Case Number: 3302290/2020

EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing. The remote hearing took place by video via CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing

Claimant		**Respondent**
The Reverend Paul Williamson	**v**	**(1) The Bishop of London (2) London Diocesan Fund (3) The Church Commissioners for England**

Heard at: Watford **On**: 22 June 2021

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: Mr N Siddall QC (Counsel)
For the Respondent: Mr E Kemp (Counsel)

JUDGMENT

1. The claims were filed outside the statutory time limit in s. 123(1)(a) of the Equality Act 2010 and were not filed within such further period as was just and equitable (s.123(1)(b) Equality Act 2010).

2. The claimant did not fail to comply with the requirements of s.18A of the Employment Tribunals Act 1996 in relation to pre claim conciliation.

3. The claims are dismissed in their entirety.

REASONS

Background and issues for determination

1. The claimant has filed two claims before the Tribunal. He filed a claim alleging age discrimination under case number 3313470/2019 ("the first claim") which claim was amended on or around 17 July 2019. The first claim was, for reasons which will become clear, found to be a nullity. A second claim was filed on or around 23 January 2020 under case 3302290/2020 ("the second claim"). The second claim replicated the complaints advanced in the first claim but also included an additional complaint of discrimination on grounds of religious belief.

2. This case was listed for a preliminary hearing to consider the two matters set out at paragraph 6 of a Case Management Order made by Employment Judge Hyams.

   2.1 First, "the ACAS question", namely whether the claimant had failed to comply with the ACAS pre claim conciliation requirements in s.18A of the Employment Tribunal's Act 1996 in relation to any elements of the second claim which did not appear in the first claim and, if so, whether such failure prevented the claimant from advancing those aspects of the claim.

   2.2 Second, "the time point", it is accepted that the second claim was issued out of time, so the issue for determination is whether an extension of time should be granted on the basis that the claim had been filed within such further period as was just and equitable (s.123(1)(b) of the Equality Act 2010).

3. I was provided with an agreed bundle of documents. I heard evidence from the claimant and from a witness for the respondent, the Right Reverend Peter Broadbent, the Bishop of Willesden. I also received skeleton arguments from the claimant and the respondent, an agreed chronology and bundles of authorities from the respondent and from the claimant. The claimant also supplied an additional authority, TGWU v Safeway. In light of the documents that I have seen and the evidence that I heard I made the following factual findings.

Facts

4. The claimant served for many years as the priest in charge of the parish of St George in Hanworth. The claimant considers that the ordination of women into the clergy is not consistent with biblical doctrine. Historically, he has pursued a number of legal challenges as a consequence of this belief. As a result, on 16 July 1997, he was made subject to an Order of the High Court ("the CPO") which declared him a vexatious litigant under s.42 of the Supreme Court Act 1981. The effect of the CPO was that he was required to obtain the High Court's permission before instituting any further civil proceedings. The claimant engaged in no further litigation for a number of years but, in 2015, he instituted proceedings in the Consistory Court. Those proceedings were stayed because he had failed to obtain permission to institute proceedings from the High Court. In consequence, the claimant made an application to the High Court for permission. His application was

refused. The claimant was therefore well aware, given the events in 2015, therefore that the CPO continued to apply to him, that he continued to require the permission of the High Court before bringing legal proceedings and that it was not a foregone conclusion that such permission would be granted.

5. In 2017, regulations were passed which set out the limited circumstances in which members of the clergy, such as the claimant, could continue to serve past the age of 70. In deciding whether an individual's service could be extended, bishops were required to have regard to any Guidance issued by the Archbishop's Council. Such Guidance was then issued in October 2017, making clear that directions to permit extension of service past 70 would be the exception. The bishops of the diocese of London had regard to the regulations and the Guidance and issued a policy which reflected these documents.

6. On 23 October 2017, the Parochial Church Council (PCC) of St George in Hanworth applied for an extension to the claimant's term of service. The claimant was approaching his 70th birthday and would be 70 in November 2018. The PCC's application was refused on 27 November 2017. On 12 December 2017, the claimant made an application for an extension of his terms of service but that application was refused on 14 December 2017.

