Neutral Citation Number: [2022] EAT 1

Case No: EA-2020-000385-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 September 2021

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

SECRETARY OF STATE FOR JUSTICE	**Appellant**
- and -	
MR ALAN JOHNSON	**Respondent**

- -
- -

Mr A Tinnion (instructed by the Government Legal Department) for the **Appellant**
Mr M Brien (instructed by Thompsons) for the **Respondent**

Hearing date: 28 September 2021

- -

JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION, PRACTICE AND PROCEDURE

The employment tribunal found that the claimant had been subject to harassment by "being compelled to complete an ill-health retirement assessment application (after expressing the fact he did not want medical retirement)". The employment tribunal erred in law in failing to make specific findings about the conduct on the part of the respondent that constituted the harassment and, if it extended beyond 20 February 2013 (the date on which the claimant submitted an application for ill health retirement) to no later than September 2020 (the date by which it was accepted any conduct was no longer unwanted) what specific conduct on the part of the respondent occurred and when the period over which it extended ended. The matter is remitted to the same employment tribunal if practicable. Having determined the date or period over which the harassment occurred, the employment tribunal should go on to determine whether it is just and equitable to apply a time limit in excess of three months. The employment tribunal also erred in law in holding that it was only appropriate to take into account the period by which the submission of the claim form exceeded the usual three month time limit in determining whether it was just and equitable to apply a longer time limit. It was also necessary to consider the effect that extending the time limit would have on the respondent's ability to defend the claim, including the fact that it would result in the tribunal having to make determinations about matters that had occurred many years previous to the hearing, albeit not because of any fault of either party but because the claim had been stayed pending the resolution of a personal injury claim. The Tribunal should have regard to the decision of the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23 (determined after the original employment tribunal hearing of this matter).

HIS HONOUR JUDGE JAMES TAYLER:

Introduction

1. This is an appeal against the decision of the employment tribunal sitting in North Shields between 17 to 19 February 2020, Employment Judge Garnon sitting with lay members. The judgment was signed by the employment judge on 28 February 2020.

2. The parties are referred to as the claimant and respondent as they were before the employment tribunal. The employment tribunal found in the claimant's favour in respect of one allegation of harassment.

3. The claimant was employed as a prison officer from 4 July 1990, latterly at HMP Frankland. On 1 October 2011 the claimant attended the scene of the brutal murder of a prisoner who had been mutilated and disembowelled. The claimant said the sights he saw would haunt him for the rest of his life.

4. The claimant submitted a claim form on **19 December 2013**. The proceedings were stayed for a number of years while the claimant's personal injury claim was brought and resolved.

5. The complaint of harassment upon which the claimant succeeded in the employment tribunal was set out at paragraph 122 of his claim form:

> "Compelling the claimant to complete an ill-health retirement assessment application when he emphatically expressed the fact that he did not want a medical retirement"

6. The tribunal slightly paraphrased the allegation, at paragraph 4.2 as:

> "C was harassed by being compelled to complete an ill-health retirement assessment application (after expressing the fact he did not want a medical retirement)"

7. The pleading appears to relate to the claimant being compelled to make the original application for ill-health retirement rather than the ongoing process during which that application was

determined. The application form for ill-health retirement was submitted by the claimant on 20 February 2013. That is apparent from an email in the bundle for this hearing. The employment tribunal did not make a specific finding of fact determining the date on which the application was originally made, despite having the relevant email in the bundle of documents and being referred to it in the respondent's chronology.

8. The claimant accepts that after the application was submitted there were no specific additional acts on the part of the respondent that forced him to continue with the application, although it is contended that the original pressure put on him to make the application continued in some way until the application had been determined.

The appeal

9. By a notice of appeal originally submitted on 16 September 2020 the respondent appealed against the determination of the tribunal that the claimant had been subject to harassment and that the complaint had been submitted within time. The appeal was considered at a preliminary hearing by HHJ Auerbach on 4 March 2021 who permitted the matter to proceed on amended grounds in relation to the determination of the tribunal that the harassment complaint was within time. He made an order with seal date 26 March 2021. Amended grounds of appeal were produced that have the same seal date:

> **" III. NUMBERED GROUNDS OF APPEAL**
>
> **Ground of Appeal #1**
>
> 33. The ET erred in law when addressing the jurisdiction/time point (primary 3 month limitation period under s.123(1) of Equality Act 2010) by:
>
> (a) failing to make any (or any clear) finding of fact and/or failing to identify and/or state in its reasons the 20 February 2013 date on which the Claimant completed and posted his IHR application;
>
> (b) failing to apply that 20 February 2013 date/event to determine whether the IHR complaint presented in the ET1 on 19 December 2013 ("*Compelling the Claimant to complete an IHR assessment application when he emphatically expressed the fact he did not want medical retirement*") had been presented within the primary 3 month limitation period or not; and/or

(c) making a finding that the 3 month limitation period had begun to run in early September 2013 [Judgment, para 4.10] without making any (or any adequate) findings of fact that the conduct complained of had continued in the period 21 February 2013 – early September 2013 (ie, after the Claimant had completed and posted his IHR application on 20 February 2013).

