



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Burchell

**Respondent:** Glebe Housing Association Limited

**UPON APPLICATION** by the respondent made by email dated **19 July 2021** to reconsider the judgment dated **5 July 2021** under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing

## JUDGMENT

1. The respondent made an application that the judgment of 5 July 2021 be reconsidered. We have allowed this application. The respondent applied for the judgment to be reconsidered because the Employment Tribunal missed out of our judgment our decision about whether the claimant's claims were brought too late. This had been in the list of issues to be decided. The respondent asked that the Tribunal reconsider its decision on the time issue only.
2. We had deliberated on the issue of whether the claimant's claims could all be heard, even if some were brought late, before giving our oral judgment at the end of the hearing on 25 June 2021, but our full decision on this issue was missed from the oral judgment (and therefore the written reasons) due to an oversight on the Tribunal's part.
3. Both parties were asked to provide any representations on this issue and were given the opportunity to request a hearing, which neither party did.
4. Having considered the reconsideration request and the submissions of the parties, the Tribunal's findings on this issue are as follows.
5. The claimant's employment ended on 25 August 2019. He engaged in ACAS early conciliation from 27 August to 27 September 2019 and his ET1 was lodged at the Tribunal on 23 October 2019. The claimant's unfair dismissal claim was presented in time. This was not disputed by the respondent but is referred to here for the sake of completeness.
6. From the presentation dates of the claimant's claim, and taking into account the ACAS conciliation period, the earliest date an allegation of discrimination could be in time is 23 June 2019, unless there was a continuing course of conduct of discrimination which brought the earlier allegations in time, or unless the Tribunal allows earlier allegations to be considered even though they are out of time, by allowing an extension of time.

7. The claimant's disability discrimination complaints covered a time period which began in 2012 and continued until after his dismissal by reason of redundancy. The claimant brought a number of complaints of discrimination and the Tribunal considered the following in relation to each complaint:
- a. Was the treatment complained of a one-off act or an ongoing act of discrimination?
  - b. Was the treatment complained about to the Tribunal within three months (subject to ACAS Early Conciliation) of the incident or the last act in a series of incidents?;
  - c. If there was no complaint within three months (subject to ACAS Early Conciliation) of the incident or the end of the ongoing act, was the complaint made within such further period as the Tribunal considers is just and equitable (as per s123 Equality Act 2010)?

### **The Law**

8. Discrimination complaints are subject to the time limits set out in the Equality Act 2010 at s123(1), as follows:

*“Proceedings on a complaint within section 120 may not be brought after the end of –*

*(a) the period of 3 months starting with the date to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.”*

9. Section 123(3) and (4) Equality Act 2010 make special provision relating to the date of the act complained of in the following situations:

*(3) For the purposes of this section—*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

10. The Tribunal must consider a number of factors in deciding whether a claim presented late can still be considered on a “just and equitable” basis.

11. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the evidence might be affected by the delay and the steps taken by the claimant to obtain advice once he knew of the possibility of taking action. The Tribunal must also take into account the merits of the claim.

12. It is not the case that it is never just and equitable to extend time where there is no

good explanation for the delay. *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194*, CA held that any explanation put forward by the claimant is a matter that the Tribunal should consider but is not the deciding issue of whether or not the Tribunal should extend time.

13. In discrimination claims, a claimant must engage with ACAS Early Conciliation before an ET1 can be submitted. The ACAS Early Conciliation must begin within three months of the date of the act complained of.

#### **Application of the law**

14. The claimant alleged that the respondent acted in a discriminatory way in relation to a number of incidents ("the Acts") which were set out in the judgment given at the end of the hearing on 25 June 2021 and in the written reasons of 5 July 2021.

15. In relation to each of these Acts, the Tribunal considered whether the Acts were brought in time. Our findings are as follows:

- i. The claimant said that the respondent submitted him to unfounded disciplinary action from 2012 onwards including a period of 8.5 months' suspension in October 2016, a disciplinary hearing on 13 July 2016 and a final written warning on 16 April 2019. The claimant said this was an ongoing act of discrimination and harassment. The last of these events (16 April 2019) was complained of to the Tribunal too late. This was presented out of time.
- ii. The claimant said that at a disciplinary hearing on 13 July 2018 the respondent relied on CCTV footage of him working in the kitchen, without his permission which he says amounted to "spying" on him. This allegation was presented to the Tribunal out of time.
- iii. The claimant said that the respondent changed the kitchen hours and menus without his knowledge. This refers to Social Care Catering Solutions' (SCCS) involvement in the respondent's catering function in 2018 and 2019. SCCS was no longer part of the respondent's kitchen operations in early 2019 although no exact date was provided to the Tribunal. This complaint was presented out of time.
- iv. The claimant said that the respondent failed to carry out any risk assessments since 20 December 2016. This was a situation that the claimant alleges carried on until his dismissal and alleges that there were repeated failures to do so. This is an allegation of an ongoing act of discrimination and is in time.
- v. The claimant said the respondent didn't allow him to take sufficient breaks. This is an allegation of an ongoing act of discrimination and is in time as the claimant was required to work his notice period and so was in work until the effective date of termination.
- vi. The claimant said that the respondent failed in its duty of care to him by not asking him how he was or holding regular meetings regarding his medical condition. This allegation is closely linked with (iv) above and is an allegation of an ongoing act of discrimination and is in time.
- vii. The claimant said that the respondent failed to raise the ovens so that he could avoid bending down. No date was provided for when the claimant says this should have happened. An Occupational Health report was obtained in January 2017 and the respondent could have been expected to make any necessary adjustments as a result of the report within a few months, so by

