. On 3 July 2015, the Complainant says that he was informed by Mr Collin Yeo, Human Resources Manager, that changes to the requirements were not being led by HM Government of Gibraltar but by the new CFO.

16. The Complainant says it was at this point that he decided to seek the assistance of Unite the Union who in turn instructed Kenneth Navas, Barristers and Solicitors. Kenneth Navas wrote to the Human Resources Manager on 30 July 2015 ("**the Navas Letter**") "instructed by Unite the Union to represent the interest of its member Mr Brian Peter Manasco." That letter sets out the Complainant's grievances in relation to DO vacancy and "the manner in which the entry requirements for the current vacancy for the position of Divisional Officer have been amended in a manner that effectively deprives him of what would have been almost certain promotion opportunity for him". The letter requested that the interviews for the DO post be suspended until such time as the Human Resources Manager had concluded his investigation into the Complainant's grievances and responded to the Complainant.

17. The Claimant then avers that unbeknown to him at the time, Unite agreed (it seems because they were under pressure from Sub-Officers) that the interviews for the DO post should be allowed to go ahead irrespective of the grievance by the Complainant. On 2 September 2015, one of the two other Station Officers and a Sub-Officer were appointed to the ranks of DCFO and DO respectively. The Complainant was the only Station Officer who was left in the running for the DO's position as the other remaining Station Officer had also decided not to apply, but the Complainant was overlooked for the promotion in favour of a Sub-Officer in apparent breach of the Single Tier policy.

18. The Complainant avers that he did not complain at the time that the promotions were made as he was effectively in the hands of Unite, who were handling his matter and his complaint. In his submissions at the hearing, the Complainant confirmed that Unite was involved from the very beginning of matters and that following the promotions Unite had agreed that it would "defend" his case.

19. In or around November 2015, representatives from Unite met with the Chief Minister, who at the time was the Minister with responsibility for Industrial Relations, with regard to his complaint. The Complainant avers that the Chief Minister said that he would ask for an investigation in relation to the process undertaken by the PSC Board to take place but did not expect to come back to the Complainant until early 2016.

20. The steps that took place after this meeting are a little less clear. On the evidence before me, the next step did not occur until May 2017 when Unite engaged with Michael Crome and the Chief Minister. When the Complainant was asked why no other steps had been taken before then he said he was waiting for a response following the November 2015 meeting and on the understanding that Unite were acting for him. He said he had no reason to make a claim as his case was being looked at and he was aware that the Chief Minister was busy with Brexit and other matters.

21. According to the Complainant, a meeting was held on 22 June 2017 with Mr Crome, the Complainant and Unite. At that meeting the Complainant alleges that an offer was made to him by Mr Crome, presumably to settle the Complainant's grievance. Whilst the figures were acceptable to the Complainant, Mr Crome asked the Complainant to put them in writing to him so that he could in turn present them to the Chief Minister. The Complainant did so by early July 2017.

22. The Complainant then avers that he met with the Chief Minister on 21 July 2017 ("**the July 2017 Meeting**") who he alleges confirmed, having seen the document produced by the Complainant, that the figures were not an issue but that he wanted to carry out an investigation as he thought, according to the Complainant, that "the PSC Board had failed him". The Complainant says that he was assured that he would have a response by the end of August / early September the latest.

23. Not having received any follow up to the July 2017 Meeting, and having sent multiple WhatsApp chasers to Mr Crome, the Complainant wrote directly to the Chief Minister on 22 January 2018 seeking a further meeting with the Chief Minister in order to finally resolve the matter ("**the January Letter**").

24. By an undated letter the Public Sector CEO (Mr Crome) responded to the January Letter on behalf the Chief Minister ("the Undated Letter"). The evidence suggests that the report commissioned by the Chief Minister was available to him by this time. In the Undated Letter, it was confirmed that the Chief Minister had considered the grievance and was content that the process undertaken by the PSC in relation to the DO vacancy was fair and correct and that he considered the matter closed. The Undated Letter pointed to the fact that the Complainant had a right to appeal the outcome of the PSC (and which Unite were fully aware of) and that the Complainant had failed to exercise that right. Unite responded to that Undated Letter requesting a follow-up meeting but the Complainant says that no response has ever been received.

25. In or around November 2018, the Complainant, on the advice of Unite, instructed Phillips Barristers & Solicitors. On 6 December 2018, Phillips on behalf of the Complaint addressed a Letter of Claim to the Gibraltar Fire and Rescue Service claiming damages for breach of the Complainant's employment contract. In the Letter of Claim, the Complainant alleged a breach of the implied term of mutual trust and confidence as a result of the promotion process and in particular the change in the minimum requirements for the DO's vacancy. No claim for discrimination was made in the Letter of Claim.

26. By letter dated 24 May 2019, Hassans responded to the Letter of Claim on behalf of the Gibraltar Fire and Rescue Service rejecting the Complainant's claim for breach of contract. No claim was commenced by the Complainant following receipt of Hassans' letter.

