

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 April 2015

Before

THE HONOURABLE MRS JUSTICE SLADE

(SITTING ALONE)

MR R J M HARDEN

APPELLANT

(1) MR S J WOOTLIF
(2) SMART DINER GROUP LIMITED

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR RICHARD HARDEN
(The Appellant in Person)

For the First Respondent

MR PAUL KIRTLEY
(of Counsel)
Instructed by:
Clarion Solicitors Limited
Elizabeth House
13-19 Queen Street
Leeds
West Yorkshire
LS1 2TW

For the Second Respondent

No appearance or representation by
or on behalf of the Second
Respondent

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Claimant brought various claims against his employer, the First Respondent, including direct discrimination and harassment on grounds of religious belief and detriment for making a protected disclosure. He brought one claim, harassment, against the Chairman of the First Respondent, the Second Respondent. The harassment claims were presented out of time. In deciding that it was just and equitable to extend time under the **Equality Act 2010** section 123(1)(b), the Employment Judge in effect held that the determinative factor was balance of prejudice. The Employment Judge held that the harassment claim should proceed as “the complaint as pleaded adds little to the remainder of the Claimant’s claim”. The basis for the decision under section 123(1)(b) did not apply to the Second Respondent as, unlike the First Respondent, there were no other claims against him. As this formed the main reason for her decision, the Employment Judge erred in not considering the just and equitable application in respect of each Respondent separately.

THE HONOURABLE MRS JUSTICE SLADE

1. Mr Harden, the Second Respondent, appeals from the Judgment of Employment Judge Licorish, sent to the parties on 22 July 2014, that it was just and equitable to extend time for the presentation of a complaint of harassment related to religion or belief against him. The Claimant was employed by the First Respondent as Chief Executive Officer until his summary dismissal on 18 October 2013. The Second Respondent is the First Respondent's Chairman and a Director. By a claim form presented on 17 January 2014 the Claimant complained of unfair dismissal, breach of contract, direct discrimination, harassment and victimisation on the grounds of age and religious belief, and detriment and/or unfair dismissal for having made a protected disclosure. Both Respondents deny the Claimant's complaints. The Claimant's complaints of ordinary unfair dismissal and age discrimination were dismissed upon withdrawal on 16 May 2014.

2. The complaint of harassment having been presented out of time, as the Employment Tribunal held, the Employment Judge therefore considered whether it was just and equitable to extend time. The act identified by the Claimant as constituting harassment was stated to have taken place on 16 August 2013. The Tribunal Judge held, that even if a subsequent fact-finding Tribunal is persuaded that further incidents took place up to and including 5 September 2013, the time limit for such a claim as pleaded expired on 4 December 2013. Accordingly the Employment Judge was satisfied that, in respect of the harassment complaint, there was no act which was arguably in time.

3. The basis upon which it was contended that the Employment Judge should extend time on a just and equitable basis was set out in paragraph 20 of her Judgment. In addition to the

factors set out in paragraph 20 is the following matter, which was relied upon on behalf of the Claimant. It was summarised in paragraph 28 of the Judgment as follows:

“... In addition, allowing the harassment complaint to proceed would add nothing to the preparation of proceedings as a whole because the fact-finding Tribunal would be bound to consider that issue as background in any event. The Respondents submit that it would not be just and equitable to extend time because the Claimant was professionally represented from the time of his suspension.”

4. Mr Harden and Mr Kirtley, counsel for the Claimant, agree that, having considered other relevant factors, the Employment Judge regarded the balance of prejudice as determinative of her decision as to whether to exercise her discretion under the just and equitable extension permission. The Employment Judge held, in paragraph 30:

“30. I next considered the balance of prejudice between the parties. Obviously, if the Claimant’s complaint is dismissed he will not be able to pursue it. In terms of any prejudice affecting the Respondents, I accept the Claimant’s submission that the matters he raises in relation to the harassment complaint would need to be considered as background at the substantive hearing in any event. As a consequence, the complaint as pleaded adds little to the remainder of the Claimant’s claim.

