



THE EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

Claimant: Mr M O'Ceafarcaigh

Respondent: Yorkshire Water Services Limited

Heard at: Leeds (by video link) **On:** Wednesday 14 October 2020

Before: Employment Judge S A Shore

Claimant: In Person

Respondent: Mr C Maclean, Solicitor

JUDGMENT

The Judgment of the Tribunal is that:-

1. The claimant's claims of direct race discrimination contrary to section 13 of the Equality Act 2010 are struck out in their entirety because they were not presented within the period of three months less one day of the last act or omission complained of, as required by section 123 of the Equality Act 2010 and I do not find it would be just and equitable to extend the time limit.

REASONS

BACKGROUND

1. The claimant began early conciliation through ACAS on 17 January 2020 and received an early conciliation certificate dated 1 February 2020. By a claim form presented to the tribunal on 22 April 2020, he brought claims of race discrimination.
2. The case came before Employment Judge Brain on 13 July 2020 in a telephone private preliminary hearing. The claimant confirmed that his claims related to four matters. The fourth of these has been resolved to the satisfaction of both parties,

so there is no need to set out the details of it here. The other three claims were allegations that:

- 2.1. The respondent failed to make arrangements for the claimant to benefit from access to its pension scheme;
 - 2.2. The claimant was treated less favourably than two colleagues in the respondent's water regulations team in that they were offered the opportunity to participate in a scheme that allowed them time off work to take training courses, whilst the claimant was not, and;
 - 2.3. The claimant was refused a 12-month career break in order to take a course in agriculture, which was less favourable treatment than the respondent would have afforded others who made such a request.
3. The claimant says that the reason for the less favourable treatment was his Irish nationality. At the private preliminary hearing, the claimant had confirmed that a claim of discrimination because of his religion was not to proceed. He also confirmed that allegations of harassment were also not the subject of a claim, but were relevant background information.
 4. Employment Judge Brain made orders for the management of the case and ordered it to be listed for today's public preliminary hearing to determine if the claimant's claims of discrimination were presented within the time limit set out in section 123 of the Equality Act 2010.
 5. The parties prepared an agreed bundle, which ran to 121 pages. The claimant provided a witness statement in support of his case. The respondent produced witness statements from Jackie Wise and Ruth Brotherton, who are managers in its business who dealt with the enquiries made by the claimant about his pension and other issues.
 6. The hearing was conducted by video link on the CVP platform. We had some problems ensuring that all the participants were logged in and able to see, hear and be heard by one another and I am grateful to the assistance from the clerks in resolving technical issues and for the patience and good humour with which the participants dealt with some long and frustrating delays. Once the technology was fixed, however, we were able to proceed without further interruption.
 7. At the start of the hearing, I went through the overriding objective of the Tribunal with the claimant and made sure that he understood the purpose of today's hearing.

FINDINGS OF FACT

8. Nearly all the facts that related to this hearing were not disputed. I therefore find that it was undisputed (or indisputable) that:
 - 8.1. The claimant began his employment with the respondent as a Water Regulation Inspector on 10 June 2013.
 - 8.2. He resigned by email dated 30 August 2019, giving four weeks' notice that he said expired on 27 September 2019. The respondent says that the effective date of termination if four weeks' notice was given would

be 28 September 2019. In giving my oral judgment, I indicated that I had approached the case on the basis that his effective date of termination was 28 September 2019, as this gave the claimant one less day where he was late in filing his ET1. In writing up these reasons, I have looked at the papers in more detail and find that the claimant's effective date of termination was 28 September 2019.