7. Subsequently, the claimant began a grievance process in respect pf the refusal to extend his service. That process culminated in a decision made by the Bishop of London on 6 November 2018 that the claimant's service would be extended only until April 2019. Amongst the documents created for the grievance process, is a note which records that the claimant was being assisted by the Unite Trade Union and that Unite were considering making the claimant a test case by bringing either an employment tribunal claim or a judicial review of the refusal to extend his service. On 12 September 2018, the claimant's Unite representative was copied in on an email which made reference to the fact that the claimant had previously been declared a vexatious litigant.

8. On 14 November 2018, the Bishop of London issued a "formal direction" regarding the claimant's terms of service. The direction confirmed that the claimant's service would not be further extended past April 2019. On 15 November 2018, the Bishop of London informed the PCC of this decision.

9. On 18 November 2018, the claimant reached the age of 70. The claimant accepts that during 2018 he was in reasonably good health.

10. In late 2018, Unite engaged Thompsons to assist the claimant in relation to his dispute. In December 2018 and January 2019, the claimant had conversations with his solicitor about the proposed Employment Tribunal claim. The claimant told his solicitor that he believed that he was being discriminated against on grounds of his religious beliefs regarding the ordination of women into the clergy. However, a decision must have been taken not to to include any complaint of religious discrimination in the claim

filed with the Tribunal, as no complaint of religious discrimination featured in the first claim. The claimant must have been aware that the his claim did not include any allegation of religious discrimination.

11. The claimant also alleges that he informed his solicitor that he had been declared vexatious and explained that he would need the permission of the High Court in order to bring Employment Tribunal proceedings. I have heard no evidence from Thompsons but have assumed, for the purpose of this hearing, that the claimant did indeed inform his solicitor that he was the subject of a CPO and that the permission of the High Court was required before litigation in the Tribunal could be commenced. However, subsequently, the first claim was filed without permission from the High Court having been obtained. The claimant, it appears, took no steps to check that an application to the High Court had been made and that the necessary permission had been obtained. The claimant attributes his failure to do so to the state of his health during 2019.

12. From early 2019, onwards the claimant was distressed by thoughts of his impending retirement and he saw his GP on a number of occasions for support with his mental health. He was experiencing depression and anxiety at this time. The claimant maintains that his GP records do not fully represent the extent of his difficulties over this period because the GP records are, he believes, incomplete; additionally, he had a tendency to put on a brave face and felt unable to be frank with the GPs who he did not know particularly well.

13. On 21 January 2019, the GP records show that he was “very upset and feeling low”. He was diagnosed as suffering from stress and offered counselling, which he declined, and anti-depressants.

14. On 4 February 2019 he was seen again and recorded as “feeling better - more cheerful”. There is a reference in the records to the fact that he is proposing to take legal action. He was not seen again by his GP until June 2019, when he reported feeling depressed and reported that this was impacting on his memory and concentration. On 3 July 2019, he was seen by the GP again reporting low mood. The claimant is recorded as saying that he did not want to take any medications, or have counselling, he just wanted to talk about his worries. On 3 August 2019, a letter was sent by the claimant’s GP, Dr Koor, summarising the interactions that the doctor had had with the claimant. It noted that “It is a pleasure to know things are progressing in a satisfactory manner and that you are making a good recovery.”

15. It was not then until October/November 2019 that the claimant saw the GP again and it is evident that the claimant’s mental health deteriorated in around November 2019. There were some concerns that the claimant had expressed suicidal thoughts. The GP notes record that again his preference was to talk to his GP rather than to receive counselling and that the claimant had some fears that any treatment that he received might be used against him in any court proceedings.

16. On 1 February 2019, the claimant's representatives made contact with ACAS to begin the conciliation process in respect of a claim of direct age discrimination. An ACAS Conciliation Certificate was issued on 1 March 2019. On 1 April 2019, the first Employment Tribunal claim was issued, under case no. 3313470/19, making a complaint that, in refusing to extend the claimant's service, the respondent had subjected him to direct age discrimination which was not objectively justified.

