



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M I Khan  
**Respondent:** AIG Life Ltd  
**Heard at:** Leeds **On:** 5 April 2019

**Before:** Employment Judge Trayler

## Representation

**Claimant:** Mr A Tucker, Counsel  
**Respondent:** Ms J Ferrario, Counsel

# RESERVED JUDGMENT

1. The claim is dismissed as the Tribunal does not have jurisdiction to hear it.

# REASONS

## Preliminary Hearing

1. The issue to be determined at this Preliminary Hearing is whether it is just and equitable for the tribunal to hear the claim presented by the claimant on 1 November 2019, it having been presented to the tribunal later than three months after the last act of race discrimination relied upon by the claimant.
2. The preliminary hearing was arranged at an earlier preliminary hearing conducted by Employment Judge Maidment on 4 January 2019. On that date the Employment Judge summarised the complaints made by the claimant. The parties confirm that the issues raised in Mr Khan's claim are as recorded by the Employment Judge on 4 January 2019.

3. I do not recite these here because they can be read within the notes of that earlier preliminary hearing. In short however, Mr Khan complains of comments of a racial nature as harassment because of his race. These are said to have occurred at a Christmas party and therefore probably in December 2017 and thereafter between January and May 2018. Mr Khan also complains of manipulation of his performance figures and amendment by changing a probationary period and ultimately his dismissal as being because of his race.
4. The latest in this list of allegations is therefore the dismissal which is accepted as having occurred on 2 May 2018.
5. Any complaint about discrimination either occurring on 2 May 2018 or as part of conduct extending over a period within Section 123 Equality Act 2010 ending on 2 May 2018 therefore has to be presented to the tribunal by 1 August 2018. This time limit is set by Section 123 Equality Act 2010 which provides that proceedings on a complaint such as the claimant makes may not be brought after the end of the period three months starting with a date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. For these purposes conduct extending over a period is to be treated as done at the end of the period. I make no finding as to what the claimant complains of is “conducting extending over a period” and treat as the parties have done the date of the last act complained of as being 2 May 2018 when the claimant was dismissed. Certainly, there is no complaint of any discrimination after that date.
6. I have explained to the claimant during the course of the hearing that I make no judgement on the prospects of success of his complaints save that they are arguable complaints and there is no reason on the basis of the strength or otherwise of the allegations which the claimant makes to cause me to say that it is not just and equitable to allow an extension of time.
7. Section 123 of the 2010 Act has been the subject of a large number of decided cases over the years and the provisions of the 2010 Act differ little from those of the earlier legislation as to race discrimination.
8. What is clear from the case law is that I have to take into account all relevant circumstances when exercising what is a judicial discretion as to whether I think it is just and equitable to allow the claim to be heard.
9. No one factor is determinative of this and once all relevant information has been gathered this is to be weighed by the Employment Tribunal when deciding whether to exercise the discretion by allowing the claim to be heard.
10. Such is clear from the decision in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576. It would also be an error for a Tribunal in all cases to attribute the error of a qualified legal or other advisor to the claimant and determine that if there has been fault on the part of the claimant or his advisors or that they have failed to show a reasonable excuse for delay that the exercise of the discretion should not be made in favour of allowing the claim to be heard. There are in addition a number of cases in which it is clear that a misunderstanding of the legal time limits is not necessarily fatal to a claimant as can be seen from *Rathakrishnan v Pizza Express (Restaurants) Ltd* and *Anderson v George S Hall Ltd* UKEAT/0631/05/DA I will

return to the later part of these reasons to the decided cases to which the parties refer me.

