

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102617/2018

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Held in Glasgow on 3 May 2018

Employment Judge: Iain F. Atack

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Kamaljeet Singh

**Claimant
Represented by:
In Person**

**Advocate General for Scotland
as representing the Ministry of Defence**

**Respondents
Represented by:
Mrs P Macaulay
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

15 The judgment of the Employment Tribunal is:-

(One) That under section 123 of the Equality Act 2010 the Employment Tribunal does not have jurisdiction to hear the claimant's complaint of direct race discrimination which is dismissed.

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(Two) That under paragraph 4 of Schedule 9 of the Equality Act 2010 the Employment Tribunal does not have jurisdiction to hear the claimant's complaint of disability discrimination which is dismissed.

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E.T. Z4(WR)

REASONS

Introduction

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1. In his ET 1 presented on 13 February 2018 the claimant brought three claims. There was a claim of direct discrimination on the grounds of race; a claim of disability discrimination and a claim of indirect discrimination on grounds of race. The respondent argued that the claim of direct race discrimination was out of time and that the Tribunal did not have jurisdiction to consider the complaint of disability discrimination as the claimant was a member of the Armed Forces. This preliminary hearing was fixed to determine the issue of time bar in relation to the claim of direct race discrimination and whether the Tribunal had jurisdiction to consider the claim of disability discrimination. No issue was taken in respect of the claim of indirect race discrimination although the respondent's position was that it lacked specification.

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2. The respondent produced a bundle of documents extending to 82 pages and the claimant a separate bundle extending to 33 pages. Reference to the bundles will be by reference to the page number preceded by the letter R in respect of the respondent's bundle and the letter C in respect of the claimants.

3. The claimant gave evidence but no evidence was led by the respondent.

4. From the evidence which was led and the documents to which I was referred I made the following material findings in fact.

Material Facts

5. The respondent is the Advocate General for Scotland as representing the Ministry of Defence, the government department responsible for the Armed Forces.

6. The claimant held the rank of corporal in the 3rd Battalion, the Rifles (3 Rifles).
7. The claimant was not employed under a contract of Employment. Members of the Armed Forces are appointed at will by the Crown under the Royal Prerogative.
8. The claimant gave notice to terminate his service on 25 October 2016. He was discharged on 25 October 2017.
9. The claimant was charged with failing to attend for a duty contrary to section 15 (1) (a) of the Armed Forces Act 2006, R46.
10. He attended a Summary Hearing before Major Raw of 3 Rifles on 23 June 2017.
11. The claimant denied the charge. It was found proved and the claimant was sentenced to a fine of 8 days' pay to be paid over 3 instalments.
12. The claimant appealed the decision on 23 June 2017, pages R63-4.
15. 13. Initially the claimant appealed against both the findings of the Summary Hearing and the punishment imposed.
14. The claimant subsequently restricted his appeal to the punishment imposed only.
15. 15. On 1 August 2017 the claimant applied for legal aid in connection with his appeal, C 26.
20. 16. A member of the Armed Forces applying for legal aid and in seeking to appeal against a finding may if unsuccessful in the appeal be required to make a contribution from income towards the defence costs of the case. That contribution ranges from £250 to £1,000.
25. 17. On 21 September 2017 the Summary Appeal Hearing Court held at the Military Court Centre Colchester restricted the fine to be imposed to £175.

18. The claimant submitted a service complaint on 29 November 2017, R 15. That service complaint has not been withdrawn.

19. The claimant had a meeting with Major Raw at some unspecified time between 23 June and 21 September 2017 at which he requested time off to consult a solicitor. Whilst there was some dispute about the procedure the claimant was following in making this request, it was granted.

20. The claimant submitted the Early Notification certificate to ACAS on 25 January 2018. The Early Conciliation Certificate was issued on 5 February 2018. The claimant's claim was submitted to the Employment Tribunal on 13 February 2018.

Submissions

Claimant's Submissions

21. It was Mr Singh's position that the act of discrimination took place on 23 June 2017 but that there was a continuing act of discrimination from 23 June until 21 September. He submitted that the actions of Major Raw when he had gone to speak to him about obtaining time off to see his lawyer were discriminatory.

22. He also alleged that the provisions relating to contributions to the appeals procedure were discriminatory and that this affected the whole procedure at the Summary Appeals Hearing.

23. He submitted that the only reason he had given up his appeal in respect of the conviction was because if he proceeded with it and was unsuccessful he might have to pay a contribution of £1,000.

24. It was his position that the punishment was imposed on 21 September when the Summary Appeal-Hearing Court-reduced the fine-which had been imposed upon him by Major Raw. This he said was a continuation of the discrimination he had suffered on 23 June.

25. He submitted that his disability discrimination claim was set out in the service complaint contained at page C 15, paragraphs 11 and 12.

