Appeal No. UKEAT/0390/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 January 2014

Before

THE HONOURABLE MRS JUSTICE COX DBE

(SITTING ALONE)

MS T J HALL APPELLANT

ADP DEALER SERVICES LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2014

APPEARANCES

For the Appellant	MS SIAN McKINLEY (of Counsel) Bar Pro Bono Unit
For the Respondent	MR CHRISTOPHER EDWARDS (of Counsel) Instructed by: TLT LLP Solicitors 1 Redcliffe Street Bristol BS1 6TP

SUMMARY

AGE DISCRIMINATION

JURISDICTIONAL POINTS – Extension of time: just and equitable

The Employment Tribunal dismissed the Claimant's age discrimination claim on the basis that it was time-barred and that it was not just and equitable to extend time.

On appeal it was held that no error of law was disclosed in the Tribunal's reasoning and the appeal was dismissed.

THE HONOURABLE MRS JUSTICE COX DBE

Introduction

1. The Claimant is appealing against a judgment of the Reading Employment Tribunal sent to the parties on 3 May 2013, following a Pre-Hearing Review, that there was no jurisdiction to determine her complaint of age discrimination and that her claim would therefore be dismissed.

2. The Claimant appeared in person below and drafted the Notice of Appeal herself. Today she is represented by counsel, Ms McKinley, who has helpfully regrouped the grounds of appeal so as to draw out and focus on the errors of law said to be disclosed in the judgment. These are, essentially, the failure by the Tribunal to refer to and consider the law relating to extensions of time; the failure to take relevant factors into account; the failure to provide adequate reasons for the decision; and findings on matters which are said to be legally perverse.

3. Mr Edwards, on behalf of the Respondent, who also appeared below, submits that none of these criticisms has any merit. The Employment Judge heard the evidence. She arrived at a decision which was clearly open to her, in the exercise of her discretion, and the Employment Appeal Tribunal should not interfere.

The facts

4. The Claimant was employed by the Respondent as a Compensation Manager for about seven months, from 4 July 2011 until the effective date of termination of her employment on 10 February 2012.

5. She subsequently brought a claim alleging, materially, age discrimination contrary to the **Equality Act 2010**, which was drafted by the Claimant in person and received by the Employment Tribunal on 30 November 2012. Her complaints were set out comprehensively

and articulately. She complained, essentially, that she had had no probationary review at any stage; that she was subjected to age discriminatory treatment at work by two named managers, including the making of a derogatory, age-related comment; that on 12 January 2012 she was called to a meeting with both managers and told that her employment would be terminated because it was "not working out"; and that after her employment ended she was given misleading references by the Respondent, the last one of which was in July 2012.

6. It is apparent from her ET1 that the Claimant was aware, at the time she presented it, that her claim was prima facie out of time, because she said this at paragraph 6.2:

> **"PLEASE NOTE: I know that a straightforward claim for age discrimination would be out of time but due to circumstances outlined in 9.1 and 10 below I feel it would be just and equitable to extend the time and I am therefore with great respect requesting this."**

7. In those further paragraphs the Claimant stated, at paragraph 9.1, that when she had complained to the head of HR about the references she also told him that she would be taking Tribunal proceedings. He said that they should go through the grievance process first and she duly submitted a grievance, which was heard by internal counsel and dismissed on 19 September. At that point the Claimant stated that she decided to take advice and was advised to submit this claim. At paragraph 10.1 she said this:

> **"These facts and the insistence on the grievance process, and it being heard by a lawyer, has been continuing discrimination and extended the time needed to submit my claim."**

8. In their ET3, in addition to denying the substance of the allegations, the Respondent disputed that there was jurisdiction to determine them on the basis that the various complaints were all time-barred. The Employment Tribunal gave notice of a Pre-Hearing Review, on 19 April 2013, to consider and determine whether the claims were out of time. On that date the

Claimant gave evidence in the form of her witness statement, which was essentially unchallenged.