- 8.3. The claimant had raised the issues that are still live in his case some time before his resignation and engaged in correspondence with the respondent after his effective date of termination.
 - 8.4. He started early conciliation on 17 January 2019 and was given an early conciliation certificate on 1 February 2020.
 - 8.5. The ET1 was filed on 22 April 2020.
 - 8.6. For the purposes of this judgment, I am taking the claimant's effective date of termination – 28 September 2019 – as the date of the act to which the complaint relates as he stated in the private preliminary hearing on 13 July 2020 that there was no treatment about which he complains that happened after the end of his employment.
 - 8.7. I therefore find that the claimant did not bring his claim before the period of three months starting with the date of the act to which the complaint relates, as he did not start early conciliation on or before 27 December 2019 and issued proceedings on 22 April 2020.
9. At the private preliminary hearing, the claimant had said that he had delayed in presenting his claim because he was engaged in correspondence with the respondent about the first two of his claims. There was no correspondence about the third matter beyond his resignation.
 10. The claimant gave evidence from a statement dated 21 September 2020. In his statement, he says that he was misled on the timescales of the response from the respondent. He says that his nationality was mocked on countless occasions. He tried to raise the issue, but was not listened to. The rest of his statement dealt with the merits of his claims.
 11. In answer to brief cross-examination questions, the claimant said he was not aware of the relevant time limits for claims. He realised that there was possibly a time limit. ACAS mentioned it to him in February 2020. He accepted that he would have been aware of the time limit at that time. He confirmed that he was not ill or incapacitated to a degree that prevented him from lodging his claim at any time.
 12. In answer to questions from me, the claimant confirmed that he had never made a written complaint about being discriminated against because of race before he issued proceedings. He wanted to resolve his issues and never thought it would go this far. The trigger for his contacting ACAS was that nothing was happening. He didn't know what to do, so he went online and ACAS came up via the gov.uk website.
 13. The claimant said that he wanted a sensible outcome to his complaints. He had not known what to do.

14. The respondent's witnesses set out the steps they had taken to resolve the claimant's issues.
15. Mr Maclean had prepared a succinct set of closing submissions to which Mr O'Ceafarcaigh responded.

DECISION

16. The principles on extensions of time on a just and equitable basis are best set out in **Robertson v Bexley Community Centre [2003] EWCA Civ 576**. In paragraph 25 of that judgment Auld LJ stated that:

"It is also of importance to know that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an appeal tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the appeal tribunal if it were deciding the issue of first instance would have formed a different view. As I have already indicated, such an appeal should only succeed where the appeal tribunal can identify an error or principle of law making the decision of the tribunal below plainly in this respect."

17. In the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13**, it was noted that a litigant can hardly hope to satisfy the burden on him to show that time should be extended unless he provides an answer to two questions (§52):

"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

18. There is no requirement on me to hear the full merits of the case before determining whether the Tribunal has jurisdiction to hear it.
19. The discretion to grant an extension of time under the "just and equitable formula" had been held to be as wide as that given to the civil courts by section 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions. Under that section, the court is required to consider 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.

20. I find that the claimant was well aware of his potential claims for race discrimination because he complained about the first two instances whilst still employed. He may not have put a label of discrimination on them and may have been hoping for an amicable settlement, but he must have given some thought to what he would do if no settlement was forthcoming. I find that he was not aware of the limitation date, because his evidence on the point was not challenged.
21. However, I do not find that the claimant's lack of knowledge was reasonable. The reason I make this finding is that he used the internet to research the possibility of a claim and used the gov.uk website to find ACAS. He is an intelligent man and should have made enquiries much earlier than he did.
22. The same principles apply in the just and equitable arena to those in the reasonably practicable arena in respect of the claimant's ignorance of the law.
23. When considering whether to grant an extension of time under the 'just and equitable' principles, the fault of the claimant is a relevant factor to be taken into account. I find that the claimant was at fault.
24. It is necessary for me, when exercising my discretion, to identify the cause of the claimant's failure to bring the claim in time. In **Accurist Watches Ltd v Wadher UKEAT/0102/09/MAA**, Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents (para 16). What a tribunal is not entitled to do, however, is to make assumptions in the claimant's favour on contentious factual matters that are relevant to the exercise of the discretion; as the burden is on the claimant to show that it would be just and equitable to extend time, where a contentious matter is relied on there must be some evidential basis for it. In this case, the claimant's only stated reason for delay was that he was negotiating his position, he was ignorant of the time limit and he was misled by the respondent's prevarication. On reading the documents in the bundle, I find that there was no action by the respondent that could be described as misleading on the issue of time.
25. When balancing the factors for and against the exercise of my discretion in the claimant's favour, I find the fact of the delay and the reasons put forward for the delay together tip the balance in favour of the respondent and I therefore decline to extend time, as I do not find it just and equitable to do so. The Tribunal

therefore does not have jurisdiction to hear the claimant's claims of race discrimination and those claims are struck out.

EMPLOYMENT JUDGE SHORE

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE SHORE ON
14 October 2020**