Neutral Citation Number: [2022] EAT 17

Case No: EA-2019-001089-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 August 2021

Before :

HIS HONOUR JUDGE MARTYN BARKLEM

- -

Between :

MR E BAYO	**Appellant**
- and -	
MINISTRY OF DEFENCE	**Respondent**

- -
- -

Mr N Roberts for the **Appellant**
Mr P Smith (Government Legal Department) for the **Respondent**

Hearing date: 26 August 2021

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JUDGMENT

SUMMARY

Practice and Procedure

The claimant was an army reservist and sought to bring claims of race and religious discrimination which occurred during a period of deployment in Cyprus. In order to bring such a claim a claimant is required first to have lodged a service complaint. The period for lodging an ET is extended to 6 months. The claimant failed to bring a claim within the applicable time limit.

Following a hearing in which an extension of time to lodge a claim was refused, the claimant sought reconsideration. By coincidence, the military appeal body considering an appeal against rejection of his service complaint considered the matter in his absence on the same day as the ET hearing.

The claimant forwarded the decision of the appeal body which continued a number of findings which were in his favour. However, the covering letter made no explicit reference to this decision being something which he could not have been able to produce at the date of the original hearing. Many other points in the letter were attempts to relitigate issues on which he had lost at the original hearing.

It was implicit from the ET's rejection of the reconsideration request that it had not realised that a document was enclosed which could not have been produced at the hearing, not least as the claimant had not received it by that date. This was, the EAT held, entirely understandable.

The matter was remitted to the same ET to begin the reconsideration process afresh.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this judgment I will refer to the parties as they were below. The appeal has been permitted to proceed to a full hearing by HHJ Tayler following a preliminary hearing held on or about 25 November 2020. It is in relation to an aspect of one ground only of the original appeal, which was settled by the claimant acting in person. All other grounds of appeal were rejected by HHJ Auerbach at the sift stage, and no appeal against that decision has been made.

2. The claimant is represented today by Mr Nathan Roberts acting under the auspices of Advocate, formally the Bar Pro Bono Unit. The respondent is represented by Mr Paul Smith, who acted below at a hearing before the Employment Tribunal (Employment Judge Buckley sitting alone) at a hearing which took place on 21 October (not the 22nd as the judgment records) at which the claimant's claims were struck out for having been lodged out of time, the Employment Tribunal having held that it was not just and equitable to extend time. That judgment has not been appealed, and I am not concerned with the details, save to say that the decision not to extend time was based on the weighing up of a number of factors. I am grateful to both counsel for their helpful skeleton arguments and oral submissions today.

3. The point in issue is short and the background straightforward. In brief, the claimant is a private soldier serving in the Army Reserve, specifically the Royal Logistics Corps. He is a Muslim. He was deployed to Cyprus with 7 Transport Regiment as part of Operation TOSCA, the UK element of the UN peacekeeping force in Cyprus, from 21 March to 19 September 2017. He alleges that he was subject to race and religious discrimination in the course of that deployment.

4. By section 123(2)(a) of the **Equality Act**, the time limit for bringing a claim of discrimination in the armed forces to the Employment Tribunal is six months from the date of the act to which

the proceedings relate. Prior to lodging a claim, the claimant must have made and not withdrawn a service complaint. The claimant did not lodge his claim until 21 February 2019, some twelve months after (as the ET found) he had been made aware of the limit. His suggestion that he had been told by his assisting officer, a Captain Clark, that he had to wait until the final outcome of the service complaint before bringing an ET claim was rejected by the employment judge.

5. Before turning to the narrow issue which the appeal gives rise to, I shall summarise the history of the service complaint. The claimant first brought his service complaint in September 2017, a couple of days before the end of his deployment. An initial interview took place, following which one aspect of the complaint was declared inadmissible on 7 November 2017. The claimant referred the matter to the Service Complaints Ombudsman on 22 November 2017, which held in January 2018 that the entire complaint was wholly inadmissible. An investigation report was delivered in July 2018, and the decision body, seemingly a single individual, delivered his decision on 5 November 2018 dismissing the service complaint. The claimant appealed and an appeal body was established comprising Brigadier R Carey, described as "appeal body member", and Ms M Obi, described as "independent appeal body member".

6. I have read the determination of the appeal body, which is dated 21 October 2019, the same date as the ET hearing. At paragraph 8 of the determination, it was noted that the claimant had lodged an ET claim "which appears to be ongoing". The determination also noted that the claimant had been asked to appear before the appeal body but declined "believing that we would be no fairer in considering his case than a decision body". A copy of the determination was posted promptly to the claimant by the Army Service Complaints Secretariat the following day, 22 October 2021. It therefore follows that the claimant could not have been in possession of the determination at the date of the tribunal hearing. Mr Roberts has sensibly disavowed any suggestion made in his skeleton argument that the delay on the part of the appeal body might

have been deliberate, something which would in any event be irrelevant to the issues I have to decide.

7. The determination is detailed and critical of a number of those in the chain of command. It made some findings which were favourable to the claimant. Although the delays which occurred through the process were lengthy and regrettable, delay is something which is not unique to the military, as those of us working in the civil and criminal justice systems are all too aware. Indeed, the appeal in this case was lodged at the EAT as long ago as November 2019, albeit the pandemic is responsible for a good deal of the subsequent delay.

8. In his skeleton argument, Mr Smith points out that the appeal body uses the word "wronged" to define whether a complaint should be withheld and that the respondent had not by the determination (which I take to be a concession that it is bound by it) made admissions of discrimination. I do not find that compelling. By section 340A(1) of the **Armed Forces Act 2006**, it is provided, "If a person subject to service law thinks himself or herself wronged in any matter relating to his or her service, the person may make a complaint about the matter". "Wronged" is therefore a term of art. In any event, the appeal body used language in a number of findings which are unequivocally of discrimination. Others are capable of being construed by an ET as equivalent. In my judgment, it is not open to the respondent to say that no part of the determination amounts to an admission of discrimination for which it is potentially liable.