11. I will start first of all therefore in making findings of fact as to what happened between the 2 May 2018 dismissal and presentation of the claim to the tribunal on 1 November 2018. The claim form was completed by solicitors and delivered by them to the tribunal office by hand.
12. At some point in June the claimant made contact with ACAS by telephone and on his evidence gives some explanation of the nature of his complaint and further the officer at ACAS provides some advice for example, on the protected characteristics within the Equality Act 2010 and discrimination generally. The claimant had little or no sophisticated understanding of this having never conducted proceedings before. I do not believe that an ACAS officer would have advised the claimant that him having made the telephone call that the time for making a claim was “on hold”. I do not believe either that the claimant had this understanding at the time although he may have reached that subsequently. I do not believe it is credible because the early conciliation provisions provide on the face of them a complex extension to the time limit for presenting a claim to the tribunal. In brief, these extensions can occur in two different ways. If a complaint is logged with ACAS within the limitation period and the ACAS certificate as to conciliation is issued also within the limitation period then the time between presenting the issue to ACAS and the issue of the certificate is ignored when calculating the three month period. The effect of that is that the conciliation period is added to the three months. The second situation is that if a reference is made to ACAS within the limitation period but the certificate is issued after the limitation period ends. Then the claimant has an additional month from the early conciliation certificate to present his claim. What is clear is that ACAS did not have any early conciliation referral by the claimant. This does not occur until later. I do not believe that ACAS will have given advice that the claimant had an indefinite time to present his claim nor that an extension of time had begun to run. I did not find the claimant credible in this respect. nor do I believe that the claimant thought he had done what was required.
13. Mr Khan, the claimant makes arrangements by telephone to see a solicitor in Leeds. The solicitor in question, Ms Kirna Madhas, is known to the claimant as part of a circle of friends but not a particular friend of the claimant himself. Mr Khan goes to see Ms Madhas at a date in June of which I have not been advised and on 2 July Ms Madhas writes a letter to the respondent concerning a potential claim by Mr Khan. Given the date of the letter I find that this was after the claimant spoke to ACAS. Ms Madhas has not attended to give evidence at the hearing. She has provided a witness statement of evidence which I have read but this is far from complete in detailing how the limitation period in this case was allowed to expire without either an early conciliation certificate being sought or a claim being presented to the tribunal.
14. In her witness statement Ms Madhas states that she cannot comment as to why the initial limitation date was missed as she was not on record at the time. Ms Madhas then says that she knows that the claimant had psychiatric problems and issues as to his son.

15. I made enquiries as to whether Ms Madhas could attend the tribunal hearing, it being clear that the credibility of her evidence and that of the claimant was questioned by the respondent, and was advised that she was attending a conference with Counsel in London. She could not therefore attend but advised Counsel for Mr Khan that no letter had been sent to Mr Khan confirming his instructions to her as she was acting as a friend.
16. As I have said I do not accept that Mr Khan believed that the time limit was on hold. He told me that he understood in some basic form that the clock was running although he was less clear as to how long the clock had to run and from which date the time limit ran.
17. Between Mr Khan and Ms Madhas some arrangements appear to have been made that ACAS conciliation certificate would be sought (this is clear from the 'letter before action' but Mr Khan did not obtain one and Ms Madhas clearly took no steps to monitor whether a certificate had been sought and whether there was any extension therefore to the initial three month time limit.
18. There is a distinct possibility from the witness statement of Ms Madhas that there is a shallow and unconvincing attempt to mislead by saying that she was not on the record but at the same time failing to mention that she had taken any action in relation to the claim on behalf of Mr Khan. That is surprising because I have seen a detailed letter sent by Ms Madhas to the respondent and dated 2 July 2018, a Monday. In that letter she states that "our client" (an expression used at least twelve times within a two and a half page letter) has been advised to contact ACAS to log his grievance and to consider early reconciliation. Within the letter is a detailed exposition of the claimant's complaint with the exception of the allegations of comments being made in December 2017 and January 2018. The letter is upon headed note paper of GSD Law of 3 Lisbon Square Leeds and Ms Madhas is described as a Solicitor and Principal Director. The letter is headed as a "letter before action". The respondent replies to that letter apparently between 21 – 23 July to which Ms Madhas replies that "we are instructed to proceed" with action.
19. Therefore, there appears to have been no action in relation to the claim or early conciliation. Mr Khan said in evidence that he had made a further approach to ACAS but this is not mentioned in his statement or in any other document that I have seen. I do not believe that any other contact was made with ACAS until 24 September 2018. Mr Khan said that he had spoken to a friend who is also bringing a claim elsewhere and that friend had advised him that he needed to have a certificate from ACAS upon which he telephoned ACAS and the certificate was issued the same day. Mr Khan said he believed that he had a one month extension for bringing his claim from the 24 September which is clearly incorrect. I believe it is likely that Mr Khan did not form that view in September and nor that he advised Ms Madhas of that. Ms Madhas would in any event have had no real justification for taking that on face value as in the circumstances of this case, the three months limit having expired before 24 September there is no extension at all by reason of conciliation for one month or otherwise.
20. Thereafter, the next action of which I am aware is that on 1 November 2018 a claim was presented to the tribunal office which is handwritten and the solicitor identified as acting for the claimant is again Ms Madhas albeit she is now with a Company