Respondents Submissions

5 26. For the respondent, Mrs. Macaulay submitted that the facts were not really
in dispute. It was her position that there were three claims, something the
claimant accepted. The first race discrimination claim was a claim of direct
discrimination and related to the allegation that the decision to prosecute the
10 claimant was discriminatory on grounds of race. The second related to the
contributions applied in respect of the military Summary Appeal Hearing
court. Mrs. Macaulay accepted that second claim could potentially amount to
an indirect discrimination complaint. That was a distinct claim and no time
bar issue was being taken in respect of it. It was her position that the first
claim being that of direct race discrimination was time-barred as that claim
15 crystallised on 23 June 2017 that being the date on which the summary
hearing took place and a sanction was applied.

27. She referred to sections 120, 121 and 123 of the Equality Act 2010. She
submitted that the claimant should have lodged his claim within 6 months of
23 June 2017 and therefore it should have been presented by no later than
20 22 December 2017. The claimant had not made contact with ACAS until
after that deadline, on 25 January 2018. The early conciliation period ended
on 5 February 2018 and the claim was submitted on 13 February.

28. Mrs. McAuley submitted it would not be just and equitable to extend the time
25 limit.

29. She referred to the following cases

- **Warrior Square Recoveries Ltd v Flynn UKEAT/0154/12/KN**
- **Bexley Community Centre (T/A Leisure Link) v Robertson**
[2003] EWCA Civ 576

- **British Coal Corporation v Keeble [1997] IRLR 336**
- **DPP v Marshall [1998] IRLR 494**

30. With regard to the claim of disability discrimination Mrs. Macaulay's position was that in terms of paragraph 4(3) of Part 1 of Schedule 9 of the Equality Act 2010 Act the Tribunal did not have jurisdiction to consider this complaint. She also submitted that in any event there was no specification provided within the ET 1 in relation to the complaint although the box headed "disability discrimination" had been ticked at section 8.1.

Decision

10 Issues

31. The issues for the Employment Tribunal to consider were firstly, was the complaint of direct discrimination on grounds of race presented in time and, if not, was it just and equitable to extend the time. The second issue was whether the Employment Tribunal had jurisdiction to consider the claim of disability discrimination.

The Complaint of direct race discrimination

The Law

The Equality Act 2010 provides in so far as relevant:-

"120 Jurisdiction

20 **(1) an Employment Tribunal has, subject to section 121, jurisdiction to determine a complaint relating to -**

(a) a contravention of Part 5 (work);

(b) a contravention of section 108,111 or 112 that relates to Part 5."

25 **"121 Armed Forces cases**

(1) Section 120 (1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the Armed Forces unless

(a) the complainant has made a service complaint about the matter, and

(b) the complaint has not been withdrawn

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(5) The making of a complaint to an Employment Tribunal in reliance on subsection (1) does not affect the continuation of the procedures set out in service complaints regulations.”

“123 Time Limits

(1) Subject to sections 140 A and 140B 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of-

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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 that 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.”

32. In this case it was the claimant's position that the act of direct discrimination on grounds of race took place on 23 June 2017. That was the date of the Summary Hearing at which the claimant was convicted and a punishment imposed by Major Raw. The claimant accepted that if the respondent was correct and there was no continuing act his complaint was out of time. It was therefore necessary for the claimant to succeed, to be able to show that there were continuing acts or a continuing act up until 21 September which was the date of the Summary Appeal Hearing.

33. It was the claimant's position that the complaint of direct discrimination was not limited to one single incident but happened over a period of time.

34. The claimant's first claim is of direct discrimination that is to say that he had been discriminated against because of the protected characteristic of race. It was his position that the treatment meted out to him at the Summary Hearing was as a result of his race.

35. The ET 1 specifically states that he was prosecuted due to his race.

36. I accepted that the act upon which the claimant relies for his claim of direct discrimination took place on 23 June when he attended the Summary Hearing and was found guilty and punished

37. The second race discrimination claim is one of alleged indirect discrimination and relates to the contributions potentially applying in relation to the military Summary Appeal Hearing Court. That is a separate ground of claim.

38. From the evidence led I could see no further acts of direct discrimination occurring after 23 June. The discussion with Major Raw to which the

claimant referred resulted in his request to see his solicitor being granted. The evidence indicated a concern upon the part of Major Raw that the correct procedures had to be followed in making such a request but notwithstanding those concerns the request was granted. That could not be construed as a continuing act of direct discrimination. It was a freestanding matter. Its only connection with the act on 23 June was that the claimant was pursuing an appeal arising from that act. Whilst Major Raw may have considered the manner in which the claimant raised the issue with him to be incorrect procedurally he did grant the request for time off for the claimant to see his solicitor. There was no less favourable treatment of the claimant.

39. The complaint about the contributions which could be applied in relation to the Summary Appeal Hearing could not be described as directly discriminatory on grounds of race. There was no evidence to suggest that the contributions were directly discriminatory. That complaint as the respondent concedes could potentially amount to an indirect discrimination complaint.

