



EMPLOYMENT TRIBUNALS

Claimant: Neil Phillips

Respondent: Bristol City Council

Heard at: Bristol

On: 15 January 2019

Before: Employment Judge Street

Representation

Claimant: Mr J Bromige, counsel

Respondent: Ms K Fryer, solicitor

JUDGMENT having been sent to the parties on 18 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. **Evidence**

1.1. The Tribunal heard from Mr Phillips and read the evidence referred to in the bundle.

2. **Issues**

2.1. The claimant claims discrimination on the grounds of gender reassignment and sexual orientation.

2.2. The claim was made late. The preliminary issue before the Tribunal to decide were whether it was just and equitable to extend time for the claims to be made.

3. Findings of Fact

- 3.1. Mr Phillips has been employed by the Respondent since May 2001.
- 3.2. He claims in respect of discrimination. The claims are in respect of incidents in June 2017, February 2018, early March 2018 and on 6/04/18.
- 3.3. Mr Phillips was off sick from early April 2018 with work-related stress.
- 3.4. He uses the internet at home and carried out his own research on this claim and the time limits.
- 3.5. He made an insurance claim on 13/06/18 in respect of bringing these proceedings.
- 3.6. Mr Phillips notified ACAS of the prospective claim on 28/06/18.
- 3.7. At that point, he was aware of the time limit precisely (38A) save as extended by the early conciliation procedure; as he wrote to his Union representative,

“I have submitted an early conciliation form this morning to acas as discussed in my previous emails. This keeps me within the 3 months minus 1 day

- 3.8. The ACAS certificate was issued on 13/07/18.
- 3.9. The usual time limit had expired during the conciliation period.
- 3.10. Mr Phillips was aware of some automatic extension by reason of participating in the early conciliation procedure.
- 3.11. The certificate was issued to Mr Phillips' Union representative, Steve Davies, on 13/07/18 (43). Mr Phillips only saw it on 26/07/18.
- 3.12. Mr Phillips complains that he was having to badger Mr Davies, who was elusive and evasive. He wasn't getting the support he needed or the explanations.
- 3.13. Mr Davies then gave him wrong advice. He advised that a grievance had to be filed. That was on 24/07/19. That was in spite of the ACAS certificate having been received (39).

“We need to put the grievance in before Acas can continue with the case as we have to give the council the opportunity to resolve the issues themselves.”

- 3.14. In the meantime, there were two requests by the insurers for further information, the last one on 4/08/18 to which Mr Phillips responded on 8/08/18.
- 3.15. The time limit in respect of 6/04/18 and any continuing act including and earlier than that date expired on 13/08/18.
- 3.16. On 18/08/18, the insurers reviewed the file, but cover was not authorised. It was later authorised, on 7/09/18.
- 3.17. On 20/08/18, Mr Phillips asked to have advice from a full-time union official (47). His local representative was still telling him that there was nothing to

worry about while the grievance was ongoing. Mr Phillips mistrusted that advice.

- 3.18. On 22 and 23/08/18, Mr Fish, a full-time officer, gave him advice. Mr Fish was categorical about the time limits. Mr Phillips was told in round terms, that his claim was already late. If he was to benefit from any extension of time, he needed to put the claim in immediately and without delay. Given the urgency, Mr Fish offered an immediate meeting (54g) to help him.
- 3.19. Mr Phillips did not find his attitude helpful. He says he was shouted at. But he agrees that the advice was that the time limit for putting in a claim had already expired.
- 3.20. Mr Phillips did not attend the offered meeting or accept that help with putting in the claim. Instead he then decided to go to a solicitor himself (54h).
- 3.21. Mr Fish repeated his advice on 24/08/18. (54f)
- 3.22. On 29/08/18, Mr Fish confirmed that he would not be submitting an ET1 for Mr Phillips (49).
- 3.23. Mr Phillips saw his own solicitor on 29/08/18. That had been the earliest appointment Mr Phillips could get, once he decided to seek legal advice on 23/08/18. She confirmed the advice that he was already late and that he had to put in his own claim.
- 3.24. On 30/08/18, Mr Phillips prepared and lodged his own claim.

4. **Law**

Time Limits: Discrimination

- 4.1. In discrimination claims, the claim may not be brought “after the end” of the period of three months starting with the date when the act complained of was done. That is EA 2010 section 123(1).
- 4.2. For the extension of time, in discrimination cases, the test is whether it is just and equitable to extend time.
- 4.3. Time limits are applied strictly in employment cases. An extension of time is the exception rather than the rule.
- 4.4. The case of *Robertson v Bexley Community Centre t/a Leisure Link* [2003] (IRLR 434 CA) establishes that the discretion to extend time is a wide one. There is no presumption that the tribunal should exercise the discretion under section 123(1)(b) unless they can justify refusing to exercise it. On the contrary, the claimant must show that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.
- 4.5. The case of *British Coal Corporation v Keeble and others* [1997] (IRLR 336 EAT) encourages tribunals to consider the factors listed in section 33(3) of the Limitation Act 1980. That guidance, in *Southwark LBC v Afolabi* [2003] (ICR 800), is extended: while the checklist in section 33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly, provided no significant factor is left out of account. The two key factors which 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.

