



EMPLOYMENT TRIBUNALS

Claimant: Mrs R Malhi
Respondent: Mitie Limited
Heard at: Birmingham **On: 13 March 2020**

Before: Employment Judge Flood
Appearance:
For the Claimant: In person
For the Respondent: Ms Hosking (Counsel)

JUDGMENT

The claimant's complaint of race discrimination was presented after the expiry of the statutory time limit. It is not just and equitable to extend time to the date of presentation. The claim is dismissed.

REASONS

1. By a claim form submitted on 22 September 2019, the claimant brought complaints of race discrimination.
2. The case was listed for a preliminary hearing and came before me **“To consider if the claim was submitted in time and if it was not whether there are any grounds on which time could be extended”**.
3. The claimant attended and gave evidence by responding to questions from the Tribunal and was cross examined by Ms Hosking. Both parties then made submissions. I adjourned the case for a reserved decision to be made.

The Issues

4. As the claimant's claim was made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates, was the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - a. Why were the complaints not made to the Tribunal in time?
 - b. In any event, is it just and equitable in all the circumstances to extend time?

The relevant law

5. **Section 123 of the EQA**, which specifies time limits for bringing employment discrimination claims, provides so far as relevant that:

"(1) ... proceedings on a complaint ... 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."
6. The language used ("*such other period as the employment tribunal thinks just and equitable*") gives the employment tribunal the widest possible discretion.
7. **Section 33(3) of the Limitation Act 1980** (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (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 or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.
8. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (**Southwark London Borough v Afolabi [2003] IRLR 220**).
9. The Court of Appeal in **Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA** made it clear that there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.
10. In the recent case of **Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640** the Court of Appeal however stated that the "*such other period as the employment tribunal thinks just and equitable*" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "*factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent*". There is no requirement that the tribunal had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour.

The relevant facts

11. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 May 2019 is potentially out of time, so that the tribunal may not have jurisdiction

12. The claimant's employment terminated by reason of redundancy on 31 March 2019 but she confirmed at the hearing that the last act of race discrimination she was relying on for the purposes of this claim is alleged to have taken place on 10 January 2019. This is an allegation of direct discrimination/harassment. She commenced early conciliation on 21 May 2019 and presented her claim on 22 September 2019, so clearly on its face both the commencement of early conciliation and the presentation of her claim are well out of time.
13. The claimant gave evidence today on the course of events leading up to her decision to issue proceedings.
14. The claimant believed that she had been subject to race discrimination and knew of the ability to bring a Tribunal claim about it at the time she says the last incident happened on 10 January 2019. She confirmed that also knew that there was a three-month time limit for bringing a Tribunal claim.
15. The claimant contended that she had been subject to bullying and race discrimination throughout her period of employment. She has raised complaints before, and this included a grievance in 2015 but says that she did not receive a satisfactory outcome. The claimant says she emailed her line manager about the January incident (and contends it was witnessed) and mentioned that there was race discrimination. She decided that she did not want to pursue it formally at the time. The main reason for this was because the respondent was going through a redundancy process at the time involving selection and application for new roles. The claimant said was afraid of losing her job and did not want to have an issue that might count against her. She said she was focussing on her career and securing employment during this time.
16. The claimant did not secure an alternative role during the redundancy consultation process and was served with notice of redundancy during February 2019. She was on garden leave from the middle/end of February and during March and her employment ended on 31 March 2019 by reason of redundancy. The claimant said that once she knew that she no longer had to be concerned for her job and career as she would not be returning to the respondent to work, she decided to pursue a grievance. She was discussing this with her trade union representative during March and her grievance was submitted to the respondent on 2 April 2019. She gave evidence that there were many delays in dealing with this and she had to chase the respondent for a response. A grievance meeting was held on 14 May 2019 and she received the outcome in a letter dated 24 July 2019. She appealed against the outcome on 28 July 2019 and an appeal hearing was held on 14 August 2019. Her appeal was turned down and the outcome confirmed in a letter dated 20 August 2019.
17. The claimant said that she was supported by her trade union representative during the grievance and grievance appeal process and he attended the meetings with her. There were discussions with her trade union representatives about possibly bringing a claim in the Tribunal and what the time limits were.
18. The claimant said that during the period when she was going through the grievance and appeal, she made requests for information from the respondent. She said that she made a subject access request but that there were continual delays in providing her with the information. She told me that she needed the information in the various e mails she had sent to her managers and the HR department which were contained on her laptop. The claimant said she could not put her claim form without the evidence from the respondent.

19. The claimant first contacted ACAS on 21 May 2019. She cannot recall exactly how this was done but things she may have done this via the ACAS website. Her period of early conciliation came to an end on 19 June 2019 when her early conciliation certificate was issued. She was not aware that she had to submit her claim within one month of the issue of the early conciliation certificate.
20. She explained that as soon as she received the grievance appeal outcome (on 23 August 2019) she got in touch with ACAS who gave her a telephone number to contact and she started to prepare her Tribunal claim. This was submitted on 22 September 2019.
21. The claimant's father was seriously unwell during 2019 having been diagnosed with cancer. He died on 4 November 2019.
22. The claimant said that she did not put the Tribunal claim in earlier despite knowing of the 3-month time limit as she decided to pursue the internal grievance process to resolve the matter. She wanted to receive an outcome and an apology from the respondent. At this point she said she had no intention of bringing a Tribunal claim and it was when she was informed on 23 August 2019 that she had no further right of appeal at the respondent that she decided to pursue Tribunal proceedings.
23. She admitted that she could not explain the gap between receiving the grievance appeal outcome on 23 August and putting her claim in on 22 September but says this may well have been the time when her father started to deteriorate in his health. She said she wanted to concentrate on her family during this period.

