



EMPLOYMENT TRIBUNALS

Claimant: Mr Dost

Respondent: Ferrovial Construction (UK) Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford by CVP **On:** 5 October 2021

Before: Employment Judge Bartlett

Appearances

For the claimant: in person

For the respondent: Ms Kennedy

JUDGMENT

1. It is ordered that the claimant's claims in case number 3300088/2020 are struck out in their entirety on the basis that the Tribunal has no jurisdiction to consider them as they are out of time.

Reasons

Background

2. The claimant's claim arises from events occurring during his employment with the respondent. His employment commenced on 4 December 2017 and it is agreed that his last date of employment and the effective date of termination was 5 August 2019 following the claimant's resignation on 9 July

2019. The claimant was employed as a health and safety graduate. Prior to the claimant's resignation on 9 July 2019 the respondent had commenced a performance disciplinary process.

3. The claimant raised a grievance on 8 July 2019. The respondent produced a written response to this grievance on 13 August 2019 which is after the termination of his employment.
4. A case management hearing held on 2 July 2021 by Judge Manley set down the following issues to be determined at this preliminary hearing:

*“1) Whether the discrimination claims have been brought within the three month time limit and, if not, whether it is just and equitable to extend time;
2) Whether any of the claims have no reasonable prospect of success and should be struck out; or
3) Whether any of the allegations or arguments have little reasonable prospect of success and a deposit should be ordered as a condition of those allegations or arguments being pursued and;
4) Any case management issues.”*

5. The Case Management summary also set out a list of issues which are limited to direct race and/or religious discrimination claims. The first act occurred on 9 October 2018 and the list continues through 11 acts. The last act identified occurred on 2 May 2019.

The hearing

6. The hearing took place via CVP. At the start of the hearing the claimant had some difficulties either being heard or hearing me. The claimant logged on with a different device and all issues were resolved. At one point Ms Kennedy dropped out of the hearing but she reconnected and the hearing resumed from the point at which she had dropped out. There were no other difficulties with communication or connection during the hearing.

7. The parties had prepared a bundle running to 99 pages for use at the hearing. In addition the claimant relied on a witness statement running to 18 pages and each party produced written submissions.
8. At the start of the hearing, I confirmed with both parties that the list of issues arising from the 2 July 2021 CMR was the final agreed to list which set out the agreed dates of discrimination that were relied on by the claimant. I stated that it was important that everybody was clear what the list of issues was and what the dates relied on were because these were important to the decisions that I had to reach today. Both parties confirmed that that list was agreed and set out the dates relied on.
9. For clarity I record the following dates:
 - 9.1 the claimant resigned in writing on 9 July 2019;
 - 9.2 he was placed on gardening leave for his 4 week notice period and the effective date of termination was 4 August 2019;
 - 9.3 the respondent sent to the claimant the written outcome of his grievance on 13 August 2019;
 - 9.4 the claimant notified ACAS on 5 November 2019 and this was the commencement of the Early Conciliation process;
 - 9.5 the claimant's ET1 was filed on 5 January 2020;
 - 9.6 the last act of discrimination the claimant relied on took place on 2 May 2019.
10. The claimant appeared as a witness where he adopted his witness statement and answered a number of questions from Ms Kennedy. I also

gave the claimant the opportunity to say anything further that he wished.

The claimant took this opportunity and spoke for approximately 15 minutes.

11. The Case Management summary of 2 July 2021 set out the following direction relating to preparation of the witness statement:

6. The claimant will prepare a witness statement, explaining any delay in referring the matter to ACAS and why, if the claim has been presented late, it is just and equitable to extend time. He should send this statement to the respondent and the tribunal by **6 September 2021**.

12. The claimant's witness statement was 18 pages long. It repeated and expanded on the information that was provided in his "brief summary of claim" which was submitted with the ET1. The only part of the witness statement that dealt with the delay in referring the matter to ACAS and whether or not it was just and equitable to extend time was the following:

I would kindly ask the respected Judge to take into consideration the stress, the anxiety I have been through and extend the deadline if it has passed. The allegation that was raised in the grievance outcome made me think about going to court.