17. During April and May 2019, the claimant accepts that he was also pursuing another line of dispute. He provided instructions to another solicitor's firm (LBMW) as a result of which LBMW sent a pre-action letter on his behalf threatening High Court proceedings and raising the possibility that injunctive relief might be sought in relation to the refusal to extend his service.

18. On 8 May 2019, the respondent filed its ET3 and grounds of resistance, raising as a defence that the first claim had been presented in breach of the CPO. The claimant said he received these grounds of resistance on 17 May 2019 and became aware, for the first time, of the breach of the CPO. It took the claimant a few days before he could confirm the position with Thompsons and established that no application for permission had been made to the High Court.

19. On 20 May 2019, Thompsons were instructed to make an application for permission to the High Court. However, Unite then withdrew its support and the claimant had to find funds for such an application to be made. The claimant decided to instruct LBMW to deal with this. A letter written by the claimant on 6 June 2019 records that, by this time, the claimant had instructed a QC, Mr Siddall. The claimant was receiving legal advice during June and July 2019 in relation to his ET claim. On 17 July 2019, the claimant applied to amend the first claim to clarify that the claimant considered that he was either an office holder within the meaning of section 49 of the Equality Act 2010,or an employee within the meaning of section 83 or that he could rely on section 53 on the basis that the claimant had been subject to discrimination in relation to a relevant qualification (namely the grant of Common Tenure).

20. On 12 September 2019, LBMW made an application to the High Court on the claimant's behalf seeking permission either (i) to continue the first claim or (ii) to institute proceedings in the Tribunal. The application was supported by a lengthy statement prepared by the claimant's solicitor addressing the nature of the claim and why it was considered that there were reasonable grounds for proceeding. On 29 October 2019, an Order was sealed by His Honour Judge Pitaway QC granting permission in both respects.

21. On 8 January 2020, an application was listed before Employment Judge McNeill Q.C. to determine whether the first claim was a nullity or whether the grant of permission could have, as it were, retrospective effect and render the first claim valid. Employment Judge McNeill Q.C.'s decision was that the first claim was a nullity because permission from the High Court had

not been obtained before it was filed. That decision is currently the subject of an appeal.

22. On 23 January 2020, the second ET claim was filed. The second claim included an additional complaint of religious discrimination, it being alleged, for the first time, that the respondent's refusal to extend the term of the claimant's service was because of the claimant's religious beliefs regarding the ordination of women. The religious discrimination claim sets out a lengthy list of matters that the Tribunal would be asked to have reference to in drawing an inference of discrimination on grounds of religious belief. Some of those matters would be relevant to the claim of age discrimination. So, for example, issues were raised in relation to the treatment of comparators whose service had been extended, or to the practices regarding extension of service adopted in other dioceses, which were likely to be relevant to the assessment of whether the respondents' defence of objective justification was made out. However the other matters raised related solely to the religious discrimination complaint and would considerably broaden the factual enquiry that the Tribunal had to engage in. Such matters included allegations relating to: a separate disciplinary process (initiated following complaints from parishioners), an alleged assault by a fellow member of the clergy and alleged "coercive control" of the claimant by a bishop in relation to a number of matters.

23. One of the issues for consideration in relation to whether it is just and equitable to extend time is the relative prejudice which would be caused by granting, or refusing, the application. The respondent points to prejudice generally in relation to likely length of time that will have passed before this case can be brought to a hearing and on the likely effects on witness recollections etc. The Respondent also places reliance on the fact that four of its witnesses in the case either have already retired, or will have retired, before this case can be heard.

The law

24. S.123(1) of the Equality Act provides that:

> "proceedings on a complaint within s.120 may not be brought after the end of (a) the period of three months starting at the date of the act to which the complaint relates or (b) such other period as the Employment Tribunal thinks just and equitable."