known as M H K Solicitors operating from the same address. Mr Khan confirmed that this was simply a change of business name as far as he was aware.

21. Ms Madhas confirms that on 24 October 2018 she received confirmation from insurers that they would cover Mr Khan's costs and she therefore prepared the claim form and it was presented to the tribunal office. The reason for the delay therefore on my finding is that the claimant through his advisor awaited the result of insurance cover for his costs. In the meantime Mr Khan did not seek ACAS conciliation. I do not believe that the claimant understood that he had a one month extension at that time.
22. In May of 2018 Mr Khan had a dispute with his wife which led to him leaving the matrimonial home thereafter returning to the property after his wife and son had left. There were disputes as to his contact with his son which took up Mr Khan's attention and undoubtedly will have upset and destabilised him as he has explained in his witness statement. He was, however, during this period after May 2018 able to instruct a separate firm of solicitors in relation to that matter, attended their office and also deal with CAFCASS as to contact with his son. Mr Khan said that his priority essentially was having contact with his son and to the extent that he "could not give a monkey's" about his job in comparison because he could always get another job but his son was his priority as he could not be replaced. That is a sensible priority of matters in the abstract and I find that it did distract Mr Khan from providing his attention to the tribunal claim. It did not however prevent him as he approached solicitors by 2 July.
23. Mr Khan also had, as has been described by a psychiatrist whose report I have read and is within the bundle, depressive disorder. The report is from Dr P Vandenabeele who assessed Mr Khan on 28 February 2019 and provided a report on 1 March. There is no mention in the report of what Mr Khan had been able to do in pursuing his claim, namely giving sufficiently detailed instructions to a solicitor to enable her to write a detailed letter before action. My finding in relation to the depressive condition is that as Dr Vandenabeele says it had an effect on Mr Khan's concentration and his general feelings of wellbeing. The doctor confirms he was not thought disordered and was irritable and became tearful and maintain poor eye contact. He presented as being depressed in mood and also self-reported the presence of low mood. Mr Khan had not accessed medical help and Dr Vandenabeele says that the depressive order was such as to have a significant negative impact upon Mr Khan's day-to-day functioning. The doctor basis this on the fact that basic activities of life such as sleep, appetite and concentration were affected and also his ability to enjoy activities and desire to engage in social activities and his levels of energy.
24. I accept that in its entirety however, that Mr Khan had shown himself to be able to address this issue and my finding is that the depressive disorder was not the principal cause of Mr Khan failing to pursue this during the limitation period but that Mr Khan had as he said "good and bad days" and devoted the good days to pursuing principally his contact with his son which in the circumstances is understandable. However, Mr Khan was not disabled from presenting his claim in time by reason of his disorder but I find that it did have some impact upon his concentration along with the issues in relation to his son.