9. I turn now to the issue on the appeal. The claimant applied for reconsideration of the tribunal's judgment in a document sent to the tribunal by email dated 5 November 2019. The "application for reconsideration" is a lengthy document which bears the date 22 October. It is an attempt to reargue points which had been determined against him at the hearing. Until one looks very closely, there is nothing to signal the fact that what is potentially a very important document

was enclosed, which was not something that the claimant could have produced at the hearing. In fact, under paragraph 3.4, headed "Delay did not prejudice the respondent", there is a paragraph (c) which reads:

> "c. Following the PH, the Respondent, having examined witness evidence provided before them in the form of witness statements following the appeal of their earlier decision (that the Applicant had not been discriminated against) wrote to the Applicant admitting that the Applicant had been unlawfully discriminated against."

10. Having been taken to that today, it does certainly appear to be a reference to the determination, although the ET's failure to spot it for what it is, as I find to be likely, is entirely understandable. Prior to the preliminary hearing, it was confirmed that the claimant's email did indeed include the decision letter and determination.

11. The ET's reconsideration judgment was very brief, and I shall set it out in full:

> "1. There is no reasonable prospect of the original decision being varied or revoked for the following reasons:
>
> 2. The claimant has accompanied his application with a witness statement and various exhibits. There is no reason why the claimant could not have given or produced this evidence at the hearing. Some of it is entirely inconsistent with the oral evidence given by the claimant at the hearing, for example the evidence on whether the claimant had received JSP 831 (Joint Services Publication).

> 3. There is no prospect of the original decision being varied or revoked on the basis of the claimant now wishing to rely on further or different evidence that could have been produced at the initial hearing.
>
> 4. The other points raised by the claimant amount to attempts to reargue the claim or assertions that I reached the wrong decision. I have considered each of the points raised by the claimant, and none of them demonstrates any arguable error of law or other reason which might give to a reasonable prospect of the decision being varied or revoked."

12. As mentioned above, the reconsideration application had made no direct mention of the determination, did not point out that it had been received by the claimant only after the hearing before the ET, and failed to point out that it contained matters capable of amounting to admissions. Given the volume of work that employment judges have to deal with, it would be entirely understandable if the employment judge in this case did not make the connection for herself and read the determination on the footing that it had been available for the claimant at the date of the hearing. I have little doubt that, had the employment judge been specifically referred to the contents of the determination and its date, she would not have written in the terms which she did, namely "There is no reason why the claimant could not have given or produced this evidence at the hearing and there is no prospect of the original decision being varied or revoked on the basis of the claimant now wishing to rely on further or different evidence that could have been produced at the original hearing". Mr Smith's valiant attempts to persuade me that the judge must have read and understood that the determination could not have been before it at the hearing were unsuccessful.

13. Mr Smith accepts that the first and the third limbs of the test in **Ladd v Marshall** [1954] 3 All ER 475, under which a tribunal has discretion to reconsider its decision on the basis of new evidence, are met. These limbs are that the evidence (1) could not have been obtained with reasonable diligence for use at the original hearing, (2) is relevant and probably would have had an important influence on the hearing, and (3) it is apparently credible. It seems to me unarguable that the material which is contained in the determination could not have been relevant to an informed decision, although the extent of that relevance is not a matter on which I can or should speculate. It seems to me, as mentioned before, that although understandable, the employment judge's failure to recognise, as I take to be the case, that there was before her material on the reconsideration which arguably contained admissions on the part of the respondent in relation to matters which were live in the case and which had not and could not have been put before her at the hearing, amounts to an error of law, and the appeal succeeds and the reconsideration judgment is set aside.

14. That leaves the question of disposal. Mr Roberts' submissions require consideration of the reconsideration regime:

> " 72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal [that is what happened here]. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may

set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full Tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

15. Mr Roberts submits first that I should resolve the matter myself. I agree with Mr Smith that this is not a case in which I should substitute my own view for that of the Employment Tribunal. Mr Roberts secondly submits that I should at least substitute the employment judge's conclusion at stage one on the basis that there must be a reasonable prospect of the original decision being varied or revoked. Although sympathetic to that submission, which has force given that it is a very low hurdle, whether there is a reasonable prospect must depend on the weight that the

determination has on the person reconsidering it. There is plainly highly material evidence in the determination, but how that interacts with and potentially displaces the other evidence and considerations which were before the employment judge is not a matter that the EAT can resolve. The decision to which I have been taken where the EAT substitutes its own views concerned substantive decisions, not reconsideration. Moreover, rule 72(3) is mandatory unless it is not practical for the same employment judge to hear the matter, something about which I understandably have no information. Mr Roberts did not press the point that the matter should be heard by a different judge. Rules 72(3) makes it clear that that is inappropriate. In any event, if, as I have already said to be likely, the employment judge simply missed the relevance of the determination, the reason for that is likely to have been the claimant's innocent failure to give it the prominence it needed in a document which raised many other issues which the judge correctly regarded as being an attempt to relitigate points on which findings had been made against him. As a litigant in person, I entirely understand the difficulties he faces, but it is his failure to draw attention to this important point that has led to the prolonged delays in the continuity of his case.

16. I therefore consider the appropriate course to be for the matter to be remitted to the same employment judge to reconsider the matter afresh at the first stage suitably apprised of the true facts surrounding the determination. Should it prove not practicable for her to deal with the matter, the provisions of rule 73(3) will be engaged.