



EMPLOYMENT TRIBUNALS

Claimant: Mr A Davies
Respondent: Royal Mail Group Ltd

Heard at: Lincoln **On:** 25 April 2019

Before: Employment Judge Ayre

Representatives:

Claimant: Mrs Davies, the claimant's wife
Respondent: Ms S Smith, solicitor

JUDGMENT FOLLOWING PRELIMINARY HEARING

The Tribunal does not have jurisdiction to hear the claimant's claim as it was presented out of time, and it would not be just and equitable to extend the time limit.

REASONS

Background

1. The claimant has been employed by the respondent since July 2005. He has been off work due to ill health since November 2017, and remains unable to work.
2. On 27 June 2018 the claimant presented a claim to the Employment Tribunal. In his claim form the claimant complained about a sexual assault that he says took place in the workplace in November 2016, and which he alleges then resulted in bullying and harassment during 2017. His claim also refers to his sickness absence being handled incorrectly and in breach of company procedure, and to bad advice from his union representatives. It is not entirely clear from the claim form itself what legal claims the claimant is seeking to bring.
3. The claim is resisted by the respondent. In its response to the claim the respondent submitted that the claim is out of time.
4. The case was listed for an open Preliminary Hearing.

The Proceedings

5. I heard evidence at the Preliminary Hearing from the claimant. The respondent produced a bundle of documents running to 59 pages.
6. At the outset of the Preliminary Hearing, and during the course of the claimant's evidence, I asked the claimant to tell me what type of discrimination he is alleging, and in particular what protected characteristic(s) he relies on.
7. The claimant told me that he is relying on two protected characteristics:-
 - a. Sex : he believes that, had he been a woman, the complaint he made in November 2016 to his manager Tony Silk about the alleged sexual assault by Robert Ives, would have been treated more seriously; and
 - b. Sexual orientation.
8. I also asked the claimant to clarify what he believes the acts of discrimination to be. In particular, I asked him to explain what happened to him that he believes is linked to his sex or sexual orientation. I asked this question on more than one occasion, and adjourned the hearing to give the claimant time to consider his answer.
9. The claimant had difficulty in articulating his claim, which he, and his wife, both said was linked to his disability. Early on during the hearing the claimant said that the lack of support from the respondent with his sickness and the failure (in his view) to properly investigate his complaint amounted to discrimination. He did not however say why, or what protected characteristic he relied upon in relation to this aspect of his claim. He also said that Robert Ives had bullied him on a daily basis up until he went off sick in November 2017, and that this amounted to discrimination.
10. When I asked him whether he was alleging any further acts of discrimination since November 2017 the claimant initially answered 'a lack of support from Royal Mail with my sickness, and the investigation of my complaints'. His claim form refers to his sickness having been "*handled incorrectly*" and not in accordance with company procedure. In the witness statement that the claimant had prepared for the preliminary hearing he referred to incidents that had occurred after he became unwell, including an issue over holiday in August 2018, and events in July 2018.
11. The claimant does not set out in his claim form or his witness statement why he believes the handling of his sickness absence is linked to his sex or sexual orientation, and neither his claim form, his witness statement nor his oral evidence during the hearing contain any prima facie evidence of any link between sex or sexual orientation and the handling of a formal complaint he raised after going off sick or his sickness absence.
12. I asked the claimant on more than one occasion to tell me what the last act of alleged discrimination was, and adjourned the hearing to give him time to consider the position. The claimant then told me that the last detriment (or 'bad thing') that had happened to him that he believed was

linked to his sex or his sexual orientation was Tony Silk brushing aside his complaint in November 2016.

The Issue

13. The sole issue for determination at the Preliminary Hearing was whether the Tribunal has jurisdiction to hear the claimant's claim, having regard to the time limits set out in Section 123 of the Equality Act 2010.