40. In my opinion the act of prosecuting the claimant on 23 June was a one-off decision. There was no evidence led of a continuing act of direct discrimination. The claimant's complaints relating to the contributions to be made in the event of his not being successful in his appeal are potentially of indirect discrimination and that is a separate ground of complaint in terms of the Equality Act. Accordingly I find that the act about which the claimant complains took place on 23 June 2017. The fact that the detriment the claimant suffered as a result of that act may have continued until 21 September, or even longer, is not relevant to the time limits which relate to when the act which gave rise to the detriment occurred - **Warrior Square Recoveries Ltd. v Flynn (above)**. The ET1 not having been presented until 13 February 2018 the complaint of direct race discrimination is out of time in terms of section 123 (2) of the Equality Act 2010.

41. The next question for the Employment Tribunal to consider is whether it would be just and equitable to allow the claimant's claim to proceed.

42. In the case of **Bexley Community Centre v Robertson** (above) Auld LJ stated at paragraph 25

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"It is also of importance to note that the time limits are exercised strictly in Employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise that discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that was just and equitable to extend time. So, exercise of the discretion is the exception rather than the rule."

43. In the case of **British Coal Corporation v Keeble** (above) the EAT held that the task of the Employment Tribunal in considering whether or not to exercise discretion might be illuminated by perusal of section 33 of the Limitation Act 1980, where a checklist is provided for the exercise of a not dissimilar discretion by common law courts. The checklist requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, and in particular the length, and reasons for, the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the party sued has co-operated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. Although the Limitation Act does not apply in Scotland, the checklist is nevertheless useful and Employment Tribunals ought to consider it -

44. I considered first of all the length of and reasons for the delay. The claimant submitted his service complaint on 29 November, that being a prerequisite for bringing a claim before the Employment Tribunal under section 121 of the Equality Act. The claimant accepted in cross-examination that he could have raised not only the service complaint but also the Employment Tribunal claim. He did not do so. He did not speak to ACAS until 25 January 2018 and no satisfactory explanation was given with regard to why the claim had not been presented before it was.
45. I did not accept Mrs. Macaulay's submission that the cogency of the evidence would be affected by the delay. The claimant was referring to one instance of race discrimination, namely his prosecution and the reason for it, and that was well documented. I did not consider that the cogency of evidence to be given by the respondent's witnesses would be adversely effected by the delay.
46. No evidence was led as to any steps taken by the claimant to obtain appropriate professional advice in relation to his claim. There was evidence he had sought legal advice in connection with his appeal from the conviction and punishment imposed on 23 June 2017, but no reference to any advice sought relating to his claim. He was able to submit his service complaint in November but no explanation was given why the ET1 could not have been presented then, when it would have been in time. Indeed, the claimant's evidence was that the claim could have been presented when the service complaint was lodged.
47. The claimant gave evidence that he thought there was a three month time limit and referred to an email of 24 January 2018, C28, requesting details of what he referred to as his "employer's" details so that he could make a claim. He accepted in that email that he was already over that limit of three months. No explanation was given as to why, even assuming the time-limit was 3 months, he did not present his claim within that 3 month period. He

was of course in that email referring to a period of 3 months running from 21 September being the date of the Summary Appeal Hearing.

5 48. I also considered the prejudice which each party was likely to suffer if the claim was not allowed to be received late. The claimant would suffer by not having his claim heard if the discretion was not exercised in his favour. I did not consider the respondent would be likely to suffer any particular prejudice.

10 49. Taking all the circumstances into account and in particular the length of the delay and lack of explanation as to why the claim of direct race discrimination had not been presented within six months from 23 June 2017 and bearing in mind the decision in **Bexley Community Centre v Robertson** quoted above, I decided not to exercise my discretion in this case. The claimant had failed to convince me that it would be just and equitable to exercise my discretion to allow the claim to proceed. The claimant's case of direct discrimination is accordingly dismissed.

20 50. The claim of Disability Discrimination

The Law

Paragraph 4 of Schedule 9 of the Equality Act 2010 provides as follows*

"4. Armed Forces

25 (1) A person does not contravene section 39(1)(a) or (c) or 2(b) by applying in relation to service in the armed forces a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces.

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(2) A relevant requirement is -

(a) a requirement to be a man;

(b) a requirement not to be a transsexual person.

(3) This Part of this Act, so far as relating to age or disability, does not apply to service in the armed forces; and section 55, so far as relating to disability, does not apply work experience in the armed forces.”

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51. The effect of paragraph 4 means that no complaint of age discrimination or disability discrimination may be brought in respect of service in the armed forces. This complaint of disability discrimination was in respect of service by the claimant in the armed forces. It therefore does not matter if the claimant's claim of disability discrimination lacks specification as Mrs. Macaulay suggested since even if it was fully specified and detailed the Employment Tribunal would not have jurisdiction to consider the complaint. Because of paragraph 4 the Employment Tribunal does not have jurisdiction to consider the complaint of disability discrimination which is dismissed.

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52. In summary, the claimant's claims of direct race discrimination and disability discrimination are dismissed. The claim in respect of indirect discrimination will proceed. A preliminary hearing will be fixed to deal with the case management aspects of that case.

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Employment Judge: I Atack
Date of Judgment: 15 May 2018
Entered in register: 21 May 2018
and copied to parties

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