

## EMPLOYMENT TRIBUNALS

**Claimant**

**Mr. Kenneth Ward**

**v**

**Respondent**

**Sheffield Health & Social  
Care Foundation Trust**

## PRELIMINARY HEARING

**Heard at: Leeds (By CVP in public)**

**On: 03 September 2021**

**Before: Employment Judge R S Drake (Sitting alone)**

**Appearances**

**For the Claimant:** In Person

**For the Respondent:** Mr. A Webster (of Counsel instructed by Beachcroft DAC LLP)

## JUDGEMENT

1. The Claimant's race discrimination claim was not presented by him or on his behalf in time.
2. The complaint of race discrimination was presented outside the primary limitation period prescribed by Section 123(1)(a) of the Equality Act 2010 ("EqA") and not within such period as this Tribunal finds just and equitable for the purposes of Section 123(1)(b) EqA so as to enable it to extend time.
3. These claims (all of them) are therefore dismissed.

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

This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

## REASONS

- 1 This decision and reasons were reserved on the day of hearing and are now being provided in accordance with the power vested in the Tribunal by Rule 62(2) and (3) of Schedule 1 to the Employment Tribunals (Constitution & Rules) Regs 2013 (The “Rules”).
- 2 I had a bundle of agreed documents to consider plus a written statement from the Claimant, and I heard detailed and extremely helpful submissions from him and from Counsel for the Respondent Trust.

### **Findings of Fact**

- 2 I made the following findings of fact relevant to the law on this issue: -

2.1 Based upon what was noted at the Preliminary Hearing (heard coincidentally before me) on 1 April 2021, it was common ground that the last date on which the Claimant asserted an act of discrimination occurred was 2 September 2020. Today, he referred to subsequent events relating to the conduct of Grievance Procedure, but he accepted that he does not assert in his ET1 that these were instances of continued racial discrimination as such, so the initial noting as to the date the cause of action arose remains unchanged. He refers in his ET1 to claims other than for discrimination, but these are unspecified and he accepted that his only claim was alleged racial discrimination.

2.2 The date upon which the primary limitation period for his discrimination claim expired therefore was 1 December 2020. The Claimant has been represented throughout until May 2021 by the Trade Union Unison and he was certainly represented by that Union when he commenced the ACAS Early Conciliation (“EC”) process on 28 October 2020. That process was certified by ACAS as concluding on 12 December 2020 and the certificate thereof (number R211548/20/78) was addressed to the Claimant and also sent to his Union by email of that date. The Claimant says he had to ask Unison to send him a copy, which he only received from their offices on 21 December 2020.

2.3 The Claimant had already carried out his own considerable research as to his rights, as to what steps he could take to commence proceedings and the relevant time limits. He says he believed that once the Early Conciliation process commenced, it interrupted the flow of time and that when he was notified of certified completion of that process, he had a month from that date specifically within which to issue his ET1, which eventually he issued on 21 January 2021. He now recognises he was mistaken. An issue for me to determine today was whether that mistaken belief was reasonable for the purposes of exercising my discretion.

2.4 The Claimant himself recognises/accepts that his claim is out of time.

2.5 The Claimant referred today, and though it was not included in his evidence bundle I allowed its admission as being a document openly available to all, the HMCTS Guidance on how to issue ET proceedings known as T420. He says he consulted it and relied upon it to derive his belief that he had a month within which to issue his claim from receipt of certification of completion of Early Conciliation. I note that under the heading “How soon must I make a claim to an ET” at page 7 is the following guidance: -

“ Submission of the Early Conciliation form to ACAS will stop the clock on the time period for you to submit your claim. Time will only start to run again when you are deemed to have received the certificate issued by ACAS. If sent by email, you will be deemed to have received it on the day it was sent”

2.6 In this case, (Bundle Page 1) the certificate is dated 12 December 2021, addressed to the Claimant at his home address and marked as having been sent by email. The Claimant says it was not sent to him personally but to Unison, which is why he had to chase them to provide him with a copy. The Guidance is silent about whether sending of it to a representative counts as sending it to the represented party. However, I find that the word “deemed” is important and significant, hence my emphasis. I take it to mean that whether or not a Claimant who is represented has actually himself seen the certificate is not the determinative issue, but whether those representing him and acting for him (as is demonstrated in this case by citing of them in the ET1 by the Claimant), were fixed with constructive knowledge because the certificate had been emailed to them on the date it bears.

2.7 The Claimant has been and indeed is still suffering from ill health but nothing in his evidence shows that he was physically or mentally unable to take steps to issue his claim (since eventually with help from his wife he did so) relying as he was on the representation of him by his Union, and upon which he still relied when he issued his claim 21 January 2021 citing it as his representative. This is supported also by the fact he instructed an official (Mr. Carruth) to appear on his behalf at the Preliminary Hearing 1 April 2021. It was only later that he terminated his membership or involvement with Unison and start a complaint process against it. Hitherto, the Claimant had available to him the resources of a recognised Union with accepted skills and knowledge, and he also accepted he had consulted a solicitor at Thompsons. I find that he was not put at any disadvantage in being able to take advice. There was no lack of available advice, and I cannot find on the evidence before me that there is anything specific enough to conclude that lack of such advice nor that the Claimant’s health was what prevented him from issuing his claim by the expiry date (extended by the EC process) which I find was 15 January 2021.

