Case Number: 1405151/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr P Passmore	**v**	University of Exeter

Heard on the papers **On: 26 November 2019**

Before: Employment Judge O'Rourke

RECONSIDERATION JUDGMENT

REASONS

1. Following a Preliminary Hearing Judgment of 30 August 2019, the Respondent applied, on 20 September 2019, for reconsideration of part of that Judgment, namely that the Tribunal had jurisdiction to hear the claim of disability discrimination (failure to make reasonable adjustments), despite it not being brought within time. The Respondent also requested the recording of the fact of a disputed date, as to the last detriment relied upon.

2. The Claimant was invited to respond and did so, eventually, on 31 October 2019.

3. After some prompting for a response, both parties agreed that the application could be considered by way of these written submissions and without the requirement for a hearing.

The Law

4. Rule 72 of the Rules of Procedure sets out the procedure for reconsideration, in particular that in sub-paragraph (1), an application may be dismissed if the Tribunal considers that there is no reasonable prospect of the Judgment being varied or revoked.

5. The case of **Fforde v Black UKEAT 68/80** indicates that the interests of justice ground only applies when something has gone radically wrong with the procedure, involving a denial of natural justice, or something of that order.

6. The case of **Redding v EMI Leisure Ltd UKEAT 262/81** sets out that 'the interests of justice' relate to the interests of justice to both sides. The reconsideration process is not there to permit parties a '*second bite of the cherry'*.

7. The 'Overriding Objective' (Rule 2 of the Rules of Procedure) sets out that cases be dealt with in ways which are proportionate to the complexity and importance of the issues and avoiding delay and expense.

The Limitation Point

8. The Respondent contends that the Tribunal's distinguishing of the case of **Apelogun-Gabriels v Lambeth London Borough Council [2002] EWCA ICR 713**, from the facts of this claim, leading it to decide, therefore that that authority did not need to be followed, was in error.

9. The Tribunal's conclusions on that issue were as follows:

8 'Conclusion on Limitation. I find that while the claim is out of time, it would, applying s.123(1), be just and equitable to extend time, for the following reasons:

a. The discretion granted to a tribunal to do so is a wide one.

*b. I consider, in the particular circumstances of the Claimant's planned career that it was entirely legitimate of him to attempt to exhaust the Respondent's internal procedure, before embarking on a tribunal claim. I accept that rightly or wrongly, he perceived that by bringing such a claim, his reputation would be adversely affected within the academic community, thus greatly limiting his future career opportunities. I don't consider that the judgment in **Apelogun-Gabriels** prevents me from coming to that conclusion. While that judgment indicated that such delay would not, of itself, justify, extending time (as perhaps suggested by previous authorities), it was, nonetheless, a factor to be taken into account in the overall assessment. I note also that the appellant in that case had held the role of an accounting assistant, which I find a distinguishing feature from the circumstances of the Claimant and his fears as to his 'card being marked' in the wider academic community.*

c. Once he knew for certain that his concerns were not going to be addressed, at least to his satisfaction, he very promptly brought this claim.

d. The balance of prejudice falls firmly, in my view, against the Claimant, as he would be debarred from seeking recourse for his complaint of disability discrimination, whereas the Respondent will have the resources necessary to meet such a claim, without undue prejudice to it.'

10. The Respondent raised the following points, in particular:

a. Distinguishing Mr Abelogun-Gabriels' case from that of the Claimant, because the former was an accounting assistant and the latter a

teaching assistant was unjustified, as claimants in many industries may experience concern that bringing litigation may adversely affect their career prospects. There was nothing unique, it was submitted, about the Claimant's circumstances that justified the distinction made. On this point, the Claimant submitted that describing his role as a teaching assistant ignores the work he had done as a pre and post-doctoral research assistant, the '*destruction of my connections within my academic network vital for an early career researcher and the long-term damage to my career by taking formal action. As a result, I had to completely switch careers and currently work in an IT support role with the NHS. I have been cut off from connections that would enable me to continue working towards establishing a career in academia.'*

b. In considering that the balance of prejudice fell '*firmly'* in the Claimant's favour, the Tribunal placed too much reliance on the Respondent's ability, as a large organisation, to bear the cost of meeting the claim. The Tribunal also failed to take into account that the claim is a weak one (relying on comments made by the Tribunal) and that effectively the Respondent will be put to the likely irrecoverable cost of defending a claim that was bound to fail. The Claimant disputed that his claim was weak.

c. There is a dispute of fact as to when the 'last alleged act of detriment' took place. The Claimant stated that it was in the period 4 to 8 June 2018 (as recorded in the Judgment), but the Respondent states that (if it occurred), it can have been no later than 10 April 2018. As this matter is something on which the Tribunal did not hear evidence, the issue remains one in dispute, to be determined in due course and therefore the Judgment will be amended, shortly, to indicate that dispute.

Findings

11. **Apelogun-Gabriels** is not authority that the delaying of Tribunal proceedings, while awaiting the outcome of grievance procedures, can never be a factor in deciding that limitation should be extended. Instead, it set out that this factor would not, of itself, justify extension, but could be taken account of in the overall assessment, which, in its Judgment, the Tribunal did.

12. The decision to distinguish the Claimant's situation from that of Mr Apelogun-Gabriels is maintained. The latter was an accounting assistant in a large London council, with likely many other such opportunities available to him in other similarly large London councils, or the finance departments of a host of businesses or in accountancy practices. The Claimant was not just a 'teaching assistant', but somebody hoping to embark on a career in Academia, where, I take judicial notice, academics working in similar fields will often know each other, having worked together in the past, attending conferences together and peer-reviewing each other's work. Thus, having one's 'card marked' as a potential 'trouble-maker' in such an environment will inevitably have potentially more far-reaching consequences for the Claimant's

career than that of Mr Apelogun-Gabriels, indicating that therefore, it was reasonable for the Claimant to have awaited the outcome of the grievance procedure, before embarking on these Tribunal proceedings.

13. I had no reason to doubt that the Claimant (unlike Mr Apelogun-Gabriels) was unaware of Tribunal limitation periods.

14. It is, perhaps, an over-statement, in the judgment, to state that the balance of prejudice falls 'firmly' in favour of the Claimant, but I do, nonetheless, find that it falls in his favour. He would be debarred from bringing any claim against the Respondent and while references were made by the Tribunal to the evidential difficulties he may face in proving his claim, such difficulties are routinely the case, particularly in discrimination cases. The Tribunal heard no evidence on the detriment issue or saw any documentation in relation to it and therefore was in no position to consider, in the balancing exercise, the claim to be without any merit.

Conclusion

15. For these reasons, therefore, the Tribunal refuses the Respondent's application for reconsideration of its Judgment.

Employment Judge O'Rourke

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Dated: 26 November 2019