27. For completeness, the Complainant has also stated that he had also approached (although no dates or supporting evidence is provided) the following for assistance:

    (i) The Ombudsman Office; and
    (ii) The Citizen's Advice Bureau.

28. For its part, HMGOG submitted that it would not be disputing the chronology as presented by the Complainant at the hearing but would simply be relying on the legal arguments based on the facts as presented by the Complainant.

The Law

29. Section 68 of the Equal Opportunities Act 2006 ("Time limits for bringing proceedings in the Tribunal or Supreme Court") provides:

> *"(1) The Tribunal shall not consider a complaint— (a) under section 69... unless the complaint is presented to the Tribunal within the period of three months beginning when the act complained of is alleged to have been done. ...*
>
> *(3) The Supreme Court or the Tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."*

30. The burden is on the Claimant to persuade the Tribunal that it would be just and equitable to consider an out of time discrimination, harassment or bullying claim. To permit an extension of time is the exception rather than the rule. The Tribunal is entitled to take into account anything that it deems to be relevant (*Hutchinson v Westward Television Ltd* [1977] IRLR 69) and the Tribunal's discretion is as wide as that of the civil courts under the Limitation Act (*British Coal Corporation v Keeble* [1997] IRLR 336 and *DPP v Marshall* [1998] IRLR 494)

31. As per *British Coal Corporation v Keeble and Others* [1997] IRLR 336, consideration should be given by the Tribunal to the factors set out in Section 33 of the English Limitation Act 1980. As described in *British Coal* (paragraph 8), this Section:

> *"requires the Court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to—*
>
> *(a) the length of and reasons for the delay;*
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
> *(c) the extent to which the party sued has co-operated with any requests for information;*
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

Decision

"the Act complained of"

32. It is the First Respondent's case that the "act complained of" took place on the 29 June 2015, being the date on which the re-advertised vacancy for the DO's post was published. Accordingly, it is the Respondent's case that the Claim Form should have been filed by no later than the 29 September 2015. The Claim was filed 8 September 2020 and so on the Respondent's case the Claim Form has been filed 4 years and 49 weeks out of time.

33. The Respondent submitted that this was not a case of "a continuing act" extending the alleged discrimination in this matter but rather that there are continuing consequences of a single act. Counsel for the Respondent referred to *Basildon Academies Trust v Poilus Curran* UKEAT/0055/15 which was a case where the appointment of a man to a teaching post in a school in preference to the claimant was held by the Employment Appeal Tribunal (UK) to be a one-off act with continuing consequences and neither the fact that the claimant continually complained about it nor the fact that the employers failed to regularise it in accordance with their own recruitment process converted it into a continuing act.

34. In response, the Complainant says that by 29 June 2015 the PSC Board that he complains about and the Navas Letter had not even taken place/been sent and therefore (although not specifically argued in this way) I presumed that the Complainant suggests that the "act complain of" is some later date. However, the Complainant does not specify a date.

35. I agree with the Respondent's submission that this is not a case of a "continuing act". However, I do not agree with the Respondent that the "act complained of" was 29 June 2015 (it being the date of the readvertised vacancy). In my view, the correct date must be the date on which the PSC Board made the appointments of the new DFCO and DO i.e. 2 September 2015. It is only on that date that the Complainant can argue that GFRS policy was disapplied. I also note that in the case of *Basildon* the act complained of was deemed in that case to be the date of the appointment of the individual to the teaching post. This must be correct because if the Complainant had been appointed on 2 September 2015 (which would have necessarily meant that the PSC Board had applied the Single Tier

policy) then the Complainant would have no cause to complain. Accordingly, the time for the filing of this Claim expired on 2 December 2015 and therefore the Claim Form has been filed 4 years and 40 weeks out of time.

Prejudice caused to parties of granting or refusing the extension

36. As I understand from the evidence before me and from the oral submissions made at the hearing, it is the Complainant's case that he is significantly financially worse off as a result of the alleged discriminatory act. A promotion would have led to an automatic increase of approximately £16,000 per annum to his salary (for the two years that he continued in the GFRS), a difference of £41,849 the in lump sum gratuity on his retirement and a difference in approximately £7,800 per annum from his pension. These sums are obviously significant.

37. On the other hand, in extending the time, HMGOG would be naturally prejudiced in losing a limitation defence and having to defend a claim (incurring, amongst other things, the costs) which is otherwise time barred.

Length and reasons for the delay

38. There can be little doubt that a delay of almost 5 years in bringing the Claim is very significant and serious. The Complainant submitted that he had been proactively dealing with the situation (by that I understand his general complaint as to the promotion process) from the first instance that he felt something was going wrong. He relies on the history of the matter and all the steps taken by him and on his behalf outlined in paragraphs 5 to 27 above as evidence of his proactiveness. When he was asked why he waited so long after the November Meeting the Complaint explained that he felt that the matter was being handled and he knew that Brexit and other matters were keeping the Chief Minister busy. To be fair to the Complainant, given my finding as to the date of the act complained of, he was still in time at this stage.