9. At paragraphs 4-7 of her reasoned judgment, the Employment Judge referred to the background and to the nature of the pleaded claim, as clarified by the Claimant in evidence, as follows:

> **"4. In essence the claim was that having been employed on 4 July 2011, the Claimant suffered ill-treatment and hostility on the grounds of her age during her period of employment. Her employment was terminated at a meeting on 12 January 2012, taking effect on 10 February 2012. She received an ex gratia payment. The letter of termination stated that her dismissal was due to her performance against the expectations of the role. The Claimant did not accept that that reflected accurately what had taken place.**
>
> **5. The Claimant was unable to look for work immediately. When she started to look for work, she was concerned that she failed to get work she said because of the nature of the reference. The references that were provided to her on three occasions stated the dates of the employment, the job title and identified that the reason for leaving was 'Dismissal: role v candidate fit.'**
>
> **6. She claims that the references that stated that were couched in terms because of her age. She considered that because of her status within the company, she should have been given a more considered reference. She also said that the impact of such a poor reference given her age was greater than it would be on a person who was younger. She felt that the company had not taken enough trouble over her search for future work.**
>
> **7. When she discussed the matter with the Respondents, it was suggested that she pursue a grievance. She discussed the matter with Kevin Bull. He indicated when her grievance was submitted that as he was implicated in that grievance, he would be unable to hear the grievance and appointed John Warwick, legal Counsel to deal with the grievance. The Claimant does not say that the manner of conducting the grievance was discriminatory but she considers the appointment of Mr Warwick to be so. The date of the appointment of Mr Warwick is 6 September 2012."**

10. The Respondent argued that the dismissal, the post-termination references, and the appointment of Mr Warwick were not continuing acts, but were discrete events and should be viewed as such. On that basis, given the evidence as to the Claimant's background in HR, her knowledge of Employment Tribunals and her ability to access the internet, the Respondent submitted that it was not just and equitable to extend time in relation to the dismissal and references claims. In relation to the grievance complaint and the role of Mr Warwick, counsel for the Respondent submitted that it was apparent that it was nothing at all to do with age discrimination and could not therefore be seen to form part of any continuing act.

The Tribunal's decision

11. The judge's reasons for concluding that there was no jurisdiction to determine the age discrimination claim appear from paragraphs 11 to 18, as follows:

> **"11. I did not consider that the three separate matters could be seen as continuing acts. The dismissal was carried out by two members of staff, one of whom, Val Stubbins, was later involved in giving a limited reference but that was in June 2012.**
>
> **12. Helen Cole was the final person to be involved in a reference in July 2012.**
>
> **13. If there was a link between Val Stubbins two acts, they were out of time in any event and I would need to consider if it was just and equitable to extend time.**
>
> **14. No other person involved in the references was involved in any other way with the Claimant.**
>
> **15. I conclude that it would not be just and equitable to extend time in relation to the dismissal aspect of the claim. The Claimant could have brought the claim much earlier as she had the knowledge, the expertise, and the ability to bring the claim. I also did not consider that her claim had much prospect of success and that is a factor that I must consider in deciding whether it is just and equitable to extend time. I do not consider it should be.**
>
> **16. In relation to the three references, I am satisfied that again it would not be just and equitable to extend time because they are an accurate reflection of what was contained within the dismissal letter. Unless the Claimant was in a position to demonstrate that there was not a policy of providing a factual only reference to parties as asserted by the Respondents, there is no issue regarding the nature of the reference. They make no reference to the Claimant's age. They merely identify what had happened. That claim as one of age discrimination simply could not succeed.**
>
> **17. The final matter on which she relied was the appointment of John Warwick to hear her grievance. That is a claim that could not succeed and I must strike it out as having no reasonable prospect of success. The claim as such is in time but the appointment of a person who is independent of any person named within the grievance is the correct thing to do in law. For Mr Ball to recuse himself from hearing the grievance because he saw that he was identified as a person mentioned within the grievance was the correct thing to do. The Claimant's assertion that this is in some way related to her age was misconceived, could not succeed and should not be allowed to proceed further.**
>
> **18. In those circumstances, I find that there is no jurisdiction to consider any aspect of the claim and it is dismissed."**

12. Ms McKinley confirms that there is no appeal against the finding, at paragraph 17, in relation to the grievance. The appeal is brought only against the refusal to extend time in relation to the events leading up to and including the Claimant's dismissal and the references aspect of her claim.

The law

13. It is common ground in this appeal that the last reference was given in July 2012 and that the Claimant's ET1 was therefore prima facie out of time. The relevant law, this being a claim brought under section 120 of the **Equality Act 2010**, is contained in section 123 of that Act, dealing with time limits, as follows:

> **"(1) 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.**
>
> **(2) Proceedings may not be brought in reliance on section 121(1) after the end of—**
>
> **(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."**

A wide discretion is thereby afforded to an Employment Tribunal in deciding whether, in all the circumstances of the case, it considers that it is just and equitable to extend time. The authorities considering the same, wide discretion available under the previous discrimination legislation remain valid.

