



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110424/2021

Held in Edinburgh on 26 April 2022

Employment Judge M Sangster

Mr T Montgomery

Claimant
In Person

Lothian Buses Limited

Respondent
Represented by
Mr Rollinson
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Tribunal does not have jurisdiction to consider the claimant's complaint of harassment. That complaint is accordingly dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 1 July 2014 to 17 May 2021. He engaged in early conciliation from 6 June to 18 July 2021 and submitted a claim to the Tribunal on 18 July 2021. The complaints raised in the claimant's ET1 were unfair constructive dismissal, failure to make reasonable adjustments and harassment related to disability.

2. At a case management preliminary hearing, held before Employment Judge McFatridge on 10 December 2021, it was determined that an open preliminary E.T. Z4 (WR)

hearing should be held to consider whether the claimant's complaint of harassment was time-barred. In the note issued by Employment Judge McFtridge on 14 December 2021, following the case management preliminary hearing, it was recorded that the claimant's complaint of harassment was essentially based on two distinct events, one which took place in December 2019 and the second in July 2020. Employment Judge McFtridge recorded that the preliminary hearing should proceed on the basis that the claimant's pleadings were to be taken at their highest and that the parties did not consider there would be any need to lead evidence, although if the claimant had any specific issues regarding whether or not the Tribunal should exercise its discretion on a just and equitable basis, the claimant may do so.

10

3. A preliminary hearing accordingly to place on 26 April 2022 to determine whether the Tribunal had jurisdiction to consider the claimant's complaint of harassment.

15

4. At the outset of the preliminary hearing there was a discussion in relation to the asserted acts of harassment relied upon by the claimant. He confirmed that he relied solely on two distinct events, which he stated took place on 16 December 2019 and 2 July 2020. It was confirmed that, for the purposes of the preliminary hearing only, it would be assumed that these events occurred and no evidence required to be led in relation to them. The claimant was asked whether he wished to give any evidence, particularly related to whether the Tribunal should exercise its discretion, on a just and equitable basis, to extend the requisite time limit for lodging his harassment complaint. The claimant confirmed that he did. The Tribunal accordingly heard his evidence. No further oral evidence was led by either party.

20

25

5. A joint set of productions was produced, extending to 88 pages. The claimant also referred to one further document, with the consent of the respondent, during the course of the hearing.

30

Issues to be determined

6. The only issue to be determined by the Tribunal was 'whether the claimant had presented his complaint of harassment within three months of the date of the acts to which the complaint relates or such other period as the Tribunal
5 thinks just and equitable, in accordance with 123(1)(a) of the Equality Act 2010.

Findings in fact

7. The Tribunal found the following facts, relevant to the issues to be determined,
10 to be admitted or proven.
8. The claimant was diagnosed as having autism and anxiety in early 2019. He finds it difficult to deal with stressful situations as a result of his medical conditions.
15
9. The claimant did not raise a grievance in relation to incident that he states occurred on 16 December 2019. He did however raise concerns informally with the respondent. This resulted in a mediation meeting with the other party involved on 14 January 2020. The other individual apologised to the claimant
20 for any upset or distress caused by the incident and the claimant accepted that apology. The claimant did not raise any further concerns in relation to the incident following that meeting and considered the matter resolved.
10. The claimant did raise a formal grievance in relation to the incident that he states
25 occurred on 2 July 2020. That grievance was raised with the respondent on 4 July 2020. The claimant was informed on 30 July 2020 that his grievance had not been upheld and that he had the right to appeal against that decision. The claimant did appeal and attended a grievance appeal meeting, with his trade union representative, on 11 August 2020. He was informed by letter dated 24
30 August 2020 that his appeal had not been successful.

11. By letter dated 26 August 2020, the claimant indicated that he did not agree with the appeal outcome.
12. The claimant was absent from work from 12 December 2020 to 19 March 2021, as a result of stress and anxiety.
13. In correspondence sent to the respondent dated 26 January 2021 the claimant indicated that *'this order for me to prepare a complaint I will be raising with Lothian buses I would like answers to the following...'* In an email dated 8 February 2021, the claimant indicated *'I am awaiting legal advice on my complaint'* in his evidence to the Tribunal, the claimant stated that he had not in fact taken legal advice at that time. He accepted however that he knew he could have done so, indicating that he chose not to.
14. The claimant's attended work from 19 March until he resigned, with immediate effect, on 17 May 2021. He secured alternative employment, which he commenced on 8 June 2021.
15. The claimant lodged his claim with the Tribunal on 18 July 2021.

Claimant's Submissions

16. The claimant gave a very brief submission, stating that the respondent knew about his disability, that had a duty of care towards him and they failed to recognise and act on that. He stated that he could have been treated a lot better.

Responder Submissions

17. The respondent submitted, in summary, that the claimant's harassment complaint was presented to the Tribunal outside the time limit and it was not just and equitable to extend the time limit.
18. With reference to the case of *British Coal Corporation v Keeble* [1997] IRLR 336 it was submitted that no credible explanation has been provided for the delay. The claimant knew of the circumstances giving rise to the potential

complaint at the time they occurred, but took no steps to raise a claim. He was a member of a trade union and was supported by them in his grievance. He knew he could take legal advice. He did not do so. The length of the delay is significant. Memories will inevitably have faded and the quality of evidence will be affected by the delay. The prejudice to the respondent of the claim being brought is far greater than the prejudice to the claimant of not being able to bring a claim. Time limits exist for a reason and should be enforced strictly.

