



# **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4123856/2018  
Held in Glasgow on 1 March 2019  
Employment Judge Shona MacLean**

**Mr S Pendleton**

**Claimant  
In Person**

**WGM Engineering Ltd**

**Respondent  
Represented by:  
Ms C Platts -  
Solicitor**

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the Tribunal does not have jurisdiction under section 123 of the Equality Act 2010 hear the claimant's discrimination complaint.

### **REASONS**

#### **Introduction**

1. The claimant sent a claim form to the Tribunal's office on 14 December 2018. The claim was acknowledged on 3 January 2019 when the parties were sent a notice of preliminary hearing for case management in private for an hour on 1 March 2019.
2. The claimant was also advised that the claim appeared to have been submitted out with the period claims should normally be submitted. Accordingly, the Tribunal would have to decide a preliminary issue, whether the claim should proceed. Once the response was received the file would be sent to an Employment Judge for initial consideration and the Tribunal would write to the claimant after that had taken place.
3. A response was sent to the Tribunal on 28 January 2019. The file was referred to Employment Judge Laura Doherty who directed that a day should be set aside for a preliminary hearing in public on 1 March 2019 to decide if the Tribunal had jurisdiction to hear the claimant's discrimination claim as it was time barred under section 123 of the

Equality Act 2010 (the EqA) given that the claimant was dismissed on 25 August 2017 and the alleged discriminatory act took place on 24 August 2017. Also, to be considered was whether the claimant had qualifying service to bring an unfair dismissal claim.

4. On 3 February 2019 the claimant wrote to the Tribunal commenting on the assertions made in the response. The claimant said he would substantiate his position "with correspondence and audio transcription (if admissible) within his fully detailed statement for the final hearing". When this correspondence has referred to me I directed that it be acknowledge and could be discussed at the preliminary hearing. The respondent subsequently sought clarification whether the claimant intended to use the audio transcripts at the preliminary hearing. Employment Judge Giles Woolfson confirmed that the preliminary hearing was to determine the issue of time bar and whether the claimant had enough qualifying service to claim unfair dismissal. He also asked the claimant to confirm whether he intended to use the audio transcripts for the preliminary hearing. The claimant subsequently confirmed that he did not.

5. The parties helpfully completed agendas from which it appeared that the claimant was not pursuing a claim of unfair dismissal.

### **Issue to be determined at the Preliminary Hearing**

6. I clarified that cases involving claims of discrimination are registered and automatically listed for a preliminary hearing for case management. While this case had originally been listed for case management, when the response was received there was initial consideration by an Employment Judge who decided that first there were preliminary issues that should be determined:

a. Does the Tribunal have jurisdiction to hear the discrimination claim as it is time barred under section 123 of the EqA given that the claimant was dismissed on 25 August 2017 and the alleged discriminatory act took place on 24 August 2017.

b. Does the claimant have enough qualifying service to bring an unfair dismissal claim.

7. The claimant explained that he was not pursuing an unfair dismissal claim under section 98 of the Employment Rights Act 1996. Accordingly, it was not necessary for me to determine issue (b) above.

8. I said that a discrimination claim should normally be sent to the Tribunal's office within three months of the act complained of. A Tribunal may consider a discrimination claim that is out of time if it is just and equitable to do so.

9. The parties agreed that the discrimination claim had not been presented in time. Therefore, the issue for me to determine was whether a Tribunal should consider the claim out of time on the basis that it was presented within "such other period as the employment tribunal thinks just and equitable".

10. The parties prepared a joint set of productions. I explained that the claimant had to tell me why he thought it was just and equitable to extend the time for presenting the discrimination claim. There was a wide range of matters that I might consider when deciding whether to exercise my discretion such as the explanation for the delay; balance of prejudice; the advice received and awareness of the right to bring a claim and the time limits. The claimant gave evidence on his own account.

### **Findings in fact**

11. In relation to the issue to be determined I made the following findings in fact. 12. The respondent employed the claimant as Solutions Delivery Manager from 12 June 2017. The claimant's offer of employment was conditional on satisfactory completion of a three months probationary period.

13. On 24 August 2017, the claimant's line manager, Matthew Ely, Contracts Development Manager made a racist comment to the claimant about his wife who is from the Philippines (the August Incident).

