



EMPLOYMENT TRIBUNALS

Claimant
Mr Majid Amoori

Respondent
EE Ltd

Heard at: Exeter

On: 13 September 2018

Before: Employment Judge Fowell

Appearances

Claimant: In Person

Respondent: Ms N Maher of DAC Beachcroft LLP

JUDGMENT

The Claimant's complaint of race discrimination is dismissed as out of time.

REASONS

1. This hearing is to determine whether Mr Amoori's claim of race discrimination was presented in time. He resigned with immediate effect on 25 October 2016, having been signed off sick since 30 September with a shoulder injury. After his departure he remained sick with mental health problems, and it was not until 11 January **2018**, nearly a year after the required date of 24 January 2017, that he contacted ACAS about early conciliation. They issued their certificate 5 days later on 16 January 2018, and the claim was presented on 5 March 2018.
2. The relevant time limit for complaints of discrimination is set out in the Equality Act 2010 at section 123. According to this it 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.
3. Hence, the normal rule is that the Tribunal has to identify the date of the complaint, which may or may not be the end of employment, and then allow a further three months, unless for some reason it is just and equitable to allow longer.

4. This three-month period may now be extended by the rules on early conciliation, which are at section 140B of that Act. However, early conciliation was not started until long afterwards. As it did not begin until after the three-month period had elapsed, this provision does not apply.
5. Why then the extensive delay until 11 January 2018, and is it just and equitable in those circumstances to extend time? In considering that question I heard evidence from Mr Amoori and was assisted by bundle of about 100 pages. Having considered that evidence I make the following findings.
6. Mr Amoori is originally from Iran. Came to the UK in 2012 as a refugee and has been in Plymouth since then. He worked for EDF and then EE in customer services, beginning with EE in September 2015. He was very successful in that role, was the best performing agent in Plymouth in 2016 and was ranked by the company in their top 100 nationally. It was a role in which performance was monitored closely, with a detailed analysis of his call times, his effectiveness in resolving issues and of customer satisfaction. He is therefore highly IT literate and was, at that time at least, used to communicating with strangers by phone.
7. Little detail was given in his claim form, but further particulars of his claim were given on 28 April 2018 (page 35). According to this, he suffered abuse in his first week of employment in August 2015 and then there was an incident of racial harassment in July 2016. Only this second incident is described as race discrimination and there is no suggestion that they were linked. It occurred when a colleague addressed him with the words "How can I help you foreigner?" He raised this, he states, with his manager at the time but the person who said it denied everything. This person was moved to a different area but only for about a week. The claimant raised it again on 22 October (while off sick) with a new Community Manager but did not receive any response and resigned a few days later.
8. There was therefore a single incident of race discrimination, which occurred in July 2016. That date, unspecified, is therefore the date on which time began to run for these purposes. There is no need for his employment to come to an end before bringing such a claim, and applying the normal time limits he ought to have done so by some time in October 2016, for most of which he was still employed.
9. That period was not a happy one for the claimant. About three or four months before he resigned he had been transferred to a new team, the broadband team, and it was here that the incident occurred. Although his sick notes only refer to shoulder pain he was also suffering from stress.
10. Following his resignation he applied for other jobs, uploading his CV to at least two job search websites. This resulted in an interview at which he was unsuccessful. He obtained Jobseekers Allowance (**JSA**). Then, on 7 December 2016, he applied for Employment and Support Allowance (**ESA**) (page 53). This involved completing an application form, which resulted in a phone call and then a medical assessment. His application was initially unsuccessful and he remained on JSA.
11. In April 2017 (page 54) the DWP looked again at his claim and he was

awarded ESA. The cause of the change is not altogether clear, but they accepted that he was too ill to work.

12. He went on to claim a Personal Independence Payment (**PIP**) (page 55), which was awarded on 17 August 2017, on the basis of his daily living needs. The main relevant conclusion was that he needed to be prompted to communicate with others. According to the assessment (page 68):

“You appeared well nourished and reported you eat everyday using normal cutlery. You are able to explain your medications and told the assessor you take the medications every day.... The observations note you were able to speak coherently and understood the questions asked. You demonstrated normal cognition and reported you filled in the how your disability affects you form independently. You also told the assessor you bank and shop online using the Internet.

You said you have difficulty planning and following journeys. I decided you can plan and follow the route of a journey unaided.”