2.8 I find that the operative reason why the Claimant did not issue his claim in time was because, though represented and advised at all relevant times by a recognised Union, he was wrong in thinking he had a month from 21 December 2020 when he actually received the EC certificate to issue, not from 12 December 2020, when he was deemed to have received the certificate. Otherwise, I found the Claimant to be an intellectually sophisticated individual, who despite health problems, could still marshal the resources necessary to undertake detailed legal research and complete his ET1 with a degree of commendable facility.

2.9 The Claimant has not shown that he did not receive advice from Unison in deciding how and when he was to proceed. In effect, he argued that had he not seen the ACAS certificate until many days later than the date it bears, but I find he could still have issued the claim by 11 January 2021 even if the first date he actually saw it was 21 December 2020, yet he failed to do so and I do not find he has given me an acceptable explanation.

2.10 There is nothing before me and therefore I find that the Respondents did not do anything to impede the Claimant or prevent him from issuing his claim.

### **The Law**

3 The time limit for issuing the discrimination claim is provided for in Section 123 EqA and is as follows:

“... Proceedings on a complaint within Section 120 may not (*my emphasis*) be brought after the end of –

- (a) the period of three months starting with the date of the act to which the complaint relates (*in this case, I find based on common ground that the last date this could be was 19 December 2019*) (the “Primary Period”) – or
- (b) such further period as the Employment Tribunal thinks just and equitable (the “Extended Period”) ... “

The time limited for presenting an unfair dismissal claim is provided for by Section 111(2) ERA and is as follows:-

“ ... An Employment Tribunal shall not (*my emphasis*) consider a complaint under this section unless it is presented to the Tribunal –

- (a) Before the end of the period of three months beginning with the effective date of termination, or
- (b) Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months ... “

4 The case law (of which I was already aware) and to which I was directed included the following: -

4.1 **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379** from which I note that the time limits for issue of proceedings “... is a jurisdictional and not a procedural issue ... “which means that if a case is out of time and time is not extendable, the Tribunal simply has no power or jurisdiction to hear the claim (*my emphasis*);

4.2 **Palmer & Saunders v Southend BC [1984] IRLR 119** from which I note inter alia that I am to consider the substantial cause (if shown) (*my emphasis*) of the Claimant’s failure to issue within the Primary Period, whether there was any

impediment preventing issuing in time, whether or not the Claimant was aware of his right to issue a claim, whether the Respondent had done anything to mislead or impede the Claimant issuing his claim, whether the Claimant had access to advice, and lastly whether delay was in any way attributable to that advice.

4.3 **British Coal v Keeble [1997] IRLR 336** from which I note inter alia that I am to consider the length and reasons given for delay, the extent to which delay may affect cogency and recollection of evidence, any promptness of action by the Claimant once, after the Primary Period had expired, he became aware of the alleged facts which gave rise to his cause of action, the steps he took once he knew of the possibility of taking action, and lastly the balance of prejudice to the Claimant of not allowing the claim to proceed and to the Respondent in allowing it to do so;

4.4 **Robertson v Bexley Community Centre [2003] IRLR 434** from which I note that application of S123(b) involves the exercise of a discretion which is an exception rather than the rule; this point is augmented by the EAT's decision in **Simms v Transco [2001] All ER 245** which is authority for the proposition that whilst the fact a fair trial is impossible will most likely preclude extension of time, it does not follow that merely because a fair trial is still possible time should be extended – each case is fact specific'

4.5 **Chief Constable of Lincolnshire v Canton [2009] EWCA Civ1298** in which the Court of Appeal held that the comments in **Robertson** merely indicated that there was a broad discretion, the question being one of fact and judgement rather than policy. Because of the breadth of discretion, the appellate courts are reluctant to interfere with the exercise of the discretion if the issue is appealed.

4.6 **Afolabi v Southwark BC [2003] ICR 800** from which I note that it is my duty to ensure no significant circumstance is left out of my consideration when considering whether to exercise my discretion or not, and also that if I fail to take account of prejudice to a Respondent of allowing a claim to proceed out of time, I will be in error.

4.7 **Adedeji v University of Birmingham Hospitals FT [2021] EWCA Civ23** - in which the Court of Appeal held that it is not mandatory for Tribunals to simply to follow a "check list" approach as was said to be attributable to the **Keeble** decision, but that the length of time and reasons for delay are to be considered. In the present case, I have found the reason to be the mistaken belief of the Claimant based on his own research and not based on any advice or absence of advice from the representatives who acted for him throughout the relevant period of time.