Ground of Appeal #2

34. The ET erred in law when exercising its jurisdiction under s.123(1)(b) of Equality Act 2010 to extend time on just and equitable grounds by:

(1) holding that the Claimant's delay in presenting the ET1 (excess of the primary 3 month limitation period) was "only by a few weeks at most" [Judgment, para. 4.10] whereas the true length of delay was the 7 month period following 20 May 2013 (date falling 3 months after 20 February 2013 date/event), for which see Ground of Appeal #1; and/or

(2) holding that the 6-7 year passage of time between bringing the IH complaint to trial (ET1 presented 19 December 2013, trial conducted 17-19 February 2020) was irrelevant because it "is fault of neither party" [Judgment, para 4.12], whereas that substantial passage of time, and its effect on the Respondent's ability to answer in 2020 complaints about matters which occurred in 2012 and 2013, was both (a) legally relevant (irrespective of fault), and (b) material, to the Employment Tribunal's exercise of its discretion to extend time – see Adedeji v Uni. Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ.23, paras. 31-32.

35. Further and/or in the alternative, the ET erred in law and breached its duty to give reasons by failing to address the aforementioned prejudice issue the Appellant raised either at all or adequately in the Judgment.

The relevant law

10. Section 26 of the **Equality Act 2010** defines harassment at subparagraphs (1) and (4) as follows:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

[...]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

11. Harassment requires that there be conduct on the part of the harasser that is unwanted and has the relevant objectionable purpose or effect.

12. The time limit within which claims to the employment tribunal must be brought is set out at section 123 of the **Equality Act 2010** which at the relevant time provided:

> "(1) … 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 of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> […]
>
> (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."

13. Conduct on the part of a respondent that constitutes harassment could potentially be conduct that extends over a period.

14. It is to be noted that the claim form was presented on **19 December 2013**, after the repeal of the statutory dispute resolution procedures and shortly before the introduction of the requirement for early conciliation, so the time limit was not subject to extension under either regime.

15. The approach to be adopted to time limits in employment tribunal claims was considered by Leggatt LJ in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR. 1194 at paragraphs 18 to 20:

> "18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para 75.
>
> 19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
>
> 20. The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 576; [2003] IRLR 434, para 24."

16. The employment tribunal is now discouraged from focusing on what are sometimes referred to as the **Keeble** factors but should, in exercising its wide discretion, take into account all relevant factors, which will almost always involve considering the length and reason for the delay and whether the delay has prejudiced the respondent in respect of matters such as investigation and obtaining

evidence.

17. In **Adedeji v University Hospitals Birmingham NHS Trust** [2021] EWCA Civ 23, Underhill LJ at paragraphs 31 to 32 considered whether an employment tribunal in analysing a claim that had been submitted a matter of days outside the statutory time limit was entitled to take into account the fact that allowing an extension of time would result in consideration of matters that had happened a considerable time before the submission of the claim, because the claim included complaints that went back over a considerable period of time. Underhill LJ held that was a matter that the tribunal was entitled to take into account:

> " 31. However, I do not believe that the substantive point that the Judge was making at para. 33 of her Reasons was about the impact of that very short delay, which she herself described as "not substantial". Rather, she was making the point that the substance of the claim concerned events which had occurred long before the formal act complained of, and that the evidence of those events was likely to be less good than if a claim about them had been brought nearer the time: see para. 22 above. I appreciate that, if that was her point, her reference to "impact on the cogency of evidence" is rather inapt because if taken by itself it would suggest that she had in mind '*Keeble* factor (b)', which is indeed focused specifically on the impact of the delay following the expiry of the relevant deadline; but we are concerned with the substance of her reasoning, which is in my view adequately clear, and we should not be distracted by any mere looseness of expression.
>
> 32. So understood, I see no error of law in this element in the Judge's reasoning. Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less undesirable in principle. As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago. On the facts of this case the Judge clearly had in mind both the respects in which the events of late 2016 were historic, as identified at para. 22 above; and she also had in mind the fact that the Appellant could have complained of them in their own right as soon as they occurred or in May, immediately following his resignation. She does not, rightly, treat this factor as decisive: in fact, as I read it, she placed more weight on the absence of any good reason for the delay. But what matters is that she was entitled to take it into account. As regards the Appellant's point that the relevant proposals were contained in emails, it is not clear that this specific point was made in either the ET or the EAT, but in any event it cannot be assumed that it follows that no oral evidence on the issue would be required: the assessment of whether there was a risk of evidence being less satisfactory because of the passage of time was for the Judge and cannot be challenged in this Court unless it was perverse. (I would add, while acknowledging that this does not appear to have been the Judge's approach in this case, that the fact that the grant of an extension

> will have the effect of requiring investigation of events which took place a long time previously may be relevant to the tribunal's assessment even if there is no reason to suppose that the evidence may be less cogent than if the claim had been brought in time.)"