13. These problems were therefore significant but he continued to manage on a day to day basis. His medical records only cover the period from March 18 but they record at that time that he was on medication and had some paranoid ideation, including hearing and seeing his sister, who died in a car accident.
14. It is not suggested by any means that Mr Amoori’s health problems were the result of events at work, although they may have played a part. It is also relevant to note that he has no family in the UK and has separated from his ex-partner and child, so the long, isolating period of being out of work will have been very difficult to cope with.
15. He continued to see his GP regularly, and she referred him to a specialist at the University medical centre in early 2018, from which time his mental health was stable or improving.
16. He first contacted solicitors about his potential claim in late 2017. They were based in Liverpool. With them he discussed some options, including a personal injury claim or an employment tribunal claim. He did not accept their advice about pursuing a civil claim – which may well have included consideration of time-limit issues – and he returned their paperwork without agreeing a retainer. He estimated that it was about two weeks later, on 11 January 2018, that he contacted ACAS.
17. As noted above, they concluded early conciliation five days later on 16 January. The claim was not then presented within the usual month, and it was not until about seven weeks later, on 5 March 2018, that he did so.
18. Hence, the broad picture is that there was an incident at work in July 2016, at which time he was in relatively good health and functioning well at work. If he had been aware of the process he could certainly have taken steps at that stage to bring a claim. Thereafter his mental health appears to have declined by stages, through a period in which he was able to apply for jobs, until he needed help with daily living. He began to look into bringing a claim in late 2017, when he was still quite ill, and has managed it subsequently without missing any deadlines or failing to deal with an directions or correspondence.

Applicable Law

19. The Court of Appeal made clear in *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, that when employment tribunals consider exercising discretion to extend time,

‘...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 the discretion is the exception rather than the rule.’

20. The Court of Appeal gave further guidance more recently in *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194. It noted that s.123 does not specify any list of factors to which a tribunal is instructed to take into account. Although it was suggested in *British Coal Corporation v Keeble and ors* 1997 IRLR 336, EAT that it may be useful for a tribunal to consider the list of factors specified in s.33(3) of the Limitation Act 1980, a tribunal is not required to do so. The tribunal is only required to ensure that it does not leave a significant factor out of account – as provided in *Southwark London Borough Council v Afolabi* 2003 ICR 800, CA. The Court pointed out, however, that there are two factors that are almost always relevant when considering the exercise of any discretion whether to extend time – the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

21. Addressing these two main factors first:

- a. The length of the delay here is very considerable. The period from July 2016 to March 2018 is 20 months, as against the three months provided by statute.
- b. The degree of prejudice to the respondent is hard to assess. They have not provided any evidence about it. I therefore have to approach it on the basis that they know the alleged harasser, of witnesses, and the managers concerned, and that they are still employed. However, it is also the case that there was no formal grievance raised at the time and hence no investigation. There is nothing for the respondent to refer back to, and so they would be starting their investigation afresh. As a result they are in my view likely to face some real difficulties.

22. The other factors in s.33(3) are of less relevance:

- a. The respondent has not failed to cooperate with any requests for information.
- b. The promptness with which the claimant acted once he knew of the facts giving rise to the claim is an issue which overlaps entirely with the delay, since the full facts of the incident were known from the outset. He did not know about the mechanics of the process until a relatively late stage, in particular the need to go through ACAS, but he has not suggested that he did not know about employment

tribunals or the right to bring a claim of discrimination. There is however also the further delay until March 2018 in presenting the claim.

- c. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action also overlaps with the delay point, and here no steps were taken until a very late stage.
23. I was also referred by the respondent to *Southwark London Borough Council v Afolabi 2003 ICR 800, CA*, where the claimant brought a race discrimination claim nearly nine years late and the tribunal allowed it. I have therefore considered it with care. In that case Mr Afolabi was denied promotion in 1990 but only became aware of the facts from seeing his personnel file in 1999 which revealed various comments about him. He acted promptly once he knew of the right to bring a claim, and there was a file of documentary evidence relating to that episode such that it was possible to revisit the episode years later. Further, as here, the respondent did not provide any evidence that they suffered prejudice as a result.
24. That was therefore a very different set of facts. Here, again, all of the facts were known from the outset and there is no documentary record of what went on. The most significant factor does appear to be the subsequent delay, and the resulting likelihood of some real difficulty for the respondent at this lapse in time.
25. The test of what is just and equitable involves a balance of all the factors, including what is fair to both parties. The claimant, in my assessment, had the skills and ability to find out what was required at a much earlier stage, certainly in late 2016 or early 2017, but put off doing so. He had other priorities and it was perhaps a daunting prospect. That is understandable. His health then became worse, and it would have seemed even more daunting. But the total accumulation of time, and the potential for unfairness to the respondent now appears to be too great, and so on balance I conclude that it would not now be just and equitable to extend time.
26. Accordingly, the claim must be dismissed as out of time.

Employment Judge Fowell

Date 13 September 2018