Case No: 1802506/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr M Arif

Respondent: Health and Social Care Information Centre t/a NHS Digital

HELD AT: Leeds **ON: 15 and 16 October 2018**

BEFORE: Employment Judge Davies
Mr J Rhodes
Mr W Roberts

REPRESENTATION:

Claimant: In person
Respondent: Ms Brewis (counsel)

JUDGMENT having been sent to the parties on 16 October 2018 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

Introduction

1. These were claims of direct discrimination on the grounds of race and religion or belief brought by the Claimant, Mr Arif, against his employer, the Health and Social Care Information Centre trading as NHS Digital. The Claimant has represented himself and the Respondent has been represented by Ms Brewis of counsel.
2. The Claimant had attended a case management hearing with Employment Judge Smith, who had discussed with him what his complaints of discrimination were and set them out in a schedule to his case management order. The Tribunal discussed those with the Claimant at the outset of the hearing and he confirmed that those were his complaints. In summary, they are as follows.
3. The Claimant is employed by the Respondent as an accountant. He is a British Pakistani and a practising Muslim. His substantive role is at Band 7 in the Agenda for Change banding system. Although he works as an accountant, the Claimant does not have accountancy qualifications. The Claimant says that there have been significant differences between him and a more senior manager, Mr Leathley. He

raised grievances against Mr Leathley in 2007 and 2009. Employment Judge Smith recorded that the Claimant 's complaints of discrimination start with a slotting-in process that took place as part of a restructuring in 2013. Mr Leathley slotted the Claimant into a particular role and the Claimant complained about that. He appealed against Mr Leathley's decision. The appeal was dealt with by Mr Vincent, who upheld Mr Leathley's decision. The Claimant was moved into management accountancy and he took the view that that reduced his promotional opportunities. He says that the acts of Mr Leathley and Mr Vincent were acts of direct discrimination on the grounds of race or religion.

4. The next complaint relates to an application the Claimant made for the post of Band 8A Business Manager in January or February 2014. He was not appointed and he says that Mr Leathley and a Mr Turner provided negative references for him. He says that that is why he was not appointed and he says that the provision of those negative references was an act of direct race discrimination or religion discrimination by those two individuals.

5. The next complaint relates to a vacancy for a Band 8A Financial Accountant People Costs, which was advertised in around August or September 2014. It was initially advertised with a requirement for a qualified accountant but it was subsequent re-advertised without that requirement and at that stage the Claimant applied for it. The Claimant was not successful. The successful candidate a Mr O'Sullivan was white.

6. The Claimant's case is that the advertisement had been deliberately manipulated to allow Mr O'Sullivan to apply for the post and he said that the failure to appoint him was direct race or religion discrimination.

7. The next complaint of discrimination relates to an expressions of interest exercise carried out in September or October 2016 for a Band 8A Financial Accountant. The expressions of interest exercise was for a post for one year acting up. The Claimant completed an expression of interest for the post. Shortly afterwards there was a substantive Band 8A Financial Partnering post that also needed to be filled and candidates who had applied in the expressions of interest exercise were considered for both roles. The Claimant was not appointed to either role. A Ms Steele was appointed to one of them. The Claimant says that he has greater experience than her and he says that the failure to appoint him to the post to which she was appointed was an act of direct discrimination on the grounds of race or religion. The Claimant found out that Ms Steele had been appointed to that role he told us in about mid-November 2016.

8. Those complaints of discrimination were all recorded by Employment Judge Smith. He then set out a chronology relating to a grievance lodged by the Claimant on 1 December 2016 complaining about all of these matters, including the 2013 slotting-in exercise. On 21 February 2017 he was told that his informal grievance was unsuccessful, so he issued a formal grievance. On 25 September 2017 he was told that that was unsuccessful and he appealed. He was told on 27 November 2017 that his appeal was rejected. Employment Judge Smith recorded that the Claimant's last complaint of discrimination on the grounds of race or religion related to the delay in dealing with his grievance at the informal and formal stages and he recorded that the Claimant was saying that this delay was done because of his race or religion.

