



EMPLOYMENT TRIBUNALS

Claimant: Ms N Nash
Respondent: Priory Central Services Ltd
On: 14 June 2022
Before: Employment Judge Ahmed (sitting alone)
At: Leicester

Representation

Claimant: In person
Respondent: Mr Oliver Lawrence of Counsel

JUDGMENT

The Claimant's complaints of sex and age discrimination have been presented out of time but it is just and equitable to extend time to enable the complaints to proceed.

REASONS

1. This was a preliminary hearing to determine whether the complaints of sex and age discrimination should be struck out as having been presented out of time.
2. The case is presently listed for a full merits hearing for four days on 31 July 2023 and 1 - 3 August 2023.
3. At this preliminary hearing I heard evidence from the Claimant who supplied a written witness statement and gave oral evidence. The Respondent did not give evidence but relied on oral submissions through its counsel, Mr Lawrence. I am grateful to him for his helpful submissions. The Claimant has throughout been a litigant in person and I am grateful to her too for her oral submissions.
4. The Claimant was employed from 2 January 2017 as a Direct Nurse Recruiter. The Respondent is part of a group of companies which provides adult care, healthcare, education and Children's services.
5. The Claimant's employment ended on 23 March 2021. The ACAS early conciliation began on 22 June and an early conciliation certificate was issued on 3 August 2021. The ET1 Claim Form was presented on 2 September 2021.

6. In 2020 the Respondent undertook a restructuring exercise as a result of which the Claimant was placed at risk of redundancy. There were 3 Direct Nurse Recruiters before the re-organisation. Following the restructure the District Nurse Recruiter role was removed. The Respondent introduced two new senior roles and two junior roles.

7. The Claimant applied for the senior roles in or around 16 December 2020. She was not successful. Two male candidates who had significantly less experience and younger were appointed. The Claimant believes this was an act of direct age and sex discrimination.

8. The two allegations are therefore alleged to have occurred on 29 January 2021 at the latest. The allegations are firstly, not being appointed to the senior role and secondly, some inappropriate comments allegedly made by an HR Director in a zoom meeting on 29 January 2021.

9. I should add that the Claimant appears to make some further allegations in her witness statement today which are not the subject of these proceedings and there is no application to amend today. I do not therefore consider them as part of this hearing.

10. The Claimant's explanation for the delay is as follows: After her employment ended the Claimant says she was in a mentally fragile state and not able to focus on legal proceedings. She says that her condition deteriorated after termination of employment. She discussed the possibility of bringing a claim with a cousin who is not legally qualified. The cousin suggested the Claimant should go and see a Solicitor. The Claimant cannot remember when the discussion with her cousin was but she believes that she went to see a solicitor sometime in March 2021. By then she had secured another job and wanted to concentrate on her new role.

11. Unfortunately, the new job did not work out and that ended in June 2021. It was then that she made enquiries with ACAS and started early conciliation on 22 June 2021. She received an ACAS early conciliation certificate on 3 August 2021 and issued her claim to the Employment Tribunal on 2 September 2021.

THE LAW

12. Section 123 of the Equality Act 2010 deals with time limits and states:

“(1) 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. ...

(3) For the purposes of this section

(a) conduct extending over a period is to be treated as done at the end of the 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.”

13. In considering time limits the Tribunals sometimes have regard to the factors set out in section 33 of the Limitation Act 1980 and the so-called **Keeble** factors (see **British Coal Corporation v Keeble** [1997] IRLR 336. It is not necessary to go through them as a form of checklist.

14. In the case of **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434, the Court of Appeal said this:

“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 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.”

15. The approach to be adopted to time limits in employment tribunal claims was considered in the Court of Appeal case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 where Lord Justice Leggatt (at paragraphs 18 to 19) said this:

“18. First, it is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble*), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ15; para 33.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

16. In the recent EAT case of **Secretary of State v Johnson** [2022] EA-2020-000385, HH Judge Tayler said this as to the delay between the lodgement of the claim and the final hearing:

“I also consider that at paragraph 4.12 in the last two sentences, the tribunal directed itself that it was only the period by which the complaint was originally submitted out of time that was legally relevant. It is clear from the decision in **Adedeji** that in considering whether to exercise the broad discretion to extend time it is relevant for the tribunal to consider the consequences for the Respondent of granting an extension, even if it is of a relatively brief period, including whether it will require the tribunal to make determinations, for whatever reason, about matters which occurred long before the hearing. Accordingly, while it was correct that it was neither of the parties' fault that there had been considerable delay whilst the personal injury proceedings had been dealt with, allowing an extension of time, even of a relatively brief period, would result in the tribunal having to make determinations on matters that had happened many years ago. That was a factor that the tribunal was required to consider.”