25. I am concerned in this matter that Ms Madhas says that she was “not on record” and therefore could not explain the failure to present the claim in time. She makes no mention of having written a detailed letter before action nor the second letter to the respondent. I do not believe Mr Khan when he says that the letters she sent were sent without his instruction or that he was ignorant of their content. That is beyond belief in this matter. On the face of the letter however, the solicitor is taking on the affairs on behalf of Mr Khan and says that she has advised him in effect to get an early conciliation certificate. The solicitor, as Mr Khan accepts, could have drafted a letter for him, in other words a letter making his points but written and signed by him rather than by solicitors as a letter before action but she chose not to do that. The claim is put in by the same solicitor who wrote the letter albeit with a different firm title and the claim form gives details of what is complained of including the allegations of harassment albeit that the claim purports to make a complaint of unfair dismissal when Mr Khan does not have two years qualifying service, that complaint was dismissed on 4 January 2019 by consent.
26. Factually therefore, the claim should have been put in by 1 August 2018. It was presented on 1 November 2018 and is three months late.
27. In the solicitor’s statement she says that she awaited confirmation from an insurance company that they would provide cover for the claimant to bring a claim, Mr Khan makes no reference to this issue either in this evidence or statement. The solicitor says that this confirmation was received on 24 October 2018 and the claim was then presented on 1 November. The solicitor says that she had been advised by Mr Khan that he had a one month extension but if Mr Khan had done this the solicitor should in reality have checked the position which is clearly incorrect on any calculation.
28. I am critical of Ms Madhas because she presented as having taken the matter in hand on behalf of Mr Khan yet failed to do so. If she advised Mr Khan to seek early conciliation this should have been checked along with any alteration that this gives to the limitation period. Despite this, no control is taken of the matter until the insurance approval arrives, the claimant makes an early conciliation referral on 24 September and then she accepts what the claimant says and presents a claim which is out of time on any calculation five weeks later.
29. I believe that Mr Khan had a right to expect better of his solicitor representative and to have clear advice on time limits, for the solicitor to ensure simple compliance with the early conciliation process is made by logging into the website or a telephone contact is made and that a letter was sent to Mr Khan setting out the limits of her responsibilities and what she was doing on his behalf, whether she was doing this as a friend or not.
30. It seems that the matter was left to Mr Khan after the letters were sent to the respondent and then Ms Madhas waited for the funding to arrive, in the meantime Mr Khan did not make the referral until 24 September.
31. I turn therefore, now to the exercise of the discretion whether to allow the claim to be heard by the tribunal which in turn depends upon whether I think that it is just and equitable to allow it.

32. It is clear from the Court of Appeal decision in Robertson and Others that the time limit remains at three months (subject to early conciliation). There is then a further chance for the claim to be heard if the tribunal thinks it is just and equitable.
33. I have to take into account to all relevant factors including those from Limitation Act when exercising this discretion.
34. It is also clear from the decided cases to which I have been referred that it is not possible to put any other gloss upon the words of the statute or the freedom of the exercising a discretion, in a judicial manner such as whether this should be viewed in a liberal way or that any one factor necessarily determines whether the discretion should be exercised in favour of allowing the claim to be heard.
35. I have to consider the exercise of the discretion against the background of the facts I have found in this case and I now seek to take into account the relevant factors. First of all, I have to consider the length of the delay which in this case is three months. As is submitted on behalf of the claimant if the claimant had, for example, obtained an early conciliation certificate by 31 July 2018 he would have had an extension of one month. If a referral is made sooner and conciliation through ACAS took place within the three month limitation period then the conciliation period is added to the three month time limit and so if there had been compliance the ordinary time limit would have been longer than three months. It is impossible to say how long because in some cases as here the certificate is issued on the same day and in others some weeks taken by ACAS to seek conciliation of the differences between the parties.
36. However, I agree with the submissions of the claimant that the delay has caused no loss of cogency in the evidence in this case and none is asserted by the respondent. In addition, in any event the respondent was alerted to the issues which Mr Khan seeks to pursue in his claim within the letter of the 2 July 2018 and is therefore put on warning to ensure some cognisance is taken of the factual circumstances.
37. I am to consider the balance of prejudice in this case. The prejudice to the claimant if his claim is not allowed to go through is that he would be denied the chance to put right a wrong against him. I have said that this is an arguable case but a tribunal has not heard and adjudged the evidence and the course of any actions taken by the respondent and whether this is because of Mr Khan's race. However, discrimination is an important issue in present day society in England and Wales and if I do not allow the claim to go forward Mr Khan's opportunity to challenge the respondent on this will be denied.
38. By contrast the prejudice to the respondent is that it would have to incur the costs and inconvenience of defending of the claim. However, the respondent would have had to have done this had the claim been presented in time and therefore no additional prejudice is caused by the lateness of presenting the claim. The prejudice issue therefore is substantially heavier against the claimant than the respondent.
39. I consider the reason for the delay. As above, I have found fault on the part of the claimant and/or on the part of his representative. The claimant appraised his solicitor of the facts and it was simple to have the claimant log an early conciliation referral with ACAS by telephone or online immediately and then diarize the time limits and