- 4.6. Where the primary time limit has expired, the key question is why the claim was not brought earlier than it was. *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0305/13.

5. Submissions

- 5.1. Mr Bromige gave a helpful written submission.
5.2. Ms Fryer gave a helpful oral summary of the facts with reference to cases mentioned above.

6. Reasons

- 6.1. The claims were made on 30/08/18. The ACAS notification date was 28/06/18 and the ACAS certificate date 13/07/18. The case pleaded is that the latest incident on 06/04/18 is only the last of a continuing act. If so, it may be treated as conduct extending over a period and treated as done at the end of that period, which here would be 6/04/18. In respect of a claim in relation to 06/04/18, the time limit expired during the ACAS conciliation period so time was automatically extended to one month after 13/07/18. The Claimant's claim should have been issued by 13/08/18.
- 6.2. This claim concerns matters deeply personal to Mr Phillips.
- 6.3. Throughout he was suffering work-related stress.
- 6.4. Mr Phillips was considering his claim actively from at least June 2018.
- 6.5. He was aware the ACAS certificate had been issued. He became aware of that late, but knew by 26/07/18, still comfortably before the time limit expired.
- 6.6. He was aware of and mindful of there being strict time limits.
- 6.7. He was able to conduct his own internet research.
- 6.8. He was aware of the usual time limit.
- 6.9. He was aware that the ACAS procedure provided only a limited extension to that time limit. He was, at the least, aware of there being some urgency.
- 6.10. He was not helped by his insurers delaying and not authorising funding until 7/09/18.
- 6.11. He was misled by his union officer until he secured the advice of his full-time officer. There was a failure by Mr Davis to act with expedition as well as the manifestly wrong advice then given about pursuing a grievance.
- 6.12. I accept that both the union and the insurers caused him delay. He did well to realise that the advice he was getting was questionable.
- 6.13. By the time he spoke to Mr Fish, on 23/08/18, he was mistrustful of the advice he had had from his union. He had however asked to speak to a full-time representative in the expectation of getting accurate advice .

- 6.14. By 22 and 23/08/18, he was given absolutely clear advice about the time-limit with confirmation that it had passed and that the claim had to go in quickly to secure an extension of time. He chose not to follow that advice.
- 6.15. He decided then that he preferred to obtain the independent advice of his solicitor.
- 6.16. Mr Fish advised him clearly and accurately several times between 22/08/18 and 29/08/18 and offered to help him get the claim in by meeting him on 23/08/18..
- 6.17. I accept that Mr Phillips was misadvised up until 23/08/18. Even though he had done his own research, I accept that he was entitled to rely on the advice he had, even though he was uneasy about it.
- 6.18. What is harder to understand is the delay after that. Knowing that the claim was already late, Mr Phillips turned down the opportunity of a meeting to draft the claim form. He waited six more days. I accept that that is the earliest appointment he could get with his solicitor, at the point when he decided he wanted to pursue that rather than union advice. But he only chose to seek legal advice when given the plain advice that the claim was already late.
- 6.19. He waited with his eyes open to the risk that further delay would prejudice his ability to bring this claim, a risk he was expressly warned of. He could have put in the claim as soon as he realised that the decision to speak to a solicitor would involve further delay.
- 6.20. In the end, he put in his own claim, on 30/08/18. He could have done that in the course of the period from 23/08/18.
- 6.21. He does not rely on ill-health during this period. His oral evidence was that he was at that point feeling rather better.
- 6.22. His delay is essentially unexplained.
- 6.23. Mr Bromige points out that the respondent's internal grievance outcome was only recently produced, so the relevant witnesses have been interviewed recently. The prejudice to the respondent is said to be limited.
- 6.24. That point has less resonance than it might, given that earlier acts are relied on as a continuing act and go back to June 2017. While it is said that the official grievance investigation has only now been completed, having been commissioned on 31/08/18, witnesses will still face questioning about some matters already eighteen months in the past. There is some prejudice in that in addition to the prejudice of having to face a claim lodged after the expiry of the usual limitation period. .
- 6.25. In my judgement, it is not just and equitable to extend time. Mr Phillips had long contemplated the possibility of bringing the claim and knew in principle of the time limits and that they were strict. He made a deliberate choice, on the basis of clear advice, echoing his own suspicions, that the time limit had passed and in the context of advice to put in the claim quickly, to delay further. I recognise the prejudice to him in that his claim progresses no further but I weigh against that prejudice to the respondent in that the claim is made on the basis of a continuing act going back to June 2017: the delay has an impact.

6.26. Time is not extended and the Tribunal has no jurisdiction to hear his claims.

Employment Judge Street

Date 20 February 2019