9. Employment Judge Smith also recorded that there were questions of time or limitation for the Tribunal to consider. The claim form was presented by the Claimant on 23 February 2018 and Employment Judge Smith identified that some or all of the complaints may have been presented outside of the statutory time limit. The Tribunal would need to consider whether there was conduct extending over a period so that the claims were brought within three months (plus early conciliation extension) from the end of the period. If not, he indicated that the Tribunal would need to decide whether the claims were presented within such further period as the Tribunal considered just and equitable.

10. Having discussed those complaints briefly at the start of the hearing the Tribunal adjourned to read the Claimant's witness statement, the nine witness statements presented on behalf of the Respondent and the documents that they referred to.

11. The hearing reconvened at 2pm and we began by discussing with the Claimant the evidence on which he was going to rely when inviting the Tribunal to draw an inference that the matters he complained of had been done because of his race and/or his religion. We asked that question because in his witness statement he dealt very briefly with that matter. There was one very short paragraph at the end in which he asserted that four unnamed Muslim staff members had left the Respondent all to start posts at a higher band and he said that that showed that other staff had suffered discrimination as well. He did refer to the fact that Mr O'Sullivan and Ms Steele are both white.

12. In addition, the Tribunal had noted that the documents at the time indicated that the Claimant had not suggested that he had been discriminated against because of his race or religion. On the contrary, the recurring theme was the Claimant saying that Mr Leathley was blocking his career because the Claimant had raised grievances against him in 2007 and 2009. Those grievances had nothing to do with race, religion or discrimination. The Claimant was also saying that Mr Vincent was being influenced by Mr Leathley. The papers did indicate that the Claimant had mentioned discrimination in the December 2016 grievance. However, on the face of the document, the grievance investigator asked the Claimant about that and he explained that what he meant was that he had been treated unfairly by Mr Leathley because of raising grievances about him in 2007 and 2009. The notes of the grievance investigation meeting suggest that there was a discussion with him about what is meant by discrimination and that he confirmed that he was not saying he had been ill-treated because of a protected characteristic. He signed the minutes of that investigation. When we asked him about it he indicated that in fact he did not agree that the minutes were an accurate record of what had been said. The Tribunal has not heard evidence about that yet and so we assume that the Claimant may establish that he did not say what the minutes record.

13. The Tribunal also noted that the documents indicate that by the time of the grievance appeal the Claimant was asked the same question about what he had meant by discrimination. He is recorded as having given the same answer: that he was not saying this was something to do with a protected characteristic. What he was saying was that Mr Leathley had blocked his career because of the earlier grievances. Again, the Tribunal has not yet heard the evidence and we note that the Claimant disputes that that is what in fact he said.

14. Having read the statements and documents and identified those features of the evidence, the Tribunal explored with the Claimant what evidence he was relying on that he said would entitle us to draw an inference that the reason he was treated

in the way he complained of was because of his race or his religion. He drew the Tribunal's attention to the fact that the two successful candidates were white and to his view that this was being done because of his race or religion. We noted that the documents included records of the various interview processes, including the questions that were asked and the scores of the various candidates and that on the face of it the Claimant had not been the highest scoring candidate in any of the relevant processes. We also noted that Mr Leathley and Mr Vincent did not sit on any of the interview panels, so the Claimant would have to make good the proposition that they had been behind the scenes manipulating what was going on because of their view about race or religion.

15. In the course of the discussion, the Tribunal asked the Claimant to identify the evidence that he said led to an inference that the various individuals who were involved in his grievance from 2016 onwards had deliberately delayed dealing with it because of his race or religion. At that stage he very fairly indicated that he was not saying that any of those individuals had deliberately delayed dealing with his grievance because of his race or religion. The Tribunal checked with him and he confirmed that he was not saying that the handling of his grievance was discriminatory.