14. Mr Edwards draws attention to the longstanding and well-known appellate authorities, which emphasise the difficulties an appellant will face in seeking to overturn on appeal a Tribunal's exercise of discretion (see, for example, **Hutchinson v Westward Television Ltd** [1977] ICR 279, **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740, and **Chief**

Constable of Lincolnshire Police v Caston [2010] IRLR 327). In the case of **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434, the Court of Appeal said this, at paragraph 25:

> **"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a Tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the Tribunal below plainly wrong in this respect."**

The burden was therefore on the Claimant to provide an explanation as to why she did not bring her claim within time.

15. Ms McKinley submits that the authorities point to the wide variety of factors that may be relevant to exercise of the discretion to extend time, depending on the particular circumstances. These, too, are common ground. They include such matters as the reason for, and extent of, the delay; whether the Claimant was professionally advised; the balance of hardship caused to the parties and whether a fair trial of the issues is still possible; the merits of the proposed claim; and the length of the extension sought.

16. Ms McKinley also draws attention to the checklist of factors which appear in section 33 of the **Limitation Act 1980** which, as Mr Edwards accepts, Employment Tribunals may find helpful as a guide in some cases. This includes the prejudice that each party would suffer as a result of the decision reached. There is no dispute that one or more of these factors may be of relevance in any particular case. Whether they are relevant will depend on the particular facts and circumstances which arise. Not all of them will be relevant in every case, as Ms McKinley

accepts. Further, to the extent that any of them may be relevant, the judge may conclude that there are other important factors canvassed before him or her, which outweigh those other factors.

The appeal

17. The first ground of appeal advanced is that the judge erred by failing to refer to and consider the legal test to be applied. Ms McKinley submits that nowhere in her judgment did this Employment Judge set out the law relating to applications for an extension of time. Nor did she direct herself expressly as to the wide variety of factors that could be taken into account. Further, at the only point when she did direct herself (in paragraph 15) as regards the relevance of the prospects of success for the claim, it constituted a misdirection, because the judge stated that she "must" have regard to this factor, when it is only one of the many factors which she may take into account in considering whether it is just and equitable for the claim to proceed. Ms McKinley submits that the judge's failure to refer expressly to the law, coupled with her failure to mention any factors other than those referred to in paragraphs 15 and 16, strongly suggests that the judge did not take any other factors into account when reaching her decision. To focus only on these factors, to the exclusion of all others, was an error of law.

18. Realistically, as it seems to me, this first ground of appeal will only bite if Ms McKinley can show that there were indeed other factors which were relevant in this case, but which were not taken into account by the judge. Ms McKinley fairly accepts that grounds of appeal 1, 2 and 3 all run together in this case, the Claimant alleging, in ground 2, that the judge failed to take relevant factors into account; and ground 3 being a **Meek** challenge to the adequacy of the Employment Judge's reasons.

19. It is correct that the Employment Judge did not set out expressly the applicable statutory provisions or the case-law relating to the Tribunal's power to extend time in relation to delay in presenting an ET1. However, Ms McKinley fairly accepts that that would not in itself amount to an error of law, given that this is an area of law which is well known, long-established and frequently applied by Employment Tribunals throughout the land.

20. The essential question for the judge, given that there was no dispute that the claim was prima facie out of time, was whether, in the exercise of her discretion, it would be just and equitable in all the circumstances to extend time. In my view it is clear from her judgment that this was the question that the judge was determining. I have no doubt that this experienced judge was well aware of the relevant statutory provisions; of the wide discretion they afforded her; and of the need for her to have regard to all relevant factors in the exercise of that discretion. Her use of the word "must" in paragraph 15 in my view simply reflects her view that, in this case, it was necessary for her to have regard to the merits of the proposed claim as a relevant factor. It does not disclose an error of law in her reasoning. I shall return to her finding in that respect later on in this judgment.

21. Thus, the real question is whether the judge erred in failing to take account of relevant factors, or in failing adequately to explain her reasons for refusing to extend time and dismissing the claim.

