



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms Z Zorokong**

**v**

**Victoria Lucy Bogue**

**Heard at:** London Central Employment Tribunal (by Video)

**On:** 22 August 2022

**Before:** Employment Judge E Burns

## **Representation**

**For the Claimant:** Robin Robison, Employment Consultant

**For the Respondent:** Laura Robinson, Counsel

## **JUDGMENT**

The decision of the Employment Tribunal is that the Claimant's claims are out of time and are therefore not permitted to continue against the Respondent.

## **REASONS**

### **THE HEARING**

1. The purpose of the hearing was to determine if the claimant's claims against this respondent had been submitted in time.
2. The claimant undertook early conciliation against three respondents between 19 January and 28 February 2022. These were her employer, the Defence Infrastructure Organisation ("DIO") (part of the Ministry of defence), her former line manager Sarah Hartley and this respondent.
3. When she presented her claim form to the tribunal on 1 March 2022, which named the same three respondents, she provided an incorrect ACAS certificate number for DIO and Ms Hartley. Her claim was therefore accepted only against Ms Bogue. The tribunal sent her a letter on 4 April 2022 telling her this.

4. The claimant told Employment Judge Elliot at a case management hearing in this case that she had not received the letter. Employment Judge Elliot arranged for it to be sent to her again on 13 June 2022.
5. On 28 June 2022, the claimant presented two further claims. One claim was submitted against DIO and the second against Ms Hartley. As at the date of today's hearing, the claimant against DIO had been served, but the other claim was still being processed. I was able to check the tribunal's electronic case management system to locate the two new claims and respective Acas early conciliation certificates and shared details of the information I could see with the parties
6. Before proceeding with the hearing, in light of the new claims, I discussed whether it was sensible for me to proceed to determine the time point against Ms Bogue. The parties agreed that it was and I therefore did so.
7. The hearing was conducted by video. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.
8. The claimant gave evidence. For the respondent, I heard evidence from Bhawana Patel a senior HR case worker employed by the Ministry of defence. There was an agreed hearing bundle of 56 pages.

#### **FINDINGS OF FACT**

9. Having considered all the relevant evidence before me, I found the following facts on a balance of probabilities.
10. The claimant commenced employment with the DIO on 24 February 2020 in a senior role as deputy Chief of Staff. She was initially line managed by the respondent in this case, Ms Bogue, Director of Corporate Services. Ms Bogue was two levels of seniority above the claimant.
11. The claimant's line management changed on 4 May 2020 to Ms Hartley, then DIO Transformation and Change Head.
12. The claimant's particulars of claim contain a number of paragraphs which refer to the respondent to this claim. She says she started to have issues with the respondent almost immediately. She identified a number of incidents involving the respondent and Ms Hartley. The last incident in relation to which she cites the respondent occurred on 16 December 2020.
13. The claimant submitted a grievance about the behaviour of the respondent and Ms Hartley (and others) to her employer on 3 December 2020. This led to the claiming leaving her role and moving to an entirely new role outside of the respondent's chain of command on 25 January 2021.
14. The respondent had some involvement in finalising the claimant's appraisal for the performance year 2020 / 2021 meaning there was some ongoing

interaction between them up to, at the latest May 2021. Although the claimant mentions being unhappy with the appraisal in her particulars of claim, she does not cite the respondent as being responsible for this.