13. The claimant provided further evidence in response to Ms Kennedy's questions and when he was given the opportunity to speak to his witness statement. This can be summarised briefly as follows:

13.1 he was waiting for the outcome of his grievance which he received on 13 August 2021. He was shocked and disappointed by the outcome. His behaviour changed and a month later a colleague said he could do something about the situation and contact ACAS;

13.2 the claimant contacted ACAS and they told him he could go to the Employment Tribunal;

13.3 he submitted the ACAS form in November 2019 and they said he had

one month to submit his claim which was 5 January 2020 so on that information his claim is in time. He went by the information he was given by ACAS;

13.4 the claimant's second grievance dated 31 October 2019 referred to him having "*sought all necessary legal advice from ACAS and my lawyers, in case of an adverse outcome, I will pursue this case to the Employment Tribunal.*" The claimant said that he had only spoken to ACAS and to a friend who is a law student;

13.5 The claimant had no intention of going to court it was only when he was disappointed with the outcome of his grievance that he decided to go further. A friend told him that he can go to court but he did not want to. He is not pursuing a claim for financial gain it is a moral issue;

13.6 It was put to the claimant that the only reason he put forward for delay in submitting his claim was stress. The claimant said that even in August, September and October 2019 he could not think of anything else. He was going through a lot of stress and could not have thought about these things from August until November 2019;

13.7 It was put to the claimant that the reason why he says he was discriminated against because of his race and/or religion was because of the statement of Mr Truman made on 11 April 2019 which was that "*you have a different religion than I; you are also a consensus a different ethnicity you are a minority. You are valued, all right.*" The claimant responded that Mr Truman made it clear in the first HR meeting in April 2019 that they were of different ethnicity and what he did afterwards has confirmed that he acted the way he did because of their different ethnicities.

Submissions

14. both parties relied on written submissions and made supplementary oral submissions.

The law

15. Section 123(1) of the Equality Act 2010 (EqA) provides that the time limit for a discrimination claim to be presented to the tribunal is at the end of the period of three months starting with the date of the act which the complaint relates.

16. The tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable under section 123(1)(b) of the EqA.

17. In **Hutchison v Westward Television Ltd [1977] IRLR 69, [1977] ICR 279**, the EAT set out that when considering whether to exercise its discretion as to what is just and equitable Employment Tribunal's have "*a wide discretion to do what it thinks is just and equitable in the circumstances ... they entitle the [employment] tribunal to take into account anything which it judges to be relevant*".

18. In **Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, [2021] ICR D5**, the Court of Appeal stated that "*The best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay"*".

19. Where a claim has not been presented within the three month time period the burden (of persuasion not proof) is on the claimant to convince the tribunal that it is just and equitable to extend time.

Findings of fact

20. The claimant's only complaints are complaints of discrimination. He accepted that the last act of discrimination about which he complains occurred on 2 May 2019. His ET1 was submitted on 5 January 2020. I find that all of his claims are out of time. Therefore I must consider whether it is just and equitable to extend time.

21. The reasons given by the claimant for not presenting his claim in time are as follows:

21.1 He was waiting for the outcome of his grievance which did not arrive until 13 August 2020;

21.2 he did not know anything about ACAS or Employment Tribunal's until he contacted them after 13 August 2020;

21.3 he had no intention of bringing an Employment Tribunal claim. It was only after he was disappointed by the outcome to his grievance that he decided to take matters further;

21.4 between August and November 2019 he could not think about anything but his complaints to the respondent;

21.5 he was stressed and had been affected mentally and physically by his treatment by the respondent;

21.6 he relied on what ACAS told him;

21.7 ACAS told him that after he submitted his ACAS form he had one month

to submit his ET1 and that is what he did.

22. I find that the claimant is an educated individual. His role with the respondent was as a graduate and on his own evidence his role included giving presentations, preparing reports and no doubt complying with some deadlines.

23. I accept that the claimant was not aware of how to make complaints to the Employment Tribunal until he undertook some research in autumn 2021. This is the case for many employees and workers, most do not have or need to have such knowledge, until they have an issue about which they may wish to complain to an Employment Tribunal. It is fair to say that when an issue arises most employees and workers need to find some information on Employment Tribunals so they can decide what to do.

24. The acts of discrimination of which the claimant complains start in October 2018 and run through to May 2019. By the time of this hearing these acts are approximately 2.5 to 3 years in the past. It is not possible to list the final hearing for approximately one year and therefore a final hearing is unlikely to take place until 3.5 to 4 years after the alleged offence occurred. This is a substantial period of time and it cannot be said that the evidence would be fresh in the circumstances. This gives rise to some but limited prejudice to the respondent.

25. The claimant stated that it was only after he received the response to his grievance on 13 August 2020 that he was galvanised into action. It is understandable that an employee may wish to wait until the outcome of a grievance before submitting an Employment Tribunal claim. This is less

understandable when an individual, such as the claimant, has ceased employment before the conclusion of the grievance. However, even in these circumstances if the claimant had submitted his claim promptly after 13 August 2019 I may have found it was just and equitable to extend time.