16. That meant that the last act of discrimination the Claimant was complaining about was the appointment of Ms Steele, which he found out about in about mid-November 2016. In view of this change in the way his case was put, compared with the what was recorded by Employment Judge Smith on 1 June 2018, the Tribunal decided that it would be proportionate to deal with the question whether the claims were brought within the statutory time limit as a preliminary issue at the start of the hearing. The Tribunal therefore heard evidence from the Claimant about the delay in presenting the claim and heard submissions from Ms Brewis. We indicated to the Claimant that we would let him respond in the morning so that he had overnight to reflect on what he wanted to say.

Issues

17. The Tribunal assumed for the purposes of this part of the proceedings that there had been a course of discriminatory conduct over a period that ended in November 2016 with the appointment of Ms Steele. The issue the Tribunal would therefore be deciding was, assuming there was conduct extending over a period that ended in mid-November of 2016, were the complaints brought within the three months (plus early conciliation extension) of that date? If not, was it just and equitable to extend time for bringing them?

The facts

18. Having heard evidence from the Claimant the Tribunal made the following relevant findings. The last act of discrimination he is complaining of took place in mid-November 2016. The Tribunal asked him when he first thought that the matters he is complaining about were being done because of his race or his religion. The answers he gave were inconsistent. Initially, he suggested that from a very early stage that he thought that Mr Leathley was acting in this way because of his race or religion. During the course of his evidence, he made an allegation of a discriminatory act by Mr Leathley in about 2010. He confirmed on the second morning that it was 2010. That allegation had never been made before in the documents, the witness statement or the pleadings. The Claimant said that from that point on he thought that it was his race or his religion that lay behind what Mr

Leathley was doing. However, later in his evidence he said that actually it was not until November 2016 looking back that he put all these events together and thought that what was going on related to his race or religion.

19. The Claimant started ACAS early conciliation on 21 December 2017 and his certificate was issued on 3 January 2018. He presented his ET1 claim form on 23 February 2018. That means that there was a substantial delay between the last act he complained of and the presentation of his ET1 claim form. The Claimant was asked about the reason for the delay. It was not addressed in his witness statement, so he gave oral evidence about it. He explained that he did not really think there was a delay because he had simply been exhausting the Respondent's internal grievance process. As soon as that process had been completed he set about contacting ACAS and then bringing his claim. He said that it was the Respondent who had taken a year to deal with his grievance and that in fact therefore there was no delay.

20. The Claimant also said that he had read somewhere that he had to exhaust his internal processes before he could bring an Employment Tribunal claim. He could not remember where he had read it. He thought it might be in the Respondent's grievance policy but that document was in the Tribunal file and it did not say anything of the kind. The Claimant came this morning having tracked down the document he said he had read. The Tribunal managed to obtain and print out copies of it for him. It is a guide produced by ACAS on asking and responding to questions of discrimination in the workplace. On page 4 of the document there is a section about resolving disputes. It says, "Before taking a claim to an Employment Tribunal … an employee or job applicant should normally use the employer's grievance procedure or other internal dispute resolution mechanism – these should be the first port of call. If internal procedures do not result in an acceptable outcome in circumstances that might result in an Employment Tribunal claim ACAS will provide a free conciliation service early conciliation which may avoid the need to make a claim." On the next page of the document, page 5, there is the following paragraph:

> Whilst these steps can help resolve a dispute an employee or job applicant must keep in mind that there is normally a time limit of three months from the day that gave rise to the complaint to making a claim at an Employment Tribunal …

21. Plainly, the document does not say that somebody has to exhaust the internal process before they can bring a Tribunal claim. Indeed, it clearly flags up the time limit for bringing a Tribunal claim. In any event, the Claimant explained he had not read the guidance in November or December 2016. He only read it after the internal process was concluded in November 2017. The Tribunal found that the Claimant did not read any policy or document in about November or December 2016 that told him he must exhaust the Respondent's internal process before he could bring a Tribunal claim.

22. The Claimant explained that he found out about ACAS and early conciliation by carrying out some internet research after his grievance appeal was rejected. No reason was identified why he could not have carried out internet research a year earlier, when he first suspected that he was being discriminated against because of his religion or belief. The Claimant is not a member of a trade union and he gave evidence that he could not afford legal advice, but information about bringing Tribunal claims and time limits is available on the internet and, when the Claimant looked for it he was able to access it.