22. Relevant factors in this case, Ms McKinley submits, would include the fact that the evidence was not affected by delay; that a fair trial of the issues was still possible; and that the balance of hardship fell on the Claimant. However, her primary contention is that there were two specific and important factors which should have been taken into account in this case and which were not referred to in the judgment, namely the Claimant's ill-health during the period

after her dismissal; and the Respondent's suggestion that the Claimant should engage with the Respondent's grievance process before submitting her claim to the Tribunal. These were factors, Ms McKinley argues, which were relevant to the reasons for the delay and the Employment Judge should have had regard to them. If she did have regard to them and discounted them as relevant factors, or regarded them as outweighed by other factors, then she submits that the judge failed to say so and to explain why.

23. I accept that a claimant's ill-health may be, and sometimes will be an important factor in relation to an application for an extension of time. However, the difficulty for this Claimant in making good that submission is the state of the evidence before the Employment Judge. In relation to the Claimant's ill-health, the evidence consisted of the following, in paragraph 2 of her witness statement:

> **"I immediately started my job search and went for numerous interviews and second interviews, but after several months the money was running out, and I couldn't pay my rent. I lost my home and was forced to move in with my daughter, in Horley, Surrey. It was a very difficult time and I became severely depressed. I was already stressed from the treatment that I had received at ADP, and it was particularly worrying as I had only just begun to pick myself up after recovering from breast cancer. Losing my job was really the last straw. I just couldn't handle another battle at that time."**

24. While the Claimant now refers in her Notice of Appeal to other evidence that she says she gave at the hearing about her depression, where she asserts that she advanced it as the prime reason for not bringing her claim sooner, this was not contained in her witness statement. Her assertion is also disputed by the Respondent. There are no notes of evidence before me (no notes have been asked for) and there is therefore no basis upon which I could accept the Claimant's assertions as to what else was said below in this respect.

25. In addition, I note that there was no medical evidence placed before the Employment Judge as to the Claimant's state of health, indicating how this may have affected her over the

period with which the judge was concerned, or how it was relevant to her failure to submit her ET1 in time. That the Claimant was very distressed at the time of the hearing is clear, because the judge made reference to it in her judgment (paragraph 10), having observed this for herself at the hearing. The burden was, however, on the Claimant to provide evidence in support not only of ill-health but also of a causative link between her medical condition and the delay in bringing her claim in time.

26. It goes without saying that I have real sympathy for the Claimant, given the serious illness she describes in her witness statement. However, in my view Ms McKinley is seeking to elevate paragraph 2 of her witness statement to evidence of a causative link, which it plainly is not, in particular given the other things said in that statement. The evidence as to the Claimant's health, such as it was, was before the Employment Judge and she had regard to it. The fact that she does not refer to it expressly in her reasons is, in my judgment, not an error of law. Rather, it is indicative of the limited weight she considered was to be attached to it, given the state of the evidence generally. As Mr Edwards observes, at paragraph 15 the judge did make a general finding as to this Claimant's ability to bring the claim.

27. In relation to the grievance, it is correct that delay caused by a Claimant awaiting completion of an internal procedure may, in some circumstances, be a relevant factor to be considered in deciding whether to grant an extension of time. See, for example, the case of **Apelgun-Gabriels v London Borough of Lambeth** [2002] ICR 713. Ms McKinley draws attention to paragraph 10.1 of the ET1 and to what she categorises now as a genuine mistake, or a misunderstanding by this Claimant as to the viability of the handling of her grievance as an act of discrimination and, in particular, an act of victimisation. She submits that the Employment Judge should have had regard to this and should have referred to it expressly in her judgment.

28. However, although this was a suggestion advanced in the ET1, it was not advanced by the Claimant in her evidence. While I accept, as Ms McKinley submits, that some allowance should be made for the fact that the Claimant was a litigant in person, this Claimant was clearly able to advance articulately what her case was, including her arguments about delay. It is clear that this point was not advanced in this way by the Claimant at the hearing. To the extent that she seeks now to advance, as an explanation for delay, something that was not advanced in evidence before the Employment Judge, this is a matter which the EAT cannot have regard to on appeal.

29. In the Claimant's witness statement, the evidence given in relation to the grievance was as follows. The Claimant told the head of HR, Kevin Ball, on 14 August 2012 that she was going to start Tribunal proceedings, and on 16 August he advised her that it would be in everyone's interest if they followed the grievance procedure before engaging the legal system. Over the next two weeks, she sought legal advice, and the solicitor advised her to do as Mr Ball suggested. On 29 August she submitted her grievance and on 19 September she learned that it had been rejected. She considered appealing and consulted the solicitor, who suggested that she appealed. She then decided to submit a Tribunal claim. However, her claim was not submitted until 30 November, more than two months after her grievance was rejected, in circumstances where this Claimant was plainly alive to the possibility of a claim, on her own account, by mid-August and stated that she had sought legal advice.