26. This is not what happened, the claimant did not submit his ET1 until 5 January 2020. This is more than 4 ½ months after he received the outcome of the grievance.

27. The claimant's evidence was that he spoke to ACAS during some undefined dates after 13 August 2019 which led him to contact ACAS in relation to early conciliation on 5 November 2019. This is almost 3 months after he received the conclusion to his grievance.

28. Taking all of these factors into consideration I find that there is very substantial delay on the claimant's part in submitting his ET1.

29. I find that the claimant has not provided good reasons for this delay the following reasons:

29.1 I do not consider a lack of knowledge to be a good reason in the circumstances of this claim. As set out above the claimant was educated and would have research skills. Most other employees or workers would be in a similar position and it was up to the claimant to obtain timely advice or knowledge on these matters if he wished to pursue a claim in the Employment Tribunal;

29.2 the claimant said that he followed ACAS's advice when he sought it. However on his own evidence he delayed seeking this advice because he had no intention of bringing an Employment Tribunal claim. The claimant

says that he was galvanised into bringing a claim after the receipt of his grievance and after comments by colleague. I accept this but I do not find it compelling. By changing his mind the claimant risked being out of time and there is nothing unjust or inequitable about that;

29.3 the claimant said that he acted on ACAS' advice to submit his ET1 within one month of obtaining the Early Conciliation Certificate. The claimant submitted his ET1 on the last possible day for it to be in time even on this version of events. This is a risky strategy at the best of times;

29.4 the claimant said that he was stressed because of the respondent's actions. He also referred to anxiety. There is no evidence that he suffered from any medical conditions. Again many employees who suffer disputes in the workplace are significantly and negatively affected by them. I do not find the claimant's distress to be a good enough reason.

30. Weighing all of the circumstances into account I find that there has been substantial delay in bringing the claim and the reasons for delay do not warrant the exercise of my discretion to extend time.

31. In conclusion I find that all of the claimant's claims are out of time and I do not find that it would be just and equitable to exercise my discretion to extend time.

32. All the claims are dismissed for lack of jurisdiction.

Strike out

33. Rule 37 of the Employment Tribunal's Rules of Procedure sets out the criteria that must be applied in considering whether or not to strike out all or part of a claim or response.

34. The respondent asserts that the claimant's claims have no reasonable prospects of success. This is because even if the facts as pleaded by the claimant were established they do not discharge the prima facie burden of proof which lies on him.

35. Attached to the ET1 was a document called "brief summary of facts" which is nine pages long. This has been expanded on in the claimant's 18 page witness statement. It is clear from these documents that the claimant feels aggrieved by the way he was treated at work. He does not accept the criticisms made of his work or performance by the respondent. He refers to them defaming him and that some of the criticisms were very small. The claimant disagrees with the respondent's assessment of his work. However this in itself is not sufficient to discharge the prima facie burden of proof. There must be something more. The claimant relies on the comments by Mr Truman not reflecting the views of his colleagues and there has been some fabrication and lies. What the claimant struggles to disclose is any connection between the treatment and his protected characteristics. I recognise that an Employment Tribunal is entitled to draw adverse inferences in the correct circumstances. I accept that the claimant refers to conversations with Mr Truman about his religion and there were some adverse comments about timekeeping and some discussions about the timing of prayers.

36. I find that there is a real and significant risk that the claimant will not be able to establish any connection between his protected characteristics and the acts complained about.

37. However I bear in mind that strike out must be an exception and a high

threshold must be met.

38. Therefore if I had not decided to dismiss the claims for want of jurisdiction I would not have ordered that they were struck out in their entirety.

Deposit order

39. Rule 39 sets out the criteria that must be applied in considering whether or not to make a deposit order in respect of all or part of a claim.

40. I rely on the findings that I have made in the strike out section of this judgement and I consider because of the difficulties the claim discloses, even taking it at its highest, in establishing any connection whatsoever between the protected characteristic and the acts complained of there are little reasonable prospects of success of each act of discrimination complained about.

41. The claimant's evidence was that he spent one year unemployed but he has been in employment for approximately one year. His salary with the respondent was £31,000 and the indications from the claimant were that he has obtained a similar position to that he held with the respondent.

42. If I had not dismissed the claims want of jurisdiction, I would have imposed a deposit order in the amount of £20 for each allegation set out in the directions of 2 July 2020.

Employment Judge Bartlett

Dated 14 October 2021

Case No: 3300088/2020

JUDGMENT SENT TO THE PARTIES ON

2 November 2021

FOR THE TRIBUNAL OFFICE