



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Simpson  
**Respondent:** Burberry Plc (Burberry Limited)  
**Heard at:** East London Hearing Centre  
**On:** 2 July 2020  
**Before:** Employment Judge McLaren

## Representation

Claimant: Ms R Hodgkin, Counsel  
Respondent: Mr B Gray, Counsel

**JUDGMENT** having been sent to the parties on 16 March 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

# REASONS

## Background

1. The claimant was employed as a department manager by the respondent, a luxury fashion house. He joined the respondent on 5 March 2005 and his employment ended on 16 August 2019. He brought claims of unfair dismissal, direct race discrimination and failure to pay notice pay.

2. This was a remote hearing to which both parties consented. I was provided with a bundle of documents amounting to some 128 pages. I heard evidence from the claimant and was provided with written skeleton arguments and heard oral submissions from both representatives.

## Issues

3. The claimant had brought a claim for race discrimination arising from the failure to be promoted. The promotions about which he complains took place in April 2017, June 2017 and May 2018.

4. The question to be determined was whether the failure to be promoted was an act or omission. If the latter, then the claim was potentially in time. If the former, then the claim was submitted outside the three months' time window and I was asked to consider whether it would be just and equitable in all the circumstances to extend time.

Finding of facts

5. The claimant accepted that he did not raise any complaint about his not being promoted because he is black at any time in April or June 2017 or in May 2018.
6. He explained that he spoke to ACAS in May 2019 after the disciplinary process had started. In that conversation with ACAS he then became aware that the failure to achieve promotion was also an act of discrimination.
7. The claimant raised a grievance about his failure to be promoted on 10 July 2019. There is no reference in his grievance letter to the concept of discrimination and promotion. He does complain that he was overlooked but does not link this to his race. The claimant told me that, despite the fact he made no reference to it in the letter, he did have this in mind, having spoken to ACAS.
8. It was put to the claimant that, not only was discrimination not raised in the grievance, he did not raise lack of promotion as discrimination in any of his 33 points of appeal. Only one of those 33 points refers to discrimination and that is on dismissal. Again, the claimant explained this by saying that the focus of the appeal was his dismissal and that was why it did not reference promotion, not because he did not think the failure to be promoted was discrimination.
9. I prefer the evidence of the letters written at the time to the claimant's oral evidence of his state of mind as explained at this hearing. Accordingly, I find the first time he raises complaints that failure to be promoted was an act of discrimination was within his claim form submitted in December 2019
10. In submissions it was put that the claimant may also have delayed raising this as an issue discrimination because he feared repercussions and perhaps wanted to wait until he secured promotion. There was no evidence given in support of this.

Relevant Law and Submissions

11. S123 (1) (b) Equality Act 2010 sets out the relevant time limits for bringing a claim. The question of when the time limit starts to run is more difficult to determine when the complaint relates to a continuing act of discrimination or to a discriminatory omission S.123(3) EqA makes special provision relating to the date of the act complained of in these situations. It states that
  - a. conduct extending over a period is to be treated as done at the end of that period — S.123(3)(a)
  - b. failure to do something is to be treated as occurring when the person in question decided on it —
  - c. S.123(3)(b). In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it — S.123(4).

12. I was directed to Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA on the question of acts or omissions. On behalf the claimant it was submitted that while the factual circumstances were different in the case of Abertawe, looked at from the claimant's perspective, which is the appropriate perspective, the failure to gain promotions was not an act but were omissions. It was the respondent's failure to act in promoting others above the claimant that was the act of discrimination. In those cases the relevant time period runs from the point at which the claimant could reasonably have concluded that the omission was not going to be remedied. It was submitted that this was the conclusion of the internal grievance process on 16 September 2019 and the claim was therefore in time.

13. On behalf the respondent it was submitted that these are not omissions but acts. If they are to be seen as omissions, then the Equality Act section 123 (3)(b) specifies that for the purposes of the section on time limits, failure to do something is to be treated as occurring when the person in question decided on it. The next subparagraph then provides that, in the absence of evidence to the contrary, the person is taken to decide on a failure to do something when they do an act inconsistent with doing it. It was put to me that the act of appointing other people was inconsistent with the respondent's having decided to fail to do something.

14. On the factors to consider in the exercise of the discretion I considered British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT which suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980 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 has cooperated 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;
- e. and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

15. This is a useful guide but is not to be followed slavishly, the checklist in S.33 is not a legal requirement but should be used as a guide. There are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time. Those are the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.

16. In respect of the just and equitable extension of time, the claimant's representative submitted that the claimant had given a reason for the delay, namely only becoming aware of his rights once he spoke to ACAS, and that the respondent's evidence would not be affected by the delay. It was the claimant's position that the respondent had been aware of the claim of discrimination since September 2019 and was fully aware of the

complaint about promotions once this was raised in the grievance in July 2019. The respondent had been able to plead to the case in their amended reply and they would face little or no prejudice if this claim was pursued. There would be significant prejudice to the claimant if he were not able to pursue the claim which was part and parcel of the discriminatory conduct.

17. On behalf of the respondent, it was submitted that no reason has been given for the failure to bring this claim, let alone a good reason. The respondent would suffer significant prejudice if this claim were allowed since the focus of the investigation into the grievance had not been on discrimination. The respondent would now be asked to deal with allegations which rely on inferences from events that are a number of years old. Documentation is only kept for a period of six months, some of the relevant witnesses have left employment and all would be being asked to account for subjective and evaluative decisions taken over two years ago. The prejudice to the respondent would be considerable

### Conclusion

18. I considered the submissions made and the evidence I heard. If indeed the failure to promote is an omission and not an act, then I prefer the respondent's submissions on this point. I conclude that the respondent in promoting other people over the claimant did an act which is inconsistent with deciding on a failure to do something. I conclude therefore that in this case the relevant time limit runs from the date on which others were promoted and not from the date at which the grievance concluded. The claimant's case is not in time.

19. I then considered whether it would be just and equitable to extend time. Based on my findings of fact the claimant has not provided any reason why the claim was late. On his evidence he could have raised it at least from when he spoke to ACAS. Further, I am persuaded by the respondent's position that the prejudice in this case would be on their side if the claim were to be permitted. There would be significant difficulties in providing contemporaneous documents or relevant witness evidence to address the claim which has not been investigated. I accept that there will be some prejudice to the claimant if he is not able to pursue this claim, but he is nonetheless able to pursue his claim for discrimination on dismissal and, on balance, I find the prejudice weighs more heavily on the respondent if this claim were permitted.

20. For these reasons I have concluded it is not just and equitable to extend the time limit in the circumstances of this case.

**Employment Judge McLaren  
Date: 12 August 2020**