4.8 **Miller v MoJ UKEAT/003/15** - in which the EAT found that what Mr. Webster described as the "forensic approach" to balancing prejudice (to the Claimant of his claim be struck out, or in contrast to the Respondent if time be extended to validate the issuing of the claim) is not to be regarded as the determinative test alone of whether discretion to extend time should be exercised. The key issue is to consider all the circumstances and the operative cause of delay.

## Conclusions

- 5 I noted the evidential burden rested with the Claimant and I heard/received his evidence given by written statement and oral testimony upon which he was cross-examined. I considered all this material and the documents before me in my post-hearing deliberations.
- 6 I am satisfied that the Claimant gave his evidence sincerely and believing it to be the truth. However, I noted that . I explained these were not within my purview as a Judge at a Preliminary hearing determining jurisdictional issues, but I recognise it was hard to reconcile herself to this legal reality.
- 7 In particular, my application of the guidance and law to the findings on the evidence set out above are as follows:

7.1 It is common ground that the claim is prima facie out of time in relation to the primary period prescribed by S123 EqA;

7.2 Applying **Palmer** I am to find what the operative cause of delay in presenting the claim was, and I have done so in finding paragraph 2.7 above;

7.3 Applying **Keeble** and the clarification or refinement of it offered by **Adedeji**, the length of time of the delay has been considered and though not more than a few days, it was a delay caused by the Claimant and not by any other party and was in the context of having advice available to him as to time limits but a mistaken belief caused by unreasonable and mistaken reliance on an inaccurate interpretation of the Guidance document T420. The reliance was unreasonable because the word “deemed” in that document makes it clear that what matters is the date when a person is to be regarded as or is to be construed as being aware of the date of an ACAS certificate

7.4 Applying **Robertson**, **Simms** and **Canton**, I conclude that exercising discretion to allow this claim to proceed would be the exception rather than the rule, and the fact that it may still be possible for there to be a fair trial is not necessarily a compelling reason for allowing it to do so, because in balancing what is just and equitable in this case I conclude that allowing the claim to proceed simply because though fully represented and advised at all times, the Claimant unreasonably misunderstood guidance which he could have but did not clarify with his Union. Furthermore, if he were right in saying he should be permitted to proceed because he did issue within one month of the actual date he saw the ACAS certificate, such an argument would enable him or any other Claimant to say that whatever the date of actual knowledge might be, one day, one month or even six months after the date it bear, time only runs from that date. That is an argument which is not consistent with the scheme of the EqA or consistent with the scope of the discretion available to extend time where a claim is clearly albeit just a few day out of time;

7.5 Applying other aspects of **Palmer & Saunders** and **Keeble**, there was no evidence before me of any obstacle preventing the Claimant from issuing his claim within the Primary Period, and certainly no barrier or impediment erected/caused by the Respondent;

7.6 Applying the guidance in **Miller** but nonetheless addressing the question of comparative prejudice, I find that the Claimant's complaint as set out in his ET1 relates to events leading up to and including 2 September 2020 and if his claim is struck out on the basis it is out of time, I recognise he would lose the opportunity to pursue the claims on its merits; In contrast, if the claim were allowed to proceed, the Respondent would be put to the task of defending itself in relation to events which are not contested but which are clouded by the passage of time and no real argument in the Claimants case of how or why he says that the acts complained of were because of his race so there is little which is indicative to me, such as to indicate undeniably strong merits favouring the Claimant; When considering what is just and equitable, I have to take account of any imbalance in this respect but seen together with all other relevant matters as found above; As indicated above I accept that a clear and important finding is that the Claimant unreasonably relied on a mistaken interpretation of T420 despite the context being availability of advice and representation at the time;

7.7 All the factors I have noted above I find favoured the Respondent or at least demonstrated that the Claimant could not establish he had issued his claim within a further period after expiry of the Primary Period such as could be characterised as just and equitable;

8 Applying the law to the factual findings, and taking account of the guidance referred to above, I find that the Claimant had access to advice at all relevant times and access to means to research his position and lodge a claim. He was eventually able to do so by 21 January 2021 and there is no reasonable or legitimate reason before me to explain the delay by 15 January 2021.

10 Therefore, I conclude that a delay, albeit short beyond the Primary Period is such that it would not be just or equitable to extend the Primary Period at all. I have considered the balance of prejudice and though I recognise that a Claimant whose claim is struck out at this stage is disadvantaged substantially, I also recognise that a Respondent which is put to the time, trouble, and cost of defending a claim based on an as yet unsubstantiated allegation of his race as a basis for alleged discrimination, is also substantial disadvantaged.

11 Accordingly I find that the claim was issued out of time for not being issued within the Primary Period, and that in the circumstances as found in this case, and bearing in mind the principal guidance that extending time is the exercise of a discretion which should be exceptional in discrimination cases, it would not be just and equitable to extend time beyond the Primary Period. Thus, the discrimination claim is dismissed as the Tribunal has no jurisdiction to hear it. This deals with both the **Dedman** and again the **Robertson** points.



Employment Judge **R S Drake**

Date: 03 September 2021

Date: 10 September 2021