SUBMISSIONS

17. Mr Lawrence on behalf of the Respondent argues that the Tribunal should refuse the application to extend time for the following reasons:

17.1 The Claimant has not put forward any reason for the delay at all. The Claimant states that her mental health has deteriorated since her employment with

the Respondent. She does not say that her mental health had anything to do with the delay in bringing her claims. The delay is, he says, unexplained.

17.2 The claims are at least one month out of time and most likely two months out of time. That is, he argues, a significant length of time. Of particular note is the gap in time between the Claimant receiving the contact information of a solicitor and the Claimant eventually contacting that solicitor in March 2021. The Claimant had over three months to speak to her solicitor but she chose not to do so. She then delayed further. The result of the delay is that the Respondent will have to produce evidence as to the conscious or unconscious motivations of its employees several years after the alleged discrimination is said to have taken place. This is prejudicial to the Respondent. In that respect he also relies on the EAT's decision in **Johnson** that the delay between now and final hearing should also be taken into account. Such delay he argues adds to the existing prejudice.

CONCLUSIONS

18. First of all I am satisfied that the complaint has indeed been brought out of time. There is no question of any act extending over a period to bring it in time. It is therefore necessary for me to consider whether it is just and equitable to extend time within the meaning of section 123(1)(b) of the Equality Act 2010.

19. I accept that the following **Keeble** factors are relevant in this case: the reasons for the delay; the length of the delay, the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of the action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

20. I also consider that it is necessary to consider the relative prejudice to the parties. This goes to the question of the interests of justice and thus to whether it is 'just and equitable' to extend time.

21. I am satisfied that the Claimant has given an explanation for the delay. She may be criticised for delaying the process of seeing a solicitor after speaking to her cousin but it cannot be said that there is no explanation for the delay or that it is wholly unsatisfactory.

22. The Claimant has not supplied any medical evidence of the effect on her mental health but the Claimant is a litigant in person and it would be unreasonable to expect her to come armed with such evidence to this hearing. I accept her oral evidence that she did find it difficult to cope and that initially she wanted to just get on with her new job and concentrate on making that a success.

23. The Claimant's employment ended in March 2021. As a litigant in person she would not be expected to appreciate time was already running. The period of inactivity in real terms is March – June 2021. Her conversation with a cousin was relatively short and all we can usefully derive from it is a recommendation to seek professional advice.

24. The Claimant was slow in getting advice but the delay cannot be described as inordinate or even excessive. It is not clear what legal advice the Claimant received and I have been careful not to stray into privileged matters. In particular it is not clear whether this was a full set of instruction or a short call to obtain free advice, as is

often the case. The solicitor does not appear to have been retained to undertake any work as is clear from the absence of any correspondence. It is possible, indeed likely, that that this was one of those free advice calls that solicitors sometimes offer in order to attract work. They are usually very short and cursory. It does not appear that time limits were discussed because if they were the Claimant is likely to have initiated steps to start her case.

25. It seems to me that one of the critical issues is the question of relative prejudice. The Respondent has not provided any evidence of prejudice suffered or likely to be suffered by reason of delay. It is not said for example that relevant witnesses have left their employ or as the old expression goes “ have died or are beyond the seas”. It has not established that it will suffer any prejudice by the delay. The Claimant would on the other hand suffer substantial prejudice because it would be the end of her claim in its entirety if these complaints were struck out.

26. In my view the delay is relatively short. I appreciate that the Claimant does not get the benefit of the ‘stop the clock’ provisions because she starts early conciliation too late but that is just a technicality. A delay of a few months in discrimination cases is not unusual. The Respondent should have no difficulty in terms of memory issues. It is unlikely the cogency of the evidence will be affected. In any event this case is unlikely to depend on disputed facts. The redundancy exercise will have been largely documented. The Respondent will have notes to refresh its memory on the merits of the candidates.

27. As for the **Johnson** point on the delay between now and the final hearing, this case is listed for late July/early August 2023. In the overall scheme of things it is unlikely to cause any significant prejudice to the Respondent.

28. In all of the circumstances it is appropriate in my judgment to exercise the “widest possible discretion” conferred by **Morgan** and extend time to enable the complaints of sex and age discrimination to proceed.

Employment Judge Ahmed

Date: 4 August 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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