



EMPLOYMENT TRIBUNALS

Claimant: Mr C Doyle

Respondent: Inchcape Retail Limited

Heard at: Manchester

On:

13 April 2018

Before: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: In person

Respondent: Mr O Dear, Solicitor

JUDGMENT

The just and equitable limitation period within which the claimant's complaints was to have been brought is up to and including 11 December 2017. The complaint is accordingly presented in time.

REASONS

1. This hearing was fixed to consider whether the claimant had presented his claims to the Tribunal in time and, if so, whether the Tribunal could consider the claims and make any further case management orders as appropriate.

The Facts

2. By a claim form presented on 11 December 2017, the claimant brought complaints of sexual orientation discrimination against the respondent. His claims are not currently well particularised and it was unclear from the Claimant's claim form when the last act of discrimination was alleged to have taken place.

3. The claimant's employment with the respondent commenced on 2 February 2015 and terminated on 5 February 2017, following the Claimant's resignation on 14 January 2017.

4. The claimant alleges that he was discriminated against throughout his employment and up to and including the date of termination of his employment on 5 February 2017.

5. The claimant did raise a grievance following his resignation. The claimant was asked to attend a grievance hearing by the respondent but he never did. He says that this was because his claim was, at that stage, in the hands of his lawyer and it was agreed that his lawyer would handle his claim and his grievance and arrange any grievance hearing for him.

6. The claimant did himself initiate contact with ACAS for the purposes of early conciliation on 10 March 2017. This was within the three month period following the termination of his employment. An early conciliation certificate was issued on 24 April 2017. However, the claimant asserts, and the Tribunal accepts, that the claimant never received a copy of that certificate, that not having been sent to the claimant individually but to the solicitor acting for him at the time.

7. 5 February 2017 was the date of the last discriminatory act complained of. The claimant confirmed that nothing about the grievance outcome or process is, even in part, part of his claim. Accordingly, the ordinary time limit would expire on 4 May 2017. Even allowing for early conciliation, there was a delay of almost seven months before the claimant presented his claim on 11 December 2017.

8. In oral evidence, the claimant gave a number of reasons for his delay. He said that the solicitor acting for him did not deal with matters effectively or professionally and, in fact, ended up being sacked from Hicks Watson, the firm he had instructed, with no papers to be found. The claimant was aware of this situation by early May 2017.

9. Following becoming aware of the situation with his instructed solicitor, the claimant did not have the confidence to proceed. He had been let down by his solicitor, he had no money to seek advice, he felt down about the situation generally and did not want to "rake it up" again. The claimant's partner had also become depressed, and, in his own words, the claimant felt "a bit kicked back" which resulted in him having no confidence to deal with matters himself. There was no specific evidence of mental health issues or medication prescribed to the claimant, and the Claimant was able to find alternative work shortly after leaving the Respondent, but the Tribunal accepts that the claimant was low and, in his words, "kicked back".

10. Around the beginning of December 2017, two things happened which caused the claimant, around that time, to lodge his Employment Tribunal complaint. First, he saw something in the news about a sexual orientation matter which made him feel that he should, morally and ethically, follow his claim through. Secondly, at around the same time, he had advice from a customer (who happened to be a Judge), which gave him the confidence and the boost he needed to pursue matters.

11. The Tribunal assessed the Claimant as giving truthful evidence.

12. The Tribunal understands from the respondent that, of the respondent's employees named as potential witnesses in the claim form, one has left the employment of the respondent. In respect of the other, the respondent argues that, if the Tribunal did find his actions to be discriminatory, it had taken all reasonable

steps to prevent such action from happening and, accordingly, the claimant would suffer no detriment because if the claim was to proceed then the wrong respondent is named.

The Law

13. Section 123 of the Equality Act 2010 (EA) provides that: “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.” Accordingly, the Tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable.

14. There is no argument in this case that “conduct extended over a period” extends the time limit.

15. Section 140B EA provides for an extension to the time limit to facilitate early conciliation.

16. The Respondent referred the Tribunal to *Hutchinson v Westward Television Ltd* [1977] IRLR 69, which states that, in determining whether, or how, to exercise its discretion, the employment tribunal may take into account anything that it deems to be relevant. That said, it is plain from the language used, that Parliament has chosen to give Tribunals the widest possible discretion.

