



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr. M. Beach

**Respondent**

(1) Qantas Cabin Crew (UK) limited  
(2) Ms. D. Morgan

v

**Heard at:** Watford

**On:** 6 July 2017

**Before:** Employment Judge Heal

**Appearances**

**For the Claimant:** Mr. G. Airey, solicitor

**For the Respondents:** Ms. T. Barsam, counsel

## JUDGMENT

The complaint of disability-related harassment is dismissed.

## REASONS

1. Written reasons are provided at the request of the claimant.
2. This hearing was listed as a private preliminary hearing for the purposes of case management. However, at the express request of both parties, I have converted it to a public hearing to enable me to decide whether or not the complaint of disability related harassment was presented out of time.
3. Mr Airey for the claimant identified the treatment complained of in the harassment claim like this:
  - 3.1 the second respondent refused to acknowledge the claimant's disability(s) at the hearing on 24 October 2017;
  - 3.2 the second respondent said on 1 November 2017, 'my experience, when coupled with your confidence not to disclose your medical condition, means that stigma could not reasonably have been an issue for you.'
4. The respondents accept that both of those events actually happened.

5. Assuming, in the claimant's favour, but those two events amount to a continuing act, the claimant should have contacted ACAS for the purposes of early conciliation on or before 31 January 2018. In fact, he contacted ACAS on 2 March 2018, a little over one month out of time.
6. Mr Airey invites me to find that the claim for disability related harassment was presented within such period as was just and equitable.
7. The claimant was not present today to give evidence, however both representatives asked me to determine this issue on the basis of submissions alone.

### ***The law***

8. Section 123 of the Equality Act 2010 provides that proceedings on a complaint within section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the tribunal thinks just and equitable.
9. The onus is always on the claimant to convince the tribunal that it is just and equitable to extend time. Ms Barsam touched on the principle, and I have reminded myself that, '*the exercise of discretion is the exception rather than the rule*' (*Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434).
10. I have however also reminded myself that in *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327, Sedley LJ held that, '*there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised.*' Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case, '*is not a question of either policy or law; it is a question of fact and judgment to be answered case by case by the tribunal*'.
11. As Langstaff J in *Abertawe Bro Morgannwg University Health Board v Morgan* UKEAT/0305/13 unreported, put it, a litigant will find it difficult to satisfy the burden of persuading the tribunal that it is just and equitable to extend time, unless he provides an answer to two questions:  
  
*'The first question in deciding whether to extend time is why it is that the primary time-limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time-limit the claim was not brought sooner than it was.'*
12. The factors to be applied by the civil courts under section 33 of the Limitation Act 1918 to determine whether to extend time in personal injury actions provide a helpful checklist, albeit not one necessarily to be applied slavishly in every case (*British Coal Corporation v Keeble* [1997] IRLR 336).
13. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have

regard to all the other circumstances, in particular: (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 had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

### **Analysis**

14. Therefore, I asked, why did the claimant not issue proceedings earlier, in his complaint about disability related harassment?
15. Mr Airey told me that the claimant's representative took the view that, '*all would be dealt with in one sphere. So rather than putting multiple claims [the representative] put in all the claims at once.*'
16. He added that '*when the matter was dealt with the claimant was hopeful that he would not be dismissed*'. I interpret that to mean (as I discussed with Mr Airey) that the claimant did not wish to jeopardise his employment by presenting a claim for disability related harassment while there was still some chance of retaining his employment.
17. However, I am told that the date of dismissal was 6 December 2017 and the outcome of the appeal was dated 11 January 2018. Therefore, even if the claimant waited until there was no longer any risk of jeopardising his chances of retaining his employment, he still had time to contact ACAS about his complaint of harassment within the 3 month period.
18. When I had been given the dates of the termination and appeal, Mr Airey added that these were all issues which the claimant did not want to deal with: '*the claimant did not want to bring a claim in relation to this matter*'. I think that means that the claimant was reluctant to start proceedings.
19. I should add that I have seen no documents or witness statement confirming or giving detail about these matters: what I have are Mr Airey's statements as set out above and no more.
20. So far as prejudice is concerned, if I dismiss the complaint about harassment, the claimant will of course lose his opportunity to pursue that claim. He does however have his other claims. It is plain that his main complaint is about his dismissal, however characterised: he did make sure that that claim was presented in time.
21. I note that the respondent accepts that the facts alleged did in fact take place. It is too early to be sure now, but it may well be that this complaint has some potential merit. The claimant does not have to prove disputed facts and what will be at issue are the question of disability itself (the claimant says that the respondent's appeal manager thought that he was likely to have a disability) and the issues of purpose and effect. The parties have not explored the relative

merits of the arguments to do with purpose and effect before me. The issue of disability has been touched on as above.

22. If I do not dismiss this claim, the respondent will of course be put to the trouble of contesting it. I bear in mind that the disability claim will slow proceedings to enable the process of seeking medical evidence to be pursued. This will add some expense.
23. Harassment proceedings will expose Ms Morgan to the additional stress of being a named respondent, of being accused of harassment and of having to give evidence about the motivation behind her remarks. She will still have to be a witness in any event, which will also be a source of stress, but of a lesser magnitude.
24. These matters of prejudice to the respondent are not particularly great, especially given that the other claims will continue, but I bear them in mind.
25. The respondent accepts that damage to the cogency of the evidence is unlikely. This weighs strongly in the claimant's favour, although on its own I do not consider it decisive. I allowed a short adjournment to gain sight of the letter written by the claimant submitting a complaint to the respondent. He did indeed raise these precise matters with respondent at an early stage. If matters are complained about internally at an early stage and therefore memories are searched and records kept at that point, then that too is relevant to the cogency of the evidence.
26. The claimant is a trade union representative, so he has access to quality legal advice. He did not act promptly: given that he knew that these remarks were made as soon as they were made. He was able to act promptly to make a complaint. It is said on his behalf that he delayed starting proceedings because he did not want to be dismissed, yet that did not prevent him from making a detailed written complaint about these matters on 6 November 2017, and in any event as I have already noted he still had time once the appeal outcome was known, to contact ACAS in time.
27. It is possible that the real reason why the complaint is out of time is that the claimant's representative made a mistake, failed to think through carefully what were the time limits on this claim and was working only from the date of dismissal. However, this has not been the representation made to me. I have heard nothing about mistake, fault, exactly who made any decision or how much delay arose from the claimant's own reluctance. Mr Airey's submissions were as I have recorded them above. I am far from clear whether the operative cause of the delay really came from the claimant or his representative, or both.
28. Weighing all of that up, it appears to me that balancing these various different factors is not straightforward. If I dismiss the claim, the claimant loses the opportunity to bring what might be a meritorious complaint of harassment. There is no real risk of damage to the cogency of the evidence. Other prejudice to the respondent exists, but is not very great. However, the claimant has given no solid or clear reason for not presenting his complaint in time. Claims under

the Equality Act 2010 are to be presented promptly and the claimant and/or those representing him did not do so. In all these circumstances the claimant has not shown that it is just and equitable to extend time.

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Employment Judge Heal

11/07/2018

Date: .....

24/07/2018

Sent to the parties on: .....

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For the Tribunal Office