Findings of Fact

14. The claimant has been employed by the respondent since July 2005. Since joining the respondent, the claimant has been a member of the Communication Workers' Union ("CWU").
15. In November 2016 there was an incident at work involving the claimant and a colleague, Robert Ives. The claimant alleges that Mr Ives grabbed him from behind and sexually assaulted him. The claimant says that he reported the incident to his manager, Tony Silk who, the claimant alleges, did not take the matter seriously.
16. The claimant continued to work with Mr Ives until 3 November 2017 when the claimant went off sick with anxiety and depression. The claimant alleges that Mr Silk told Mr Ives that the claimant had complained about Mr Ives, and that as a result Mr Ives bullied and harassed him on a daily basis until he became unfit to work.
17. After the claimant became unable to work due to ill health, he was referred to occupational health, and on 28 November a home visit took place at which a union representative was present. In January 2018 the claimant had repeated further contact with his trade union, including a meeting with two union representatives at the claimant's home on 22nd January.
18. The claimant was in contact with his trade union again in February 2018 and April 2018. He made his line manager and his union representatives aware of his complaint. The claimant did receive advice from the CWU, but did not ask them about time limits. Neither the claimant's line manager nor the union told the claimant that there was a 3 month deadline for making claims to the Employment Tribunal.
19. In May 2018 the claimant was diagnosed with autism. As a result of his autism the claimant interprets what happens to him literally. He was told that his situation 'would be sorted out' and believed that was what would happen.
20. The claimant began early conciliation on 2 May 2018 and the Early Conciliation Certificate was issued on 2 June 2018.
21. The claimant issued his claim on 27 June 2018.
22. The claimant could not explain why he waited from 2 June, when the Early Conciliation Certificate was issued, until 27 June 2018 to issue

proceedings. When asked why he had waited, he said he could not remember.

23. The claimant raised an internal grievance in February 2018. He did not present a claim at that time. When asked why he did not do so, the claimant said that he was advised by the NHS employment adviser to let the respondent follow its internal procedure.
24. The claimant also said that he is a very literal person, and that when he was told things would be sorted, he believed that they would be.
25. Notwithstanding this advice, the claimant filed his claim in June 2018 before the respondent had exhausted its internal procedure.
26. When asked why he had not presented his claim sooner, the claimant said that he had made a complaint to his manager in 2016. He accepted, during his evidence, that he had had plenty of opportunities to file his claim before 27 June 2018 and that he had filed both an internal complaint and his claim to the Tribunal whilst on sick leave.
27. The claimant said that his health had prevented him from bringing a claim earlier. The claimant was however at work for a year after the incident in November 2016 and did not raise a complaint at any point during that time. When asked why, the claimant said that it was because of his belief – that he should continue to go to work and ‘just get on with it’.

The Relevant Law

28. Section 123 of the Equality Act 2010 (“the EA”) provides that:-

“(1) 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...*

(3) For the purposes of this section –

- (a) Conduct extending over a period is to be treated as done at the end of the period; and*
- (b) Failure to do something is to be treated as occurring when the person in question decided on it.*

29. Where a complaint is, on the face of it, presented out of time, the burden of proving that it has been presented in time or that it would be just and equitable to extend the time limit lies with the claimant. In Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, the Court of Appeal stated that there is no presumption that a Tribunal should exercise its discretion to extend time unless it could justify a failure to do so. Rather, it is for the claimant to convince the Tribunal that time should be

extended and the exercise of discretion should be the exception rather than the rule. This does not mean however that exceptional circumstances are required in order for time to be extended.

30. In *British Coal Corporation v Mrs J Keeble & others* [1997] IRLR 336, the Employment Appeal Tribunal suggested that tribunals would be assisted, in determining whether to exercise their discretion to extend time, by considering the factors set out in section 33 of the Limitation Act 1980, namely:-

- 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 knew of the facts giving rise to the case of action;
- e. The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

31. The Court of Appeal has subsequently confirmed (in *Southwark London Borough Council v Afolabi* [2003] ICR 800, that whilst section 33 of the Limitation Act may be a useful guide for Employment Tribunals, it is just that – a guide, rather than a mandatory requirement. The Court did however suggest that there are two 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).

32. In *Department of Constitutional Affairs v Jones* [2008] IRLR 128 the Court of Appeal held that tribunals do not need to consider all of the section 33 factors in each and every case. The tribunal has a wide discretion when deciding whether to extend time.

33. The Tribunal must take account of the balance of prejudice when considering whether to exercise its discretion to extend time. This involves weighing up the prejudice to the claimant of not being allowed to pursue his claim, against the prejudice to the respondent of extending time.

Conclusions

34. I have every sympathy for the claimant, whose evidence I accept in its entirety.

35. In order for me to decide whether the claimant's claim has been presented in time, it is necessary for me, as a first step, to identify the act or acts that the claimant alleges amount to discrimination.