31. In the circumstances, and on fine balance, I am satisfied that the harassment complaint was presented within such further period as I consider just and equitable. The Tribunal therefore has jurisdiction to hear the harassment complaint.”

5. Both Mr Harden and Mr Kirtley have made admirably succinct and focussed submissions on what is a short point, whether the Employment Judge erred in law in exercising her discretion under the **Equality Act**, section 123(1)(b), to hold that the complaint of harassment was presented within time, in effect extending time for bringing the claim of harassment.

6. The principal ground of appeal is that the Employment Judge failed to consider the balance of prejudice of bringing the complaint of harassment against the Second Respondent, Mr Harden, separately from such considerations in relation to the claim against the corporate Respondent, the First Respondent. Mr Harden pointed out that the only claim against him was of harassment whereas in addition to the claim of harassment, the First Respondent faced

continuing claims of direct discrimination on grounds of religious belief, victimisation and subjecting him to a detriment for making protected disclosures. Accordingly the reason given for considering that the balance of prejudice favoured extending time on a just and equitable basis to allow the complaint of harassment to go forward as “the complaint as pleaded adds little to the remainder of the Claimant’s claim”, did not apply to him. The complaint of harassment was the only complaint to which he was a Respondent. The remainder of the claims were against the First Respondent, albeit he may have given evidence. Being a Respondent to a claim is very different from being a witness.

7. It was contended by Mr Harden that the Employment Judge erred in failing to consider whether it was just and equitable to permit the claim of harassment against him to go forward on a just and equitable basis when it had been presented out of time, and the consideration which weighed with the Employment Judge did not apply to his circumstances. Mr Kirtley for the Claimant submits that the Employment Judge did not err. An Employment Judge has a wide margin of discretion in deciding whether it is just and equitable to allow an out-of-time discrimination claim to be heard. This Employment Judge had correctly set out the facts including the position and role of the Second Respondent and the First Respondent, and correctly directed herself on the applicable law. Whilst the Employment Judge did not expressly consider the position of the First and the Second Respondents separately, nor did she set out which claims or claim the Second as well as the First Respondent faced, and it would have been better to do so, nonetheless this was not indicative of an error.

Discussion and Conclusion

8. Being the Respondent to a claim in the Employment Tribunal is very different from being a witness. All complaints are serious but perhaps a complaint of discrimination or

harassment is particularly serious. In deciding whether it was just and equitable to hear the claim of harassment, notwithstanding that it had been presented out of time, the Employment Judge was required to consider all relevant circumstances. There were two Respondents to the complaint of harassment. In circumstances where different considerations were in play in relation to each Respondent because the circumstances of each were different, the Employment Judge was required to consider whether to extend time on a just and equitable basis in respect of each separately. In this case different considerations did apply in relation to each of the First and the Second Respondents as the basis on which the Employment Judge extended time was that the complaint of harassment would need to be considered in any event. The complaints as pleaded, it was said, added little to the remainder of the Claimant's claim. It was on that basis that, on a fine balance, the Employment Judge decided that it was just and equitable for the complaint to be heard. That was true in respect of the First Respondent but not in respect of the Second Respondent. He faced no other claims other than that of harassment. There was nothing to suggest that the Employment Judge had the different positions of the First and Second Respondent in mind in this regard. Nowhere in the Judgment does the Employment Judge set out which claims the Second Respondent faced as well as the First Respondent.

9. In the determinative paragraph, paragraph 30, the Employment Judge fails to recognise that no claims remained against the Second Respondent if the out of time harassment claim were not to proceed. Therefore the justification for considering it just and equitable that the harassment claim be heard, namely that the background would be relevant to "the remainder of the Claimant's claims" did not apply to the claim against the Second Respondent, Mr Harden.

10. Accordingly the Employment Judge erred in law and the appeal is allowed.