April 2017 at the latest. Therefore this allegation is out of time.

- viii. The claimant said that the respondent failed to investigate when (unknown) colleagues locked him in the toilet on 17 September 2016. The claimant did not say when this investigation should have happened, but the respondent could have been expected to carry out any investigation when the claimant was invited back to work after his suspension ended in 2017. This is therefore out of time.
  - ix. The claimant said that the respondent made him work harder than his colleagues. This is an allegation of an ongoing act of discrimination and is in time as the claimant was required to work his notice period and so was in work until the effective date of termination.
  - x. The claimant said that the respondent made a complaint about cleaning on 20 April 2018 and called him to an unannounced meeting shortly thereafter. This complaint is out of time as time started to run from the date of the meeting, 20 April 2018.
  - xi. The claimant said that the respondent accused him of being "BAME" (in the claimant's words, i.e. racist) on 7 June 2018. This complaint is out of time as time started to run from the date of the accusation, 7 June 2018.
  - xii. The claimant said that the respondent offered him a "bribe" on 14 November 2018 to resign. This complaint is out of time as time started to run from the date of the offer, that is from 14 November 2018.
  - xiii. The claimant said that the respondent made him redundant but then re-employed Ms Scully 6 months later. This claim is in time.
  - xiv. The claimant said that the respondent failed to make reasonable adjustments on account of his disability. The claimant makes two complaints in this regard, the first of which was a failure to raise the ovens in the respondent's kitchens from floor height. The second complaint is of a failure to allow the claimant to take breaks. In the case of reasonable adjustments complaints, the duty arises as soon as the employer is able to take steps which it is reasonable for it to take to avoid the disadvantage. We find that the respondent was presented with an Occupational Health report in January 2017 and would have been expected to implement any adjustments as a result of this by April 2017, which is the date from which time starts to run. These claims are therefore out of time.
16. The Tribunal has to consider, of those that were brought out of time, were they presented within such period as the Tribunal considers just and equitable as per s123 Equality Act 2010?
17. The Tribunal notes that the claimant was provided with the assistance of his trade union throughout his employment and made complaints regularly about his treatment during his employment. There is no evidence that the claimant was in any way unable to issue his complaints to the Tribunal earlier than he did but we note that he did not have the assistance of his trade union, or indeed any professional representation, during the hearing, although he did have the assistance of his cousin.
18. What is the balance of prejudice to the parties if the Tribunal does not consider the claimant's out of time complaints? In terms of prejudice to the respondent, as this issue is being determined at the final hearing, they have already had to prepare to address these issues at the final hearing and as some allegations of ongoing

discrimination and harassment throughout the period in question are in time, we find that it would be not unduly prejudicial to the respondent to address those additional claims which remain. There was significant factual overlap between the claims.

19. In terms of prejudice to the claimant, the Tribunal noted (and this is noted in the main judgment) that the claimant experienced difficulties during the hearing in explaining his complaints and the basis on which his claim was put.
20. It was at times challenging for the Tribunal to obtain direct answers to our questions from the claimant in relation to specific allegations. The claimant had a tendency to answer questions by referring to a number of other allegations as well as the point in question. We therefore considered that it was preferable to allow the claimant to present his evidence on the allegations as a whole and the respondent's witnesses were also questioned on the allegations as a whole. This was achieved within the time allocated for the hearing.
21. The claimant was inexperienced in the legal process and (noting that we make no criticism of him in saying this) he struggled at times to understand the procedure, despite our concerted efforts to explain it to him. Conversely, at times, his nerves prevented him from addressing the Tribunal or the respondent's witnesses altogether. On balance, the Tribunal found that had the claimant not been allowed to present the entirety of his claims, there would have been the considerable risk of prejudice to him and the Tribunal's role as a fact-finding tribunal would have been hindered.
22. Therefore, the balance of prejudice to the parties falls in favour of allowing all of the claimant's allegations to be heard, including those which are out of time, to allow the Tribunal to determine what the ongoing circumstances were in at the claimant's place of work and whether the claimant had been subjected to any unlawful discrimination.

Employment Judge Barker

JUDGMENT SENT TO THE PARTIES ON  
**13<sup>th</sup> October 2021**

FOR THE TRIBUNAL OFFICE