30. Ms McKinley fairly concedes that there was an unexplained time gap between the rejection of her grievance, her consideration of whether to appeal, and the ultimate lodging of her ET1 on 30 November. Clearly, the judge had regard to the history of events after the

Claimant's dismissal. She referred expressly to that history in her judgment and dealt in particular with the grievance at paragraph 7.

31. Thus, in relation to the specific factors now relied upon, namely the Claimant's ill-health and the relevance of the grievance, these were both raised at the hearing. The judge had regard to the evidence about them, such as it was, and to the way in which reliance was being placed upon them at the hearing, rather than as they are now being articulated on appeal.

32. Mr Edwards accepts that the other, generic factors referred to by Ms McKinley, such as the balance of hardship, prejudice, and the possibility of a fair trial, although not raised specifically below, should always be in the judge's mind. But, he submits, there is no obligation upon a Tribunal to refer to them specifically in the judgment where, as in this case, they are considered either to be of neutral evidential value, or to be outweighed by other, important factors which were specifically raised and canvassed in evidence and in submissions before the Tribunal. I accept that submission. There is no necessity for the Employment Tribunal to follow a formulaic approach and set out a checklist of the variety of factors that may be relevant in any case, in particular where no reliance has been placed on any of them, or where other factors have been addressed in the evidence as being of greater significance. In this case I consider that the judge adequately explained the reasons for her decision not to extend time on the evidence she heard.

33. For these reasons, I consider that the first three grounds of appeal are not well-founded.

34. In her fourth and final ground of appeal, Ms McKinley submits that the judge made findings which were legally perverse. She submits, first, that the finding at paragraph 15 that the Claimant had the knowledge, the expertise and the ability to bring the claim was perverse.

However, in my view the Claimant does not begin to surmount the high hurdle that she must cross in pursuing this challenge. The Respondent's submissions below, based on the evidence which had been adduced, were that given the Claimant's background in HR, her obvious knowledge of Employment Tribunals and her ability to access the Internet, it was not just and equitable to extend time. The Employment Judge plainly accepted this submission, as she was entitled to. The Claimant cannot now go behind this finding or successfully mount an argument, as she seeks to do in her Notice of Appeal, that this evidence was not adduced, or that the evidence adduced was something different. This is a clear finding by the judge, after hearing the evidence, on matters which were plainly relevant to the exercise of her discretion.

35. Secondly, Ms McKinley challenges as perverse the finding, at paragraph 16, that the references claim "simply could not succeed". Further, and more generally, she challenges as perverse, or as indicative of an erroneous, fragmented approach to the Claimant's complaint, the judge's finding that her age discrimination claim did not have much prospect of success.

36. I accept the submission that Employment Tribunals should always exercise caution, when considering the merits of a fact-sensitive discrimination claim, in expressing a view on the merits without hearing the evidence (see, for example, **Qureshi v Victoria University of Manchester** [2001] ICR 863 and **Anyanwu v South Bank Students Union** [2001] 1 WLR 638.) The Claimant was arguing that she had been discriminated against soon after her employment started and that she was effectively "written off" by being dismissed, rather than having the benefit of probationary and performance reviews, which she maintained would have been given to a younger person.

37. However, the Employment Judge was here concerned with whether, in the exercise of her discretion, it was just and equitable to extend time for the claim to proceed. Having considered

the Claimant's evidence and the way in which she articulated her claim below, I do not consider that the Employment Judge erred in law in analysing the claim and coming to the conclusion she did as to its prospects, albeit in succinct terms. Mr Edwards submits, in my view correctly, that the phrase used in paragraph 16, that the reference claim as a claim of age discrimination "simply could not succeed", was an infelicitous use of language. However, read as a whole, I do not consider that the judge adopted a fragmented or erroneous approach to the complaint or that her finding can properly be categorised as perverse.

38. Thus I consider that the Claimant has been unable to identify any relevant factor that was not considered by the judge, or any irrelevant factor erroneously taken into account. Nor has she persuaded me that the judge arrived at findings which were perverse, given the evidence she heard. In my judgment the decision she arrived at was one which was clearly open to her on that evidence.

39. In my judgment, and for these reasons, the appeal must therefore be dismissed.