Legal principles

23. The time limit for bringing claims of discrimination is contained in s 123 Equality Act 2010. Under s 123(1)(b) a Tribunal has a wide discretion to extend time if it thinks it is just and equitable in the circumstances. However, it is well established that there is no presumption that time should be extended and that it is for the Claimant to persuade a Tribunal that it is just and equitable to extend time. The Tribunal has to approach such issues as a matter of fact and judgment on a case by case basis. The factors that are considered by the civil courts under s 33 Limitation Act can provide a helpful check list and the Tribunal had regard to those. In particular, the Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing an extension and should have regard to the other circumstances. These include the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action and the steps taken to obtain appropriate professional advice.

24. In a case called *Apelogun-Gabriels* [2002] ICR 713, the Court of Appeal made clear that pursuing an internal grievance process can be a reason for concluding that it is just and equitable to extend time, but it is only one factor and it is not necessarily determinative of the question.

Application of the legal principles

25. Applying those principles in this case the Tribunal assumed that there was conduct extending over a period ending in mid-November of 2016. The claims were not brought within three months (plus early conciliation extension) of November 2016. The Claimant started early conciliation in December 2017 and presented his claim on 23 February 2018. That is a delay of around 12 months. Given that the primary time limit is a time limit of three months that is a very significant delay.

26. The only reason the Claimant identified for the delay is that he was pursuing his internal grievance. The Tribunal found that he was not misled into thinking he had to do that. The document he referred to did not in fact say that he had to exhaust the internal process before he could bring a Tribunal claim, but in any event he did not read it until after his grievance appeal had been rejected. The time limit had already expired many months earlier. The Tribunal considered that the Claimant could have carried out internet research to find out about his rights and what he needed to do when he thought he had been discriminated against, but he did not do so. The grievance he was pursuing was itself, in part, very substantially out of time. To the extent that he was complaining in that grievance about the events in 2013 the Respondent did not deal with it.

27. The substantial length of the delay is a factor that weighs against extending time. The fact that the Claimant was pursuing an internal process and that that took a long time is a factor that weighs in his favour, but it is not a determining factor.

28. The Tribunal considered the impact of the delay on the cogency of the evidence and noted that in the witness statements sometimes the witnesses had indicated that they did not have a particularly good recollection of the things that were being complained about. For example, Mr Turner and Mr Leathley did not particularly remember the reference that they had given in 2014. The Tribunal also noted the Claimant's mention for the very first time of an alleged discriminatory remark by Mr Leathley in 2010. That is now eight years ago and clearly the Claimant places some weight on it in his suggestion that it was race or religion that lay behind Mr

Leathley's conduct. Mr Leathley's ability to deal with an allegation about a remark said to have been made eight years ago is plainly impaired further by the delay. Those factors weigh heavily against an extension of time.

29. Even once the Claimant was aware of the time limit for bringing a Tribunal claim, which he found out about when he carried out his internet research and through ACAS, it still took almost three months before his ET1 claim was presented.

30. The Tribunal stepped back and looked at the balance of prejudice to each party. Plainly if time was not extended there would be significant prejudice to the Claimant. He would not be able to pursue his claims of discrimination at all and that weighs in his favour. However, on the other hand there would be real prejudice to the Respondent in allowing these very stale claims to proceed with the time, expense and difficulty that that would pose.

31. Tribunals are also permitted to take into account the merits of the claim in deciding whether time should be extended or not. As the Tribunal has made clear, we have not yet heard evidence from the witnesses and the Claimant has not had the opportunity cross-examining them. In so far as we can place any weight at all on the merits in those circumstances, we simply say that at present it is not clear what evidence the Claimant will rely on in inviting the Tribunal to draw an inference of discrimination. To that extent this weighs against extending time.

32. Weighing all of the relevant factors, the Tribunal found that the balance lay in favour of the Respondent and that it was not just and equitable in the circumstances to extend time.

Employment Judge Davies

15 February 2019