change these when or if a certificate is issued. I have no information as to when the solicitor sought insurance cover for costs on behalf of Mr Khan as that information is not available. I cannot say therefore as to whether it was made in July when the letter was written or at some subsequent or earlier date. I find that a solicitor providing advice and giving assistance by writing a letter (or in this case two letters) on behalf of a person who she refers to as a client and in reality, not much more than an acquaintance would in my view have a duty of care to take these steps.

40. I also consider the promptness in seeking advice. Mr Khan sought advice within the limitation period and within two months of his dismissal. I make no real criticism of that given the other circumstances of Mr Khan's home life and his medical condition. I consider the promptness of action when he knew that the matter could or should be pursued and here there is a mixed set of circumstances. No issue or attempt to issue a claim was made until November and in essence the matter was left after 24 September when the conciliation certificate was issued and was really only pursued once finance was available. It seems more likely than not that the costs position having been clarified the claim was issued. It is more likely than not the matter was left in abeyance pending insurance cover. As I have said there is clear fault but from the case law this is not determinative as, for example, in *Chohan v Derby Law Centre* and *Anderson v George S Hall* there have been legal errors in understanding of the time limits and in interpreting of the law on time limits by legal advisors which has not prevented it being just and equitable to hear the claims. There is no "bad advice" causing the delay here. It seems more likely that Mr Khan was sent to get an early conciliation certificate. No check was made as to whether he had done so within the time limit. Some discussions as Mr Khan said took place as to a clock ticking but Mr Khan leaves it until 24 September before getting a certificate.
41. I have taken into account that legal aid is unavailable for these types of proceedings. A person wishing to pursue them therefore faces the task of preparing the case themselves or spending money on having a claim prepared for them. Also, the time limit is not uncomplicated when taken into account the early conciliation provisions and the way in which the three month time limit is effectively extended.
42. In my finding it is more likely than not the claimant was left to get an early conciliation certificate. Mr Khan says he took the view that he had already spoken to ACAS and therefore the matter was on hold but I have already found that that was not the case. I also find that he was not advised that he had a one month extension.
43. I seek to balance the above factors and in particular consider that the effect on Mr Khan in not allowing the extension is completely to stop his claim. The respondent has simply the expense and inconvenience of defending this which it would have had, as I have said had the claim been presented in time. Again, this is the fault of the claimant and the length of the delay which is not so as to render the matter unfair although three months is still a significant delay. I take into account the misleading comments by the claimant's solicitors who could have been more forthcoming in the statement of evidence as to the advice given and as to time limits and what had been done on behalf of Mr Khan before the claim was presented. Taking into account the other challenges which Mr Khan had in relation to his contact with his son and his depression I form the view that on balance it is not just and equitable to allow the claim to go forward. Although there is no prejudice to the respondent in allowing this, the other factors outweigh allowing the claim to be heard. There is fault on the



part of the claimant and his advisor in not meeting the time limit. The claimant and his representative have sought to mislead or have failed to give the full picture of what had transpired in evidence. In those circumstances it is not just and equitable to allow the complaints of discrimination to be heard by a tribunal. Therefore, I make the judgment that claim can proceed and will make orders as to the future conduct of the proceedings.

44. I take into account that it is more likely than not that the time limit was ignored whilst funding for the litigation was sought. This is not what is put forward by the claimant and his solicitor and as I have recorded above only partial disclosure of information about the delay has been given by the solicitor. There is an awareness of the need to seek conciliation on the part of the solicitor and having taken the matter on for Mr Khan she should have ensured compliance with the requirements of conciliation and clear advice given on the time limits. The failure to make a clear statement of how this matter was pursued by and on behalf of the claimant together with an ability on the part of the claimant and his solicitor to comply with the time limit means in my finding it is not just and equitable to allow the claim to be heard.

**Employment Judge Trayler**

Date: 17 May 2019