14. Paul Green, Director dismissed the claimant on 25 August 2017. Later that day the claimant sent an email to Stephen Connolly, HR Adviser, about the claimant's dismissal and the comment made by Mr Ely during the August Incident that the claimant "*should have bought a cheaper wife*". The claimant said that he found the comment offensive. He wanted to know why, Mr Green who dismissed him, did not know the reason for the dismissal. The claimant wondered what the true reason was for dismissal and whether it was because of the racist comment.

15. On 20 September 2017, the claimant met with Mr Connolly, during which the claimant mentioned talking to the police. Mr Connolly said that he was an HR practitioner dealing with the employment law which is different from criminal law; it was up to the claimant to decide what action he wished to take.

16. On 9 October 2017, Mr Connolly wrote to the claimant advising that having investigated the situation, Mr Ely did not dispute the comment that he made (the Grievance Outcome Letter). Mr Ely had explained the context of the remarks and said that he did not mean to cause any offence or harm but on reflection understood why it may have. Mr Ely had no recollection of the claimant being offended at the time as if this had been the case he would have apologised immediately. It was confirmed that the claimant's grievance was upheld. The comments were made and related to the claimant's spouse. In relation to the claimant's termination of employment, it was reiterated that the reason for the claimant's release during his probationary period was linked purely to performance and was not linked to the claimant's grievance.

17. The claimant exercised a right of appeal on 10 October 2017 which was considered by Martin Bradbury, Chairman at an appeal hearing on 26 October 2017. The grounds were that the respondent's apology was cavalier; the respondent did not take the matters raised seriously; and that the claimant's performance was not the reason for his dismissal.

18. Mr Bradbury advised the claimant of the outcome of the appeal hearing in a letter dated 2 November 2017 (the Appeal Outcome Letter). Mr Bradbury did not accept that the discrimination allegation was not taken seriously. He said that a full investigation had taken place with interviews and statements being obtained from staff members. Mr Ely was dealt with in line with company policy and procedure. In relation to the claimant's belief that dismissal was unjust and because of racism, Mr Bradbury said that there were aspects of the role that the claimant was performing satisfactorily there were other aspects where he was not. While Mr Bradbury was disappointed that this was not conveyed to the claimant at the time of his release, Mr Bradbury was satisfied that the communications were clear at the time they were made. The Appeal Outcome Letter concluded:  
*"In conclusion there were aspects of the role that you were performing in a satisfactory manner, however there were many aspects where you were not. It was therefore, with this knowledge, that I must advise that I dismiss your claim for release from contract on racist grounds. I have concluded that your release was solely on the grounds of performance. This is our final response in this grievance."*

19. The claimant responded by email sent on 13 November 2017 acknowledging that the Appeal Outcome Letter was the respondent's final response but pointing out that racism was not simply an employment issue but a criminal offence and one which the respondent had already admitted to. The claimant set out a response to the allegations about his performance and concluded that he intended to bring this matter to the attention of the authorities.

20. The claimant knew about employment tribunals and that he could bring a discrimination claim. He also knew that there were time limits in relation to employment tribunal claims. The claimant did not seek any advice from ACAS, Citizens Advice or a legal adviser. The claimant has access to a computer and the internet.

21. The claimant decided that he should follow the process of reporting the matter to the police. On 20 January 2018, the claimant reported the August Incident to Police Scotland.

22. Around February 2018 the police contacted the claimant with the view to them interviewing the respondent's employees as part of investigating allegations. The claimant indicated that he did not wish that to be done as he did not want people to be arrested.

23. Around March 2018, the claimant spoke to ACAS. He asked general questions. The claimant thought conciliation and time limits might have been mentioned but was not sure.

24. The claimant was attended an outpatient hospital appointment in late August 2018. This resulted in further medical investigation including an MRI scan in February 2019.

25. On 28 October 2018, Police Scotland sent a letter to the claimant advising that the information provided by him had been assessed by the local crime manager who determined that no crime had been committed. However, the circumstances that were reported were a hate incident: any incident which is perceived by the victim or any person to be motivated (wholly or partly) by malice and ill will towards a social group but does not constitute a criminal offence. No investigation was undertaken and no one at the respondent was contacted. No further investigation was to be carried out unless the claimant provided any new information regarding the incident.

26. The claimant sent a copy of this correspondence to the respondent on 13 November 2018. The respondent responded confirming that as far as it was concerned, it had taken all appropriate steps.