Conclusion

24. The claimant submits, that the delay in issuing the discrimination claim was caused by the respondent. She says it was their delay in not providing her with the information she needed that caused her to be unable to submit her claim earlier. She says she has evidence of the respondent consistently failing to answer and acknowledge her requests. She says her family circumstances were constantly changing during this time and she had no choice but to focus on these. She decided to pursue the internal grievance process and to wait to see if her grievance was accepted or it wasn't, and it was only after the appeal that she knew she had no choice but to bring a Tribunal claim. She therefore asks for an extension of time on just and equitable grounds.
25. Ms Hosking for the respondent submitted that factors that I should take into account are the promptness with which the claimant acted once she knew of the facts of the discrimination and became aware of the time limits; the length of and reasons for the delay and what steps she took to get professional advice. She reminds me that there is no presumption that time should be extended. She says that although the circumstances do not have to be exceptional, that extending time is still the exception rather than the rule. The burden she says is on the claimant to persuade the Tribunal to extend time. She points out that the claimant had advice from her union (skilled advisers) throughout the process. She submits that the initial reason provided by the claimant that she did not want to lose her job no longer applied by 31 March. She accepts that she was aware and had been told by her union representative of time limits but made a conscious decision that she wanted to pursue the grievance rather than bring a claim. She says that the fact that the claimant was pursuing an internal appeal

does not entitle her to an automatic extension of time and that even when she had the outcome to her appeal she waited a further month before starting proceedings. She concludes that in the absence of a valid explanation for the delay both before and after the ACAS notifications and where the claimant was aware of the time limits but chose not to follow them, the Tribunal should not exercise its discretion to grant an extension.

26. I have considered factors set out above in the relevant case law. I take particular note of the directions given by the Court of Appeal in the **Abertawe Bro Morgannwg University v Morgan** case above.
27. The length of the delay was 6 weeks in the case of commencing early conciliation and a further 4 months in the case of presenting her claim, which is not insubstantial. The claimant did not act promptly when she was aware that she had the ability to bring a claim.
28. The main issue that was discussed and which I consider relevant for me to consider here would appear to be the reason for the delay in issuing proceedings. The matters raised are that the respondent caused the delay because of fear of losing her job and then lack of co-operation in providing what she says were necessary documents; the fact that she wanted to pursue the internal grievance process (which took a significant amount of time) and the fact that she was dealing with the serious illness of her father during this period.
29. I accept that the claimant may not have wanted to pursue matters and “rock the boat” whilst in the throes of a redundancy consultation exercise (albeit she would have the protection of the laws on victimisation). However, once she was served with notice and once her employment ended, this was no longer a valid concern. In terms of the respondent’s lack of co-operation with her subject access request and other requests for information, this is something that particularly concerned the claimant. She referred to having to chase and follow up the respondent many times and said she was unable to put her claim together without the various e mails and other documents held on her laptop at the respondent. However, I note from her claim form that whilst she makes allegations of race discrimination mentioning generally what she says was happening, there is no detail in there in terms of dates and specific events. I am not clear what the claimant received in her subject access request that enabled her to submit the claim as it was submitted in September 2019. She makes general allegations of racism, a failure to investigate a prior grievance and racially bullying but does not include any real detail. It is hard therefore to see how information from a subject access request or otherwise from the respondent would have impacted her ability to submit this claim earlier.
30. I have also considered the decision of the claimant to pursue the respondent’s internal grievance procedure to its conclusion rather than submitting her claim earlier. It is understandable that the claimant looked first to internal dispute resolution rather than go straight to litigation. There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer’s grievance procedure before starting legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit, but it is only one factor to be considered. In this case, although the claimant was pursuing the matter internally, her grievance had been submitted after she had left employment and the claimant was clear that she had believed

she was a victim of discrimination throughout her period of employment. She pursued a grievance before and contended it did not produce a satisfactory outcome. She knew of Tribunal time limits from January. Therefore I did not think that the fact of pursuing an internal appeal was a determinative factor

31. I am very sympathetic to the difficulties that the claimant was having with her father being seriously unwell during this time. This cannot have been easy and undoubtedly had an impact. However, the claimant was involved in the grievance and appeal procedure, attending meetings and dealing with her subject access request throughout this difficult period so was managing to carry out tasks that she felt were necessary to enforce her rights.
32. I note that the claimant was supported by her trade union representative throughout. There is no suggestion that they provided any advice that was misleading as the claimant herself was aware of time limits and that her claim had been presented outside these limits.
33. I was not addressed on the balance of prejudice by either party, but I have considered this. The claimant will clearly be prejudiced by not being able to pursue her claim as it will bring an end to proceedings entirely. The respondent is prejudiced by having to deal with claims raised some considerable time after the limitation period had expired. The respondent has not raised any issue with delay as a result of late presentation of the claim. This would apply to both parties in any event. This issue is therefore broadly neutral.
34. It is clear from the case law that it is not a question of the Tribunal being able to exercise jurisdiction just because it would be kind. There must be some thing raised by the claimant which convinces me that it is just and equitable to do so. Considering all the matters raised above, I am not able to conclude that this has been done. It is unfortunate that this means the claimant will now not be able to pursue these claims. However, time limits are an important element of litigation and go to the tribunal's jurisdiction. They are not simply procedural matters that can be disregarded lightly. Having considered all the factors above in particular the length of the delay and reasons for it and looking at the balance of prejudice, I conclude that the claim has not been presented within "such other period as the employment tribunal thinks just and equitable" in this particular case and so is dismissed.

Signed by: Employment Judge Flood

Signed on: 13 March 2020