39. The Complainant also believed that he was working with relevant parties towards an amicable outcome (as opposed to a court process) and it was not until discussions broke down that he decided to consider and commence proceedings. He explains in his submissions that no one ever suggested to him that he was out of time to file a claim and that he was adhering to an understanding that things would be resolved amicably. Whilst I

sympathise with the Respondent, taking steps to settle matters amicably is not a good reason for not commencing the proceedings in time. The Claim could and should have been filed within the prescribed time and it could have been stayed to allow those discussions to take place.

40. In addition, as the Respondent submits, the Complainant was at all relevant time receiving advice from Unite, who had in turn instructed Kenneth Navas. Certainly, by 30 July 2015 solicitors were instructed in relation to the Complainant's case. It would have been incumbent on Unite and the Claimant's then solicitors to advise on any potential claims arising out of matters described above and presumably any such advice would have included advice on applicable time limits. If the advice did not do so or if the advice given was inadequate or incorrect, the Claimant cannot rely upon that fact "*to excuse a failure to make a complaint to the employment tribunal in due time. The fault on the part of the adviser is attributed to the employee"* (*Marks & Spencer Plc v Williams- Ryan* [2005] EWCA Civ 470).

41. The Complainant also then went on to instruct another set of lawyers in or around December 2018 and the Letter of Claim issued on the Complainant's behalf did not make any reference to a claim for discrimination. GFRS through its solicitors responded to that letter by May 2019. Even if I gave the benefit of any possible doubt to the Complainant and for all intents and purposes I "stopped the clock" from the time that the "amicable discussions" commenced and ended with the May 2019 Letter, the Claim for discrimination was still not filed for another 16 months. The Complainant provides no reason for this further delay which in itself would be fatal in most applications where the court is asked to extend time.

42. It may be that neither set of solicitors made reference to a claim for discrimination or advised the Complainant about time limited (as he alleges) because neither believed a claim in discrimination was well founded. The reason I say this is because a claim for discrimination must be based on "an equal opportunities ground".

43. The relevant section of the Act is Section 15(2) which provides as follows:

> *"15.(2) It is unlawful for an employer, in the case of a person employed by him, to discriminate against that person <u>on any equal opportunities ground</u>–*

(a) in the terms of employment which he affords him;
(b) in the opportunities which he affords him for promotion, transfer or training, or to any other benefits, or by refusing or deliberately not affording him any such opportunity; or
(c) by dismissing him, or subjecting him to any other detriment."

44. Pursuant to Section 3(1) of the Act:

"'equal opportunities ground' means the grounds of–

(a) age or age group;
(b) disability;
(c) pregnancy or maternity leave;
(d) racial or ethnic origin;
(e) religion or belief;
(f) sex (including marital or family status);
(g) sexual orientation;
(h) victimization;
(i) gender reassignment."

45. As I mentioned above, the Complainant has not set out which of the equal opportunities grounds he is bringing the claim. The Complainant is a litigant in person and therefore I am acutely conscious that he may not be aware of this requirement but on the evidence before me I do not believe any of the equal opportunities grounds arise in this claim. Accordingly, I consider that there little or no prospectus in the claim being successful.

The extent to which the cogency of the evidence is likely to be affected by the delay

46. The Complainant has not specifically addressed this point in his submissions but given that almost 5 years have elapsed since the act complained of it there is little doubt that the cogency of the evidence is likely to have been substantially affected. The evidence of the Complainant is already scant in relation to some of the issues and some of the evidence before me is already contradictory. Understandably dates and details of conversations and meeting that took place will be difficult to recall and therefore there will be questions about the reliability of such evidence. The Complainant was unsure whether certain witnesses would indeed be available to give evidence.

The extent to which the party sued has co-operated with any requests for information

47. This is not applicable as there have been no requests for information.

The promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action

48. On the Complainant's own evidence he took steps to seek advice, firstly from Unite and later from solicitors, as soon as a he felt something was wrong. There can be no criticism of the Respondent in this regard who in my view plainly took adequate steps at the relevant time.

Conclusion

49. Whilst I am particularly conscious of the potential financial value of this claim to the Complainant, having considered all of the circumstances of this case, I do not believe that it would be just and equitable to extend the time for the filing of the Claim Form. In my view, the claim itself is bound to fail given that none of the equal opportunities grounds have been pleaded nor appear to apply on the basis of the evidence before me. Nor has the Complainant provided a provide a good reason (particularly in light of the fact that he was at all material times being advised by Unite and/or solicitors) for failing to file the Claim Form in time and plainly the cogency of the evidence is likely to be affected.

50. I therefore accordingly dismiss the Claim in its entirety.

CHRISTOPHER ALLAN
CHAIRMAN
22 December 2022