I have been referred to a large number of authorities in order to assist me in the application of s.123(1)(b) of the Equality Act, in particular, the cases of Robertson v Bexley Community Centre [2003] IRLR 434 CA, Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA, Abertawe University v Morgan [2018] IRLR 1050 CA, Adedeji v University Hospitals Birmingham NHS Foundation 2021 EWCA Civ 23 all of which consider the proper approach to the application of s.123 (!) (b). From those cases, I draw the following principles:

- the discretion conferred by s.123(1)(b) of the Equality Act 2010 is a broad discretion;
- it is for a claimant who is seeking the exercise of that discretion to persuade the Tribunal that the extension of the time limit is just and equitable in all the circumstances; and
- in exercising the discretion the Tribunal may have reference to any relevant factors;
- it will almost always be relevant to consider the length of, and reasons for, delay and whether the delay has caused prejudice to the respondent
- whether there is a "good reason" for delay will be a relevant consideration but is not a necessary prerequisite for the discretion to extend time to be exercised

25. British Coal Corpn v Keble [1997] IRLR 336, EAT makes reference to the list of relevant factors when considering extension of time under the Limitation Act 1980. These factors include: the length of and reasons for delay, the extent to which the cogency of the evidence is likely to be affected, the extent to which the respondent has co-operated with requests for information, the promptness with which a claimant has acted and the steps taken by a claimant to obtain professional advice. This list of factors may be of assistance, but should not be treated as a check list which the Tribunal is obliged to apply in all cases.

26. S.18(A) of the Employment Tribunals Act 1996 provides that

> (1)before a person "the prospective claimant" presents an application to institute relevant proceedings relating to any matter the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter
> …
> (8) A person who is subject to the requirement in sub-section 1 may not present an application to institute relevant proceedings without a certificate under sub-section 4."

27. I was helpfully referred to a number of authorities dealing with the approach to be adopted in applying s.18(A) ETA 1996. From those authorities I have derived the following principles.

- What is required by a claimant in relation to pre claim ACAS conciliation is fairly limited.
- The obligation to provide information to ACAS is to provide information "relating to a matter".
- The words "relating to a matter" are words that should be given their ordinary meaning, (Compass Group v Morgan [2017] ICR 73).
- Such words do not denote an obligation to provide information about the precise claim, or claims, which are to be brought, Science Warehouse v Mills [2016] ICR 252. The word "matter" is designedly broader than claim or cause of action.
- For something to "relate to a matter" it must be "grounded in the same disputed factual matrix or a continuation of the same sequence of events", Akigbe v St Edwards Homes Limited.

- Following the issue of an ACAS Certificate, once the Tribunal has jurisdiction over a claim then the nature of the claim may change significantly, for example, by amendment in the form of addition of respondents, or new heads of claim, including new claims relating to events which took place after the ACAS certificate was issued.

Submissions

28. I received helpful written submissions from both the claimant and the respondent which they supplemented with oral submissions. I do not propose to set these out in full here. However, I have endeavoured to address the main points arising from those submissions in the conclusions that I have reached.

Conclusions

29. **Just and equitable extension of time**

29.1 I have approached this question by reference to the following principles: that time limits in the Tribunal are short, they are usually three months and there is a public interest in the upholding of time limits; that it is for the party seeking the exercise of discretion to extend time in their favour to satisfy me that this would be just and equitable. It is not necessary for the claimant to show a “good reason” for delay. However, the discretion that I am asked to exercise is a broad one to be exercised by reference to all relevant factors including the length of, and reasons for, delay and whether any prejudice that has resulted from delay. It will be relevant to consider the circumstances specific to this case: the claimant’s health; whether the fault in breaching the CPO is that of a claimant or his legal advisers and to what extent there is prejudice to either party. I need to weigh all of these matters in the balance and to reach a decision as to the outcome that would be just and equitable.

29.2 My conclusion, having engaged in that exercise, is that the claimant has failed to convince me that that it would be just and equitable for me to exercise discretion to extend time in his favour. I bear in mind here that we are talking about a very lengthy period of delay here, 10 months, which I consider requires greater explanation than a short period.