18. The respondent relied on the case of **Martin v Kogan** [2021] EWHC 24 (Ch*)* for the relatively self-evident proposition that the employment tribunal should make findings of fact on the key material matters. The claimant relied on **DPP v Greenberg** [2021] IRLR 1016 for the approach that the Court of Appeal reiterated should be applied to considering appeals from the employment tribunal, at paragraphs 57 to 58. I have considered the guidance given and have had in mind the importance of not adopting an excessively fastidious approach to considering decisions of the employment tribunal.

19. The respondent denied that there had been any harassment. In the bundle for the appeal I had an extract from the respondent's written closing submission in the employment tribunal. The respondent dealt with the time issue in respect of the alleged harassment by the claimant being compelled to complete an ill-health retirement application at paragraphs 15 and 16:

> "15. C's second complaint (being compelled to complete an ill-health retirement (**IHR**) application) is also out of time. It is clear that C's attitude towards being asked to complete an IHR application change over time, from (i) an initial period in 2012 and part of 2013 when C was opposed to making an IHR application, to (ii) to a later period starting no later than early September 2013 when C accepted (following advice he trusted) that it was in his own interests to "*hedge his bets*" and complete the IHR forms). Since harassment relates only to unwanted conduct, C's complaint here can only relate to the earlier period, which since it predates 20 September 2013 means it is out of time.
>
> 16. It is not just and equitable for the ET to extend time in relation to either of these two complaints.

The determination of the tribunal

20. The tribunal directed itself to section 123 of the **Equality Act**, and at paragraph 3.22 briefly to what it described as acts extending over a period (strictly speaking conduct extending over a period):

> " 3.22. The question of acts "extending over a period" has been considered in a number of cases notably Cast-v-Croydon College 1998 IRLR 318 and Hendricks-v-

Commissioner of Police for the Metropolis 2003 IRLR 96. Acts with only continuing consequences or a succession of isolated unconnected acts are not an act extending over a period."

21. The tribunal's determination in respect of the harassment claim subject of this appeal was at paragraphs 4.7 through to 4.12 of the judgment:

> "4.7 ... Working in a prison like Frankland is a demanding job for which an officer must be of sufficiently good physical and mental health not to be absent frequently or for long. It appears Governors at all levels at Frankland do whatever is necessary to run the prison well, which is laudable. The HR officers, particularly Ms Liddell, appear to aim to deliver whatever the Governors want and CM's and SO's obey orders and follow policy. If an officer says he cannot cope for mental health reasons, some think he must be making an excuse, whilst others think if he is genuine, he is of no use to the prison service. Either way, the claimant was pushed down the IHR option which clearly "relates to" disability as anyone who satisfy the eligibility criteria for IHR would, having regard to such cases as SCA Packaging -v- Boyle 2009 ICR 1056 and Banaszczyk v Booker Ltd 2016 IRLR 273 be a disabled person.
>
> 4.8 The Disability advisor, Ms Butler, was viewed as only useful to advise on aids an adaption for physical impairments. Managers at all levels show no sign of having absorbed any training of equality, if any, they may have received. In many respects information was not shared when it should have been hence SO Nutton did not know the claimant was not attending his capability hearing for medical reasons. The SLE application was a fiasco.
>
> 4.9 Society expects prison offers, like members of its armed forces, the police and other emergency services, to put themselves at risk. If they are injured in the line of duty that they are permanently incapable of work they may qualify for IHR. The fact the claimant was alter given IHR and his civil case for compensation has been settled does not detract from the harm done to him by writing him off as a hopeless case for rehabilitation to some work long before he or any medical advisors were ready to do so. It is that which violated his dignity and created a hostile environment for him and it is entirely reasonable it would. The so called "eggshell skull rule" is relevant to reasonableness of effect, and will be to remedy.
>
> 4.10. Mr Tinnion argues the claimant's attitude to being asked to complete an IHR application changed over time, form (i) an initial period in 2012 and part of 2013 when he was opposed to making one, (ii) a period starting **no later than early September 2013** when he accepted (following advice he trusted) it was in his own interests to do so. Since harassment relates only to unwanted conduct, Mr Tinnion says the only acts complained of can be in the earlier period, which since it predates 20 September 2013 means it is out of time. Ingenious though this argument is, we are not convinced acceptance of his union's advice makes the conduct "wanted" but even if this claim is out of time, it is only by a few weeks at most.
>
> 4.11. He adds it is not just and equitable to extend time because (a) the claimant had the benefit of trade union advice throughout the time he was trying to reach a solution before issuing proceedings (b) it is necessary his witness statement should put forward grounds for us to extend time because the burden rests on him to show it is just to extend time, not on respondent to show it is not, and (c) there is prejudice to the respondent in having to answer in February 2020 complaints about matters which occurred in 2012 and 2013.