Relevant Law

10 19. Section 123(1) of the Equality Act 2010 (EqA) states that complaints 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 Tribunal thinks just and equitable.

15 20. Section 123(3) EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

21. The burden of proof is on the claimant to establish that it is just and equitable to extend time, as explained in *Robertson v Bexley Common ntre* [2003] IRLR 434, in which the Court of Appeal said, at p :
20

“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 the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”
25

22. In *British Coal Corporation v KeeM* [1992] IRLR 336 the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act

1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised, such as

- (a) the length of any reasons for the delay;
- 5 (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued had cooperated in providing information;
- (d) the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action; and
- 10 (e) the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

23. In **LONDON Borough of Southwark v Afolabi** [2003] IRLR 220 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for
15 Tribunals, it does not require to be followed slavishly. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA ('such other period as the Employment Tribunal thinks just and equitable') that Parliament chose to give Employment
0 Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

24. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, the Court of Appeal approved the approach set out in Afolabi and Morgan and, at paragraph 37. Underhill LJ confirmed, that
25 *rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess*
30 *all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular "the length of, and*

the reasons for, the delay". If it checks those factors against the list in Keeble well and - 4 I would r - nend taking - framework for 'ts thinking. '

Discussion & Decision

- 5 25. The Tribunal **firstly considered** the **relevant time** limits **and** whether the complaint was brought within that time limit.
26. The Tribunal noted that, even if the complaint of harassment was considered as a continuing act, which taken at its highest it required to be, the last date on which it occurred was 2 July 2020. The three month time limit in relation
10 to the harassment complaint accordingly expired, at the latest, on 1 October 2020. The claimant lodged his complaint over 9 months later, on 18 July 2021.
27. The Tribunal accordingly determined that the harassment complaint was not brought within the period of three months from the act complained of.

Just and Equitable Extension

28. The Tribunal then considered whether the harassment complaint was brought within such other period as was just and equitable, noting that the onus was on the claimant to demonstrate this.
29. **As stated** above, the claimant's claim was lodged over 9 **months** after the expiry of the relevant time limit for his complaint of harassment. The claimant
w attributed the delay in raising this complaint to two factors, as follows:

- (i) The fact that internal processes were ongoing; and
- (ii) His medical conditions, which he stated made it difficult for him to deal with stressful situations.

30. The Tribunal considered each of these in turn.
- 25 31. **In relation** to the **assertion** that internal **processes** were **ongoing**, the Tribunal noted that the claimant was informed, on 26 August 2020, that his appeal had

been unsuccessful. This did not accordingly explain why the claimant had then waited almost a year, until 18 July 2021, to raise his claim.

32. In relation to the assertion that his medical condition made it difficult for him to deal with stressful situations, while this was accepted by the Tribunal, no explanation was provided as why it was that the claimant's medical condition did not prevent him engaging in the grievance and appeal process, but would prevent him raising an Employment Tribunal claim, taking advice from his trade union or a solicitor in relation to the prospect of doing so, or instructing them to raise a claim on his behalf.
33. Further, the fact that the claimant was able to raise a claim in July 2021 appeared at odds with his assertion that his medical condition prevented him raising his claim prior to then. No evidence was led to indicate that his condition changed in any way, thus altering his circumstances so that he was then in a position to raise a claim. Whilst the Tribunal accepted that the claimant was absent from work from 12 December 2020 to 19 March 2021, he was able to correspond with the respondent during that time and spoke about raising a complaint against them and obtaining legal advice in relation to that complaint. The claimant then returned to work on 19 March 2021 and was able to carry out his duties until 17 May 2021 and secure alternative employment, which he commenced on 8 June 2021.
34. The Tribunal accordingly did not accept that the claimant's medical condition the claimant's medical condition meant he was unable to raise his claim prior to July 2021, or to take advice or instruct a third party (such as his trade union or a solicitor) to do so on his behalf.
35. The Tribunal also considered the balance of prejudice between the parties, if the harassment complaint were to proceed. The Tribunal found that this weighed in the respondent's favour in all the circumstances. The Tribunal is aware that the claimant will be unable to pursue this complaint if discretion is not exercised in his favour, but notes that his other complaints will proceed to a full hearing. The respondent would be prejudiced if the claims were allowed to proceed at this stage: There is no doubt that the cogency of the evidence,

which is particularly important in claims of this nature, would be adversely impacted by **the delay in the claim being raised.**

- 5 36. For these reasons the Tribunal **did** not find that the claim **was** brought **within** such other period as was just and equitable. It is not persuaded by the claimant that it would be just and equitable to extend time in his favour. The Tribunal accordingly does not have jurisdiction to hear the claimant's harassment complaint and it is dismissed.

10

Employment Judge: M Sangster
Date of Judgment: 29 April 2022
Entered in register: 04 May 2022
and copied to parties