29.3 The delay in this case has been occasioned by the failure to obtain the permission of the High Court for the commencement of Employment Tribunal proceedings. That rendered the first claim a nullity and required the submission of a second claim. The claimant accepts that both he and his advisors all knew that this permission needed to be obtained. I need to consider why this did not occur. The reasons appear to be twofold: first, the claimant’s representative’s alleged failure to act on his instructions and second, the claimant’s health.

29.4 The claimant was professionally advised and represented, first by Thompsons and, later, by LBMW. I have accepted, for the purpose of these proceedings, that the claimant made Thompsons aware that he had been classified a vexatious litigant. His union Unite appears also to have been on notice of this. If so, Thompsons ought to have ensured that any necessary permission had been obtained from the High Court before the first claim was filed. I accept that the claimant expected his representatives to deal with this on his behalf. However, I also consider that the claimant shared some responsibility to ensure that this had been done. Although the CPO itself dated back to 1997, he had been through the Consistory Court process in 2015 and had experienced litigation being stayed because the necessary permission was not obtained and he had later been refused permission. He therefore well understood the importance of obtaining permission from the High Court before instituting any proceedings and that it could not be assumed that such permission would be granted. Despite this, there is no evidence that he took any steps to check that this had been done.

29.5 The claimant's explanation for his failure to check that permission had been sought and obtained was that he was in bad health. I accept that the claimant has had periods of being depressed and anxious and that this is likely to have affected his concentration and motivation to deal with difficult matters, such as litigation. I also accept that the claimant may on occasions have put a brave face on things and that he had some concern that, if he was frank about his health, this might be held against him in his bid to show that he could work on past the normal retirement age. However, it is also clear from the GP notes that the claimant was not averse to seeking his GP's assistance and to discussing matters frankly when in real distress. The claimant has said that the notes do not fully record all of the interactions with his GP but he has not pointed to anything specific that is missing.

29.6 Given the factual narrative that I have recorded from the medical evidence, I do not consider the claimant's adverse mental health fully explains matters. There is no evidence of his suffering any mental health difficulties of significance before 2019 and yet it is clear that litigation was "in contemplation" during 2018 at least. From July 2018, the Claimant was pursuing his internal grievance. Unite had indicated during the grievance process that it was likely that they would support an ET claim to challenge any such refusal. On 14 November 2018, the Bishop issued a formal direction confirming that the Claimant's service would not be extended. The Claimant did not take any steps either during the grievance process or, immediately after 14 November 2018, to ensure that the necessary permission from the High Court was obtained and yet he was not unwell at this time. He knew that such permission was a necessary first step before ET proceedings could be filed.

29.7 I accept that the claimant's mental health was adverse at times in early 2019. However, it appears to have fluctuated; the medical evidence refers to his having experienced an improvement in his mental health in February 2019. He appears to have been able, in around April 2019, to instruct LBMW to write a pre-action letter threatening other proceedings. It seems to me therefore that, even after 2019, the claimant was well enough to instruct his solicitors to do what he considered necessary on his behalf and, so, well enough to check that permission from the High Court had indeed been obtained.

29.8 Even after May 2019, when the respondent filed its grounds of resistance to the first claim and it became apparent that the necessary permission had not been sought, no immediate action was taken to put matters right. There is no evidence that the claimant's health impacted him from instructing his solicitors to make an urgent application to put matters right. Instead, there was a four month period of further delay during which steps were taken to file amended grounds of claim with the Tribunal. It took until September 2019, before an application was finally made for permission to the High Court. It was not until 24 September 2019 that permission from the High Court was obtained. The grant of permission did not retrospectively cure the breach of the CPO in relation to the first claim, that claim was found to be a nullity, necessitating the filing of the second claim some 10 months out of time.

