



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Bayo

**Respondent:** Ministry of Defence

**HELD AT:** Leeds

**ON:** 22 October 2019

**BEFORE:** Employment Judge Buckley

## REPRESENTATION:

**Claimant:** Mr Sambow, lay representative

**Respondent:** Mr Smith, Counsel

**JUDGMENT** having been sent to the parties on 23 October 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. The time limit for submitting a discrimination claim to the employment tribunal in the armed forces is 6 months starting with the date of the act to which the proceedings relate: s 123(2)(a) Equality Act 2010 (EA). Before submitting a claim the claimant must have made and not withdrawn a service complaint: s 121 EA. The extended time limit of 6 months is intended to take account of this requirement, but the claimant is not required to complete the service complaint process before issuing a claim. Indeed there is a risk that the claim will be out of time and potentially significantly so if a claimant chooses to wait until the service complaint process is completed.
2. This preliminary hearing was listed on the basis that last act complained of took place on 19 September 2017. The previous preliminary hearing proceeded on basis that all the alleged acts of discrimination were out of time and that this preliminary hearing was to considering a just and equitable extension of time only.

3. At the end of Mr Sambow's submissions after evidence had been heard and after the Respondent had made its submissions, Mr Sambow raised for the first time the issue of an indirect discrimination complaint made in the particulars of claim which is in time. The paragraph in question had not been considered as a separate claim by Employment Judge Eeley, nor was it something highlighted by the claimant at that hearing, although he was representing himself.
4. I have looked at the way this purported claim of indirect discrimination is described in the particulars. Although it is headed 'indirect discrimination', it is put on the basis that the way the respondent's procedure is operated puts people who make complaints under the Equality Act at a disadvantage.
5. 'Making a complaint under the Equality Act' is not a protected characteristic. In my view the claimant is not bringing an indirect discrimination complaint, because that would entail an allegation that there is a provision, criterion or practice which is discriminatory in relation to a protected characteristic. Here no protected characteristic is relied upon. Mr Smith made this point and the claimant's representative was given the chance to respond. He did not deny that no protected characteristic was relied upon, nor make any positive assertion as to what, if any, protected characteristic was relied upon.
6. Mr Smith asked me to consider striking out this part of the claim on the basis that it has no reasonable prospects of success. I agree that it has no reasonable prospects of success, indeed no prospects of success, due to the absence of a protected characteristic. However, there is in my view no need to strike out the claim because no claim of indirect discrimination as defined in the Equality Act 2010 has been brought and therefore there is nothing the strike out.
7. I disagree with Mr Smith that the claimant would have been better to put this complaint as a victimisation complaint: the victimisation provisions do not cover provisions, criteria or practices that are applied to everyone but which put those who have brought complaints under the Equality Act at a disadvantage. In any event a victimisation claim has not been brought and I would have refused any application to amend the claim form to bring one at this late stage under the *Selkent* principles.
8. Turning to the issue which was set down to be determined today, the events complained of took place between February 2017 and September 2017 and specifically the last act complained of took place on 19 September 2017.
9. The claimant submitted a joint service complaint with LCpl Dads on 17 September 2017 complaining of less favourable treatment on the grounds of race and/or religion. The claimant was informed on 20 September 2017 that he had to submit an individual complaint, which he did on 10 October 2017. An initial interview took place on 16 October 2017 after which one aspect of the complaint was declared inadmissible on 7 November 2017. The claimant referred the inadmissibility decision to the ombudsman on 22 November 2017 who issued its decision on 4 January 2018.

10. The respondent notified the claimant on 12 April 2018 that an investigator had been assigned to conduct the investigation and to arrange an initial interview. The claimant attended an interview with the investigator on 20 April 2018. A HIO was appointed in May 2018 and produced a report in July 2018 which was sent to the claimant for comment. Comments were returned in September 2018, and a conclusion was sent to the claimant on 5 November 2018. The claimant appealed by letter dated 6 December 2018. The claimant went through the ACAS early conciliation process and then finally submitted the claim on 21 February 2019.
11. The claimant raised for the first time today after cross-examination and in response to my questions that he had been told by his assisting officer Captain Clark that he had to wait until the internal procedure was concluded before he submitted his complaint. This is not something that he put in his witness statement, it was not in the ET1 or in the further particulars of claim. It was not raised in additional evidence in chief and it was not raised until right at the end of the claimant's evidence.
12. I cannot accept that something so significant would have not have been raised at an earlier point, when the issue of time limits has been highlighted since an early stage in proceedings. Further I note that the claimant's evidence contained other inconsistencies. For example he initially stated that he had never been provided with a copy of JSP 831, but later agreed that he had been sent it and had read it. Taking these factors into account, I do not accept that the claimant was told that by Captain Clark.
13. In any event, even if had been told by Captain Clark that he had to wait till the process was concluded, the claimant accepted that by January 2018 the claimant had been sent and had read JSP 831. This document makes abundantly clear in straightforward language that the time limit for issuing an ET claim does not run from the end of the service complaint procedure but runs from the date of the act complained of. The claimant did accept in evidence that he had read this document, but even if that is not true (as was later submitted by his representative) simply choosing not to read a document that he had been sent would not have been reasonable. He had the clear information before him as to time limits, so even if I had accepted his evidence as to what the assisting officer told him, it should have been clear to him that that advice was wrong. It is clearly contradicted by the official documentation and it would not have been reasonable to blindly follow that advice.
14. There was a significant delay in issuing this claim. The claimant had the information before him in January 2018 that the claim had to be issued within 6 months of the final act (i.e. by 18 March 2017 with a possible extra month due to ACAS conciliation) but did not issue a claim until nearly 12 months later because he was waiting until the service complaint was concluded. It is not reasonable once a claimant knows that the clock is ticking to simply wait until his service complaint is concluded however long that takes. The statute has already allowed an extension of 3 months to take account of the requirement to make a service complaint, but it does not provide that the time began to run on completion of the service complaint process.

15. Even in the absence of evidence from the respondent as to specific prejudice caused by the delay, I accept the respondent's submissions that there must be some prejudice in this case as a result of the effect of the passage of time on witness recollection and the availability of witnesses. I give this factor less weight than if I had had before me specific evidence from the respondent to this effect. I accept that the claimant will suffer prejudice in not being able to continue with his claim, which I assume for the purposes of today has reasonable prospects of success.
16. Taking into account all the above, and looking at all the relevant factors, including the prejudice to both parties and the length of and reasons for the delay, I conclude that it is not just and equitable to extend time and therefore all the claims are dismissed.

Employment Judge Buckley

Date 25 October 2019