36. It is not clear on the face of the claim form or the claimant's witness statement which acts of the respondent he alleges amount to unlawful discrimination or why.
37. Having listened to and considered carefully the claimant's evidence during the preliminary hearing, it seems to me that the main allegation of discrimination is about incidents that occurred in November 2016, when the claimant says he was assaulted by Mr Ives, and that Mr Silk did not deal properly with the complaint about Mr Ives. There is also the generalised complaint of 'bullying and harassment' by Mr Ives in the period from November 2016 to November 2017.
38. Given that the claimant was off sick from 3 November 2017, the primary time limit for presenting a claim relating to the period before he went off sick expired on 2nd February 2018, almost 5 months before the claimant lodged his claim. There is no extension of time as a result of the Early Conciliation process, as the primary limitation period expired some 3 months before the claimant began Early Conciliation.
39. The complaints about incidents that the claimant says occurred in July and August 2018 cannot form part of the current claim unless there is a successful application to amend, as they relate to a period of time after the date upon which the current claim was presented to the Tribunal.
40. The claim is therefore out of time.
41. I have considered whether to exercise my discretion to extend the time limit, and have taken account of the following factors:-

The length of and reasons for the delay

42. The claim was presented almost 5 months out of time, which is a not insignificant delay. The claimant has provided a number of different explanations for the delay – namely his health, his 'beliefs' that he should stay at work and 'get on with it', that he was unaware of the existence of time limits, and that he wanted to see through the internal process before issuing his claim. The claimant could provide no reason why he waited from the end of Early Conciliation until 27 June to issue proceedings.
43. In relation to the claimant's health, I accept that the claimant has, since November 2017, been genuinely unwell and able to work. He was, however, well enough to work for a year after the alleged assault and initial complaint. During that time he took no steps towards issuing proceedings.
44. Since becoming unwell he has had advice from his trade union, and has been able to raise an internal complaint in February 2018, commence Early Conciliation in May and subsequently issue proceedings in June 2018. I do not therefore accept that the claimant's health in itself was sufficient reason for him not presenting his claim on time.
45. The fact that a claimant is unaware of the time limits is not, in itself, grounds for extending time, particularly where the claimant has access to advice. The claimant was a member of the CWU and being advised by them at the time.

46. Similarly, a wish to see through an internal process is not in itself sufficient justification for not issuing claim on time. In any event, the claimant in this case began Early Conciliation and issued proceedings before the internal proceedings had concluded.

The extent to which the cogency of the evidence is likely to be affected by the delay

47. This factor is not, in my view, a determining one. Within the bundle of documents before me at the preliminary hearing was an internal report produced by the respondent into the claimant's complaint. It appears from that document as though the respondent has already carried out some investigation into the claimant's complaints and interviewed relevant witnesses. In light of this, and of the length of the delay in issuing proceedings, I am not persuaded that the cogency of the evidence would be affected by the delay.

The promptness with which the claimant acted once he knew of the facts giving rise to the case of action

48. This factor weighs heavily against extending time in my view. The claimant's main complaint is about incidents in November 2016, and yet he took no steps to issue proceedings until May 2018 when he began Early Conciliation. This was a delay of some 18 months, and the only explanation provided was the claimant's beliefs that he should stay at work and get on with things.

49. In relation to the alleged bullying and harassment in the period up to 2 November 2017, the claimant waited 6 months before starting Early Conciliation. Nothing appears to have changed in that period – so this is not a case where new facts came to light at a later stage, and indeed the claimant was able to file an internal complaint in February 2018.

The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

50. The claimant was receiving advice from his trade union before the expiry of the limitation period. He appears to have made it clear to them that he wanted to raise a complaint – albeit an internal one. The fact that the trade union seems not to have advised the claimant on time limits for issuing a Tribunal claim is a matter that the claimant may wish to take up with the CWU.

Balance of prejudice

51. I have considered this very carefully. I am conscious that the allegations that the claimant has made, particularly the allegation of a sexual assault in the workplace, are extremely serious. The claimant would inevitably suffer some prejudice by not being allowed to pursue them. He may however well be in time to pursue complaints about other more recent events.

52. The claimant did not act promptly in relation to this claim and he worked with the alleged assailant for a year after the alleged assault. There is a

public interest in the finality of litigation, and this is a factor I have taken into account.

- 53. The respondent would in my view be prejudiced if the claimant were allowed to pursue a complaint so long after the acts complained of.
- 54. On balance therefore, I find that it would not be just and equitable to extend time in this case. This has not been an easy decision, and I have a lot of sympathy for the claimant and the position he finds himself in.
- 55. As I have not extended time, the claim is out of time and the Tribunal does not have jurisdiction to hear it.

Employment Judge Ayre

Date 5 June 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE