



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms H Gamal-Bagadi

v

**(1) Home Office
(2) Mr S Fox**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP

On: 12 January 2022

Before: Employment Judge Truscott QC

Appearances:

**For the Claimant: In person
For the Respondent: Mr B Gray of Counsel**

JUDGMENT on PRELIMINARY HEARING

1. The claim No. 2302859/2020 is amended to add Home Office as a respondent.
2. The claim in claim No. 2302859/2020 against Mr S Fox is dismissed.
3. The claimant's claim of indirect religious was not presented within the time limit imposed by section 123 of the Equality Act 2010 and it is not just and equitable to extend the time for the presentation of the claim. Accordingly, the Tribunal has jurisdiction to entertain the claim and the claim is struck out.

REASONS

Preliminary

1. This preliminary hearing was fixed at a telephone preliminary hearing on 4 May 2021 in order to consider the respondent's application to strike out the claimant's claim of indirect religious discrimination set out in a letter dated 30 July 2021 [121].
2. The claimant declined to switch on her camera and did not provide a reason. Whilst there were two witnesses available for the respondent, the Tribunal decided that it would be preferable not to hear any evidence. Parties were agreed that the Tribunal should proceed by way of written submissions. The claimant's submission is contained in her replies to the respondent's application [122A-122F].

3. There was a bundle of documents to which reference will be made where necessary.

4. The respondent sought dismissal of the second respondent from the second claim and to substitute the first respondent in his place. On the basis that the first respondent confirmed that it will not run a reasonable steps defence in respect of Mr Fox, the claimant was in agreement with this course of action.

Findings

1. The claimant continues to work for the respondent. She used to work in its Third Country Unit under the line management of Lisa-Marie Taylor. In that role, she conducted interviews of asylum seekers who had converted to Christianity on 2 and/or 23 May 2019 and 11 July 2019. She did not conduct any such interviews thereafter.

2. On 8 August 2019, the claimant received an informal warning for failing to adhere to instructions in the respondent's 'Operational Mandate'.

3. On 3 September 2019, the claimant was told that she had breached the Operational Mandate again and was suspended due to this breach on 4 September 2019.

4. On the 4 September 2019, the claimant raised a grievance. There is a dispute over whether the grievance was the cause of the suspension in that the respondent says it was not, the claimant says that it was.

5. An investigation meeting took place on 1 October 2019 and an investigation report was issued on 15 October. A disciplinary hearing took place on 18 November 2019 and the claimant was issued with a final written warning on 28 November 2019 to last 24 months.

6. On 10 December 2019, the claimant appealed her Final Written Warning. An Appeal Hearing took place on 27 February 2020. On 5 March 2020, the appeal decision was to reduce the length of the warning to 18 months.

7. The claimant's suspension ended on Friday 29 November 2019. She was signed off with stress at work from Monday 2 December 2019 to 29 February 2020. From Monday 2 March 2020, she was signed off with 'work related symptoms' to 31 March 2020. She was then signed fit for work with amended duties due to 'mild depression' from 30 March to 31 May 2020. However, the claimant remained off work on special paid leave/disability leave due to a lack of a suitable alternative role. This ended on 12 June 2020 and the claimant began a phased return to work on 15 June to 10 July 2020, albeit with no "business as usual" activities.

8. The claimant commenced Early Conciliation on 30 May, which finished on 1 June. She presented her ET1 the same day.

9. A grievance hearing took place on 26 June 2020 and she received the outcome on 7 July 2020. The claimant commenced Early Conciliation on 8 July 2020 and it completed the same day. She presented a second claim to the Tribunal that day.

Submissions

10. The claimant was content to rely on her written responses to the application. The Tribunal received a skeleton argument from the respondent's counsel and a short oral argument.

Law

Indirect discrimination

11. A claim for indirect discrimination arises when a PCP is applied to the claimant according to section 19(1) of the Equality Act 2010.

Just and equitable extension

12. Section 123(1)(b) of the 2010 Act permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

13. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

14. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

15. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment ... cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what

LJ Auld said “there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised.”

16. The Tribunal’s discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information;
- the promptness with which the claimant acted once she knew of the possibility of taking action; and
- the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

17. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

18. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

19. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as “the just and equitable power” has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

20. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the “just and equitable” discretion should be exercised in the particular case.

DISCUSSION and DECISION

21. The claimant alleges that the PCP of her having to conduct asylum interviews of converts from Islam to Christianity was indirectly discriminatory on the grounds of religion. Her claim is clear (**Cox v Adecco** unreported EAT)

22. The last date the claimant was required to conduct a Christian convert interview was on 11 July 2019. The claimant conducted no such interviews after that date. Following her suspension on 4 September 2019, there was no time at which she was asked or expected to conduct such an interview.

23. If there was a PCP applied to the claimant, the last date it was applied to her was 11 July 2019 or, alternatively, 4 September 2019. The claimant argues that the PCP she contends for remained in place notwithstanding it was not applied to her.

24. The mere existence of any PCP after that date, if there was one, would not render it a continuing act absent further such application. Accordingly, the primary time limit expired on 10 October or, alternatively, 3 December 2019.

25. The claimant did not start Early Conciliation until May 2020 and it therefore did not extend time. The ET1 was presented for this claim on 1 June 2020. This is, on either calculation, between 6-8 months out of time.

26. The claimant relies on her mental health as a factor causing the delay but there is no evidence of any such diagnosis prior to 2 December 2019. That is the last day of any potential limitation period. It does not explain her failure to bring the claim prior to that date in a way that would justify an extension of time.

27. By 27 February 2020, a Consultant Occupational Physician assessed the claimant as having responded to medical treatment with only 'mild' depression remaining and being able to work. The Consultant described her as 'capable of engaging with management to discuss the return to work... She is capable of a wide range of administrative duties' [141]. There was a further period of three months before she submitted her claims.

28. The claimant say that she was advised by her Trade Union 'not to frustrate the process'. The Tribunal does not understand the reason for this advice. If given, it indicates that the indirect discrimination complaint is not central to the claimant's claim.

Balance of prejudice

29. From her own commentary on the notes of an interview with Ms Taylor, describing Ms Taylor as telling 'lies', it is evident that there is a significant conflict of oral evidence [130H-I, paragraphs 31-32 and the box containing the claimant's comments beneath] in relation to the application of a PCP. It is likely that a delay the length of the one in this case might have a detrimental impact on the cogency of the evidence in relation to a crucial issue.

30. In relation to prejudice generally, the respondent will have the prejudice of having to defend a claim which is a tangential matter in a case that is already large and complex. The real focus of the claimant's claim is the allegedly directly

discriminatory treatment of her by Ms Taylor and the disciplinary and grievance processes that arose out of that relationship. A claim for indirect discrimination raises entirely different considerations of clashing rights, proportionality and the operational needs of the respondent.

31. Resolving the indirect discrimination claim will take up considerable additional Tribunal time and is likely to be a distraction from resolving what are ultimately the core issues in the claim. The Tribunal considered that it was unlikely that the indirect claim could be heard within the hearing day allocation made for the direct claim. If this claim is dismissed, the claimant is still able to proceed with the central claims about her line management relationship with Ms Taylor and the disciplinary process which was followed.

32. On the basis of the guidance set out earlier and weighing all the relevant factors, the Tribunal considers that it is not proportionate to resolve those issues when they are out of time and are not a central part of the main proceedings, accordingly it is not just and equitable to extend the time for lodging the claim and the claim is struck out.

Employment Judge Truscott QC

Date 14 January 2022