27. The claimant then wrote to ACAS having researched its website for advice following. In early December 2018 the claimant was contacted by ACAS and received links to various websites. The claimant engages in ACAS early conciliation on 10 December 2018.

28. The claimant sent a claim form to the Tribunal's office on 14 December 2018 which included the following:

"I appreciate that this claim is being made well after the preferred three months however by way of appealing for it to be considered I would be obliged if the following could be taken into consideration:

a. I spent three to four months initially trying to resolve the issue with the company itself.

b. I had to wait almost ten months for the police report confirming this was deemed by them as a race hate incident (I must thank Police Scotland for taking the time to produce the report despite their resources being stretched); and

c. Since receiving the Police Scotland report I again tried to obtain an apology from WGM Engineering but being again refused."

29. The respondent raised the preliminary issue that the Tribunal had no jurisdiction to hear the claimant's discrimination claim as it was time barred under section 123 of the EqA given that the claimant was dismissed on 25 August 2017 and the alleged discriminatory act took place on 24 August 2017. The respondent's position was that it was not just and equitable to extend the time limit since over a year had elapsed since the alleged discriminatory act.

### **The Respondents Submissions**

30. The time limit for a discrimination claim to be presented to a Tribunal in the absence of early conciliation process being engaged is at the end of the "period of three months starting with the date of the act to which the complaint relates under section 123(1) of the EqA". The claimant states that the comments made about his wife and his dismissal constitute acts of race discrimination. These occurred on 24 and 25 August 2017. The deadline for submission of the claim would have been 24 November 2017. The claimant did not engage in the ACAS early conciliation process until 10 December 2018. Accordingly, the claim is presented out of time.

31. The Tribunal has discretion to attend the time limit for a discrimination claim by such further period as it considers just and equitable under section 123 (1)(b) of the EqA. In deciding whether it is just and equitable to extend to permit an out of time discrimination claim to proceed, a Tribunal is entitled to consider anything that it deems to be relevant and its discretion is as wide as that of the civil courts (see *Hutchison v Westwood Television Limited* 1 977 IRLR 69; *British Coal Corporation v Keeble* 1997 IRLR 336 and *DPP v Marshall* 1998 IRLR 494). Courts are required to consider factors relevant to the prejudice each party would suffer if an extension were refused including the length and reasonableness for the delay, the reason to which the cogency of evidence is likely to be affected by the delay, the extent to which the parties cooperated with any requests for information, the promptness with which the claimant acted once they knew 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.

32. Although this is a checklist, there is no legal obligation on the Tribunal to go through the list providing that no significant factor is left out. The question is whether the delay has affected the ability of the Tribunal to conduct a fair hearing. The Tribunal has a wide discretion when considering whether it is just and equitable to extend time but time limits are applied strictly in employment cases and there is no presumption in favour of extending time (see *Robertson v Bexley Community* [2003] IRLR 43). The Tribunal should not extend time unless the claimant convinces them that it is just and equitable to do so. The burden is on the claimant. The exercise of the discretion to extend time should be the exception and not the rule.

33. I was referred to *Habinteg Housing Association Ltd v Holleron* UKEAT/0274/14 as provision that I must consider length and reasons for the delay.

34. The claimant knew seven days before the expiry of the time limit that internal process had been exhausted. The delay in submitting the claim form cannot be attributed to any ongoing process being carried out by the respondent. The claimant was aware of the difference between employment and criminal law. There is a different process here and the claimant was fully aware of this. No new evidence was uncovered by the police which would make a difference to the proceedings. None of this justifies a 16-month delay in submitting the application. In any event the claimant was informed by the police on 28 October 2018 that their assessment of the case was that no crime had been committed and no further action would be taken. There was no new information and there was no material change in circumstances. Even then, the claimant does not submit the claim form until another seven

weeks after this letter was received. There is no valid explanation for the claimant delaying a further seven weeks.

35. There was no suggestion that the claimant was unable to submit the claim form due to illness or that the respondent withheld any relevant information which could have hindered his ability to submit the claim.

36. The respondent would suffer considerable prejudice if the claim could proceed given the incidents referred to happened over 18 months ago. Witnesses' recollections are likely to fade and thus having a negative impact on their ability to give evidence. Mr Green, dismissing manager, is no longer employed by the respondent.