29.9 I have had regard to the fact that there is a public interest in compliance with time limits. I also consider that there will indeed be some prejudice to the respondent if the claim goes ahead. Witnesses who would have been able to give evidence will have retired. I appreciate that some of those witnesses may have retired in any event, even if the claim had gone ahead in accordance with the ordinary timetable that one might expect, but the fact is that matters will have been significantly delayed by the claimant's failure to secure the necessary permission before instituting Employment Tribunal proceedings. Recollections will fade and witnesses who have retired may become increasingly reluctant to participate. It is practically more difficult for the Respondent to secure cooperation from a reluctant witness who has retired than it is to secure cooperation from someone who is still serving, or employed.

29.10 I also note that the second claim, as reformulated, includes a new complaint of religious discrimination which did not appear in the first claim. It is clear that the claimant was of the view, before the first claim was filed, that the refusal to extend his service was motivated by his religious beliefs regarding the ordination of women. Despite this, he and his representatives apparently decided not to include these matters in the first claim. There is no reason why these matters could not have been included when the first claim was filed. It is suggested that the addition, out of time, of this new complaint of

religious discrimination is not something that ought to be of particular concern and that it will not prejudice the respondent because it will not significantly expand the scope of the factual enquiry for the Tribunal. It is said that the facts which are relevant to the claim of religious discrimination will also be relevant to the complaint of age discrimination and the extent to which such discrimination is justified. However, that is incorrect. The matters from which the Tribunal is invited to draw inferences of religious discrimination include significant new factual allegations regarding an alleged disciplinary process, an alleged assault of the claimant by a fellow member of the clergy, and allegations of coercive control of the claimant by more senior clergy. It is not entirely clear quite when these matters are said to have occurred but it seems likely that all will have occurred before April 2019. The delay before the case is heard will inevitably impact on witness recollections of these events. Even if I am incorrect to decide that it is not just and equitable to extend time in relation to the second claim generally, I consider that it is certainly not just and equitable to extend time for these entirely new allegations of religious discrimination to proceed. There is no good reason why these matters were not included in the first claim and the delay will, in my view, cause prejudice to the Respondent.

29.11 Finally, I should record that I recognise that there will be considerable prejudice to the claimant in not being allowed to take the case forward. If the claimant is correct that his representatives failed to act on his instructions to obtain permission from the High Court then there may be a claim in negligence. However, I recognise that a potential action in negligence will not compensate the claimant for the prejudice suffered from not being able to proceed with his claim. This claim involves for the claimant a matter of principle, his obviously deeply felt wish to continue in service as a clergyman, and an alternative claim in negligence is not likely to be an adequate recompense. However, it was for the claimant to satisfy me that it is just and equitable to extend time for his case to proceed and he has been unable to do so.

ACAS

29.12 I do not consider that the failure to obtain a new ACAS certificate before filing the second claim meant that the claimant had failed to comply with s.18(A) of the Employment Tribunals Act in relation to the new complaint of religious discrimination contained in that claim. The claimant had obtained an ACAS certificate before lodging the first claim in relation to a complaint of age discrimination relating to the refusal to extend his service. I did not consider that it was necessary to obtain a new ACAS certificate merely because the second claim contained reference to a new statutory head of complaint in relation to the refusal to extend his service. It is clear that the term “matter” in the relevant statutory provision is a broad term which has been used designedly as an alternative to “claim” or

"cause of action". It is also clear that the statutory intention is that the requirement for ACAS conciliation should place only a limited burden on claimants and that it does not require them to articulate all possible grounds of complaint at the outset. The addition of a religious belief discrimination complaint would involve additional areas of enquiry as to the respondent's motivations for its refusal to extend the claimant's terms of service. However, it does in my view "relate to" the same "matter: as the age discrimination complaint. Both complaints arise out of the same factual matrix, namely the refusal to extend the claimant's service. That, in my view, is a sufficient link between the claims of age discrimination and religious belief discrimination applying the guidance in the cases that I have referred to and, in particular, in the case of Akigbe.

____

Employment Judge Milner-Moore

Date: …20 AUGUST 2021…

Sent to the parties on:

14 September 2021

For the Tribunal Office