> 4.12. We reject these submissions. On point (a), for many years, Parliament has tried various means to ensure before employees rush to a Tribunal, they try to resolve problems internally. That is what the claimant and Mr Redford were doing. The claimant was in no fit mental state to be making fine decisions on when to issue and even if, which we do not accept, Mr Redford should have pressed him to, applying Chohan v Derby Law Centre we are not willing to say there were not good reasons for any delay. If we do not exercise the discretion, patience before brining proceedings to allow the respondent the opportunity to remedy the situation would result in a decision that great wrong was done to a claimant but he can have no remedy because he waited too long. That is not just or equitable. On point (b) the discretion is for us to exercise and our decision may be made based on the facts we have found and submissions without the point being in a witness statement. On point (c) it is the short delay in bringing the claim to which we must have regard not the delay in it being brought to trial which is the fault of neither party. This case passes all the tests in Keeble for extending time."

22. It appears that the tribunal took its lead from the respondent's written closing submission in focusing on any conduct on the part of the respondent having ceased to be unwanted by no later than early September 2013. However, the respondent also denied that there had been any harassment. I consider it was incumbent upon the tribunal to identify the specific conduct on the part of the respondent that constituted harassment and, if it was more than the original pressure to submit an application for ill-health retirement, to set out what ongoing conduct occurred, and when that conduct came to an end. I consider that the employment tribunal failed to make the fundamental findings that were necessary to consider the extent to which the claim was submitted after the primary three month time limit, which was a necessary component of going on to consider whether it would be just and equitable to apply a longer time limit.

23. I also consider that at paragraph 4.12 in the last two sentences, the tribunal directed itself that it was only the period by which the complaint was originally submitted out of time that was legally relevant. It is clear from the decision in **Adedeji** that in considering whether to exercise the broad discretion to extend time it is relevant for the tribunal to consider the consequences for the respondent of granting an extension, even if it is of a relatively brief period, including whether it will require the tribunal to make determinations, for whatever reason, about matters which occurred long before the hearing. Accordingly, while it was correct that it was neither of the parties' fault that there had been

considerable delay whilst the personal injury proceedings had been dealt with, allowing an extension of time, even of a relatively brief period, would result in the tribunal having to make determinations on matters that had happened many years ago. That was a factor that the tribunal was required to consider.

24. The employment tribunal concluded that any delay was for a relatively short period of time because it focused on any conduct having ceased to have been unwanted by September 2013 . The employment tribunal will have to determine the date of any harassment and, if it is conduct continuing over a period, the precise nature of the conduct that continued. In addition, the employment tribunal will have to determine the date by which the specific conduct extending over a period ended and/or ceased be unwanted.

25. Accordingly, the appeal is allowed on both grounds. It will be remitted to be considered by the same employment tribunal if possible. I was told that Employment Judge Garnon has retired. Counsel were not aware whether he is continuing to sit after his retirement. I consider it is appropriate to remit the matter to the same tribunal if possible, having regard to the principles in **Sinclair Roche and Temperley and Others v Heard and Another** [2004] IRLR 763. I consider it is proportionate to do so. The tribunal made detailed and careful findings of fact, the majority of which are not challenged. Although there has been a significant passage of time, in the light of those detailed findings I consider that the original tribunal would be well placed to make this determination.

26. To the extent that the tribunal has erred in law, that is in considerable part because of the way it was directed by the submissions of the respondent, which did not themselves focus on the key date of 20 February 2013, the date on which the application for ill-health retirement was submitted. I do not consider that the respondent is right in suggesting the fact that the employment tribunal held for the claimant on this issue of harassment in robust terms means that there is a risk that the tribunal will

be perceived to be having a second bite of the cherry. I consider that the tribunal's professionalism can be relied upon and that it will consider with care precisely what conduct on the part of the respondent constituted harassment, if that was conduct extending over a period, the period over which it extended and whether it is just and equitable to apply a time limit in excess of 3 months, having regard to all relevant circumstances, including that an extension of time would require consideration of matters that had happened many years ago.