37. The claimant has failed to demonstrate that there are any factors which justify the Tribunal exercising a statutory discretion under the just and equitable principle. The discrimination claim should not be allowed to proceed.

### **The Claimant's Submissions**

38. The claimant appreciated that the claim was delayed. However, he was waiting to hear from Police Scotland. As soon as he did the claimant sent the report to the respondent and waited for a response. The claimant had already discussed with the respondent that the Police could investigate the matter independently.

39. Although Mr Green is no longer with the respondent his input was relatively minor and could still be a witness. Every step of the proceedings has been detailed in contemporaneous correspondence.

### **Deliberations**

40. I started my deliberations by considering section 123 (1)(b) of the EqA. I noted that I have a wide discretion to allow an extension of time under the just and equitable test, but it did not necessarily follow that discretion was a foregone conclusion. The exercise of the discretion is the exception rather than the rule and the responsibility was on the claimant to convince me that it was just and equitable to extend the time limit.

41. I considered several factors; the length of and reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the steps the claimant took to obtain appropriate advice; the extent to which the respondent complied with request for information; the promptness with which the claimant acted once he knew of the facts giving rise to the claim; and the balance of prejudice.

42. There was a delay in presenting the claim form of more than a year. The acts complained of occurred on 24 and 25 August 2017. The deadline for sending the claim form to the Tribunal would have been 24 November 2017 unless extended by the early conciliation process. The claimant knew on 13 November 2017 that the internal process was complete. There was no ongoing process being carried out by the respondent.

43. The reason for the delay was that he decided to report the August Incident to the police. Given that the claimant knew about the right to bring a claim to the employment tribunal and the difference between employment and criminal law I had difficulty understanding why he did not take both courses of action especially as during the respondent's investigation Mr Ely admitted to making the comment and the issue of the reason for the termination of the claimant's employment would be considered as part of the employment tribunal proceedings.

44. The claimant did not seek legal advice. However, he had access to a computer and the internet. The claimant did not contact ACAS until around March 2018. It was unclear what prompted this enquiry. I noted that the claimant had spoken to the police and had indicated that he did want people to be arrested. I considered it surprising that the contact with ACAS did not prompt the claimant to present a claim form to the employment tribunal. While the nature of the advice sought and provided was unclear, I considered it most unlikely that the claimant would not have been told about the need for early conciliation and potential time limits.

45. The claimant did not suggest that the delay in presenting the claim form was affected by his health. While I have no doubt that the claimant would be concerned and preoccupied about his condition he was able to present his claim form in December 2018.

46. The claimant received the letter from Police Scotland around early November 2018. Given that there was no new information or material change in circumstances and the internal proceedings had been exhausted I was unclear why the claimant wrote to the respondent seeking an apology rather than entering early conciliation and presenting the claim form to the employment tribunal.

47. I then turned to consider the extent to which the cogency of evidence is likely to be affected by the delay. I accepted that in relation to the August Incident the evidence was unlikely to be affected by the delay. I did not agree that Mr Green's input was minor; it was Mr Green who dismissed the claimant. He would be an essential witness at a final hearing. He is no longer employed by the respondent and would be giving evidence about an event which while memorable to the claimant is likely to be less significant and memorable to Mr Green.

48. The claimant sought advice from ACAS in March 2018 and December 2018. He was aware of the ability to get advice on employment tribunal claims. In December 2018 when he decided to present the claim form he was directed to websites that he could have visited sooner had he wanted to.

49. There was no evidence that the respondent contributed to the delay by failing to provide information.

50. I finally turned to consider the balance of hardship. The claimant intended in late November 2017 to pursue a claim against the respondent in the employment tribunal but chose to delay doing so until the criminal investigation was complete. He has retained the documentation and the events as he recalls them have not faded. While the respondent has documentation between November 2017 and November 2018 it was unaware that the matter was being pursued by the claimant. The respondent's witnesses are unlikely to have a clear recollection of events which were not significant to them at the time.

51. I was not satisfied that there are factors which justify me exercising a statutory discretion under the just and equitable principle. The discrimination claim should not be allowed to proceed.

**Employment Judge: Shona MacLean**  
**Date of Judgment: 05 April 2019**  
**Entered in register: 10 April 2019**  
**and copied to parties**