17. The Tribunal was also referred to *British Coal Corporation v Keeble and others* [1977] IRLR 336, in which the EAT confirmed that an employment tribunal **may** have regard to the checklist set out in section 33 of the Limitation Act 1980 in exercising its discretion to extend time, and in considering the degree to which extending the time limit or not may prejudice either party. It is notable, however, that the Equality Act does not, unlike the Limitation Act, specify any list of factors to which the Tribunal is instructed to have regard, and the Court of Appeal has made it clear that a Tribunal is not required to go through such a list, the only requirement being that it doesn't leave a significant factor out of account.

18. The Limitation Act provides:

“(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to-

- a. the length of, and the reasons for, the delay on the part of the plaintiff;
- b. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed...;
- c. the conduct of the defendant after the cause of action arose, including the extent to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

- d. the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
 - e. the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
19. The emphasis should be on whether the delay has affected the ability of the Tribunal to conduct a fair hearing.
20. The Tribunal was also referred to the case of *Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576, in which the Court of Appeal confirmed that when tribunals consider exercising their discretion under EA s123 (1)(b), “there is no presumption that they should do so.... Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”
21. Nonetheless, it is clear from case law that a Tribunal’s discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases.

Conclusions

22. Factors taken into account by the Tribunal in reaching its decision are as follows.

Reason for delay

23. The Tribunal accepted that the claimant’s solicitor let him down at the crucial time (around April 2017) and that the claimant did feel “kicked back” after this, both financially and emotionally, and therefore unable to proceed at that stage. In this case the claimant suffered as a result of being let down by his advisor.

Length of delay

24. It was accepted that this claim was out of time by some seven months and that this was the period of delay.

Conduct of the Respondent

25. It is noted that the Respondent carried out an investigation and did not uphold the Claimant’s grievance.

Promptness with which the claimant acted

26. In this case, the claim was brought after certain triggers prompted the claimant into action. The Tribunal accepted the claimant’s evidence that these triggers occurred around the beginning of December, and so considers that the claimant acted in a timely fashion once those triggers occurred.

27. The Tribunal notes that, although the claimant already knew of the possibility of taking action at a much earlier stage, the triggers referred to made him realise he might still be able to bring a claim.

Cogency of the evidence

28. Although a seven month delay will necessarily make evidence less cogent than if the claim was brought in time, the Tribunal does not consider that such a delay outweighs the prejudice to the claimant of not being able to bring his claim at all.

Relative prejudice/fair hearing

29. The Tribunal considered the relative prejudice suffered by the parties and accepted that it will be more difficult for the respondent to defend the claim in circumstances, in particular, in which one of its main witnesses had left its employment, a factor all the more likely the longer period of time between the alleged acts and the claim being made. However, on balance, the Tribunal considered that the prejudice to the respondent in this regard was outweighed by the prejudice to the claimant of not being able to pursue his claims at all.

30. As regards the respondent's argument that the claimant has named the wrong respondent (as the respondent will argue that it is not vicariously liable), that is not a matter which can be determined or can influence the Tribunal's decision at this stage in the proceedings. As it is a matter on which evidence would need to be heard. It is therefore a matter for a Tribunal in a final hearing.

31. Taking into account all of the above, the Tribunal was satisfied that a fair hearing could be conducted.

32. Accordingly, the Tribunal is satisfied that it should exercise its discretion to extend the time limit for this claim to be presented by 11 December 2017, and that that further period is just and equitable in all the circumstances of the case.

33. It would not be just and equitable for the claimant to lose the opportunity to pursue his sexual orientation claim because of the fault of his advisers. Had the advisor acted as he should, the Tribunal concludes that the Claimant would have brought his claim in time. The claimant has explained his reasons and how he came to bring his claim late and the Tribunal is satisfied that it is just and equitable for time to be extended to 11 December 2017 when this claim was presented.

Employment Judge Rice-Birchall

Date: 22 June 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 July 2018

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.