15. The claimant is a member of the PCS union. On 30 July 2020, she sought the support and assistance of her local union representative, Robin Bold. She met with him several times and it was wish his support that she submitted the grievance. According to the claimant, Mr Bold encouraged her to use the Ministry of Defence's internal resolution processes to raise her concerns. She believed she had to do this before she could take any external action.
16. The grievance process was drawn out and lengthy. I was not presented with any evidence to suggest that the respondent was involved in the process other than as someone whose conduct was being investigated. No evidence was adduced at the hearing showed she played any role in making any decisions about the grievance procedure adopted or the outcome. According to the claimant, DIO engaged an external investigator to assist it with the grievance.
17. Towards the latter half of June 2021, the claimant discussed the possibility of getting legal advice with her union rep. She was concerned about the grievance process, but was advised by him that what the respondent was doing was permitted by the process and she should continue to follow it.
18. This was the last time the claimant had any support from Mr Bold. According to the claimant, he did attend the grievance investigation meeting on 22 June 2021 and stopped responding to her messages.
19. The grievance outcome was sent to the claimant on 21 October 2021. She was unhappy with it and submitted an appeal on 3 November 2021. There was a delay in the respondent getting the appeal process started, however.
20. Because of that delay and because of the ongoing lack of support from her local union representative, the C contacted the PSU head office. She did this on 29 November 2021. This was the first time she was given any information about how she could pursue an employment tribunal claim, what she would need to do to do so and that there were time limits for pursuing claims.
21. The claimant worked out that if she wanted to present a claim about her grievance outcome, she would need to contact Acas to commence the early consultation process on or before 20 January 2022.
22. The claimant did this on 19 January 2022. She waited until this date to allow the respondent to conclude the appeal process. However, when it had not done so, she took what she believed were appropriate steps to protect her ability to pursue a claim. As noted above, she identified her employer, Ms Bogue and Ms Hartley as potential respondents to Acas.

23. The respondent provided the claimant with an appeal outcome on 25 February 2022.
24. The early conciliation process ended on 28 February 2022. The claimant presented her claim against the respondent the very next day, 1 March 2022.

## THE LAW

25. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.
26. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.
27. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.
28. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17 where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.
29. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected (*Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548; The tribunal in *Lyfar* grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time).
30. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).
31. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).
32. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of

*British Coal Corporation v Keeble* [1997] IRLR 36 as well as other potentially relevant factors.

33. Where the reason for the delay is because a claimant has waited for the outcome of his or her employer's internal grievance procedures before making a claim, the tribunal may take this into account (*Apelogun-Gabriels v London Borough of Lambeth and anor* 2002 ICR 713, CA). Each case should be determined on its own facts, however, including considering the length of time the claimant waits to present a claim after receiving the grievance outcome.
34. In the case of *Harden v (1) Wootlif and (2) Smart Diner Group Ltd* UAEAT/0448/14 the Employment Appeal Tribunal reminded employment tribunals that we must considering the just and equitable application in respect of each respondent separately and that it is open to us to reach different decisions for different respondents

## **ANALYSIS AND CONCLUSIONS**

### **Continuing Act**

35. I deal first with whether there was an ongoing state of affairs or course of conduct such that time should run from the date of the grievance outcome. In my judgment there was not. This is not a continuing act case.
36. The only link between the respondent and the grievance was that the grievance concerned the respondent's conduct. The employer was responsible for considering the grievance overall. Individuals other than the respondent was tasked with investigating it and making decisions about the procedure to be followed and the outcome. An HR lead was also appointed to advise them.
37. I note Mr Robison suggested, during his submissions, that due to her seniority within the DIO, the respondent may well have played some role behind the scenes in relation to the grievance process or outcome. I was not presented with any evidence that this was the case, however. Mr Robison was able to cross examine the HR lead on this point who denied she was involved.
38. In addition, and significantly, Mr Robison's suggestion was contradicted by the evidence given by the claimant. She said that her employer had taken steps to ensure she was able to move to a different role away from the respondent from 25 January 2021 as a result of her grievance. She also confirmed that her employer had actively engaged people to conduct the grievance investigation who were chosen deliberately so they would be independent.
39. My decision is therefore that time does not run from 21 October 2021, but instead runs from 16 December 2020, the date of the last act of the respondent.

### **Just and Equitable Extension**

40. I turn now to whether I should allow the claim because it was presented within such period as I think is just and equitable. I have decided it was not.
41. In reaching this decision, the relevant factors I took into account were the length and reasons for the delay and their impact on what is just and equitable in the circumstances where a claim has been brought against an individual as the respondent.
42. The delay in this case was lengthy. The first act complained of was in February 2020 and the last act complained of was 16 December 2020. The normal time limit would have been 15 March 2021. The claimant initiated the early conciliation process on 19 January 2022. The gap between these dates is 10 months and 4 day.
43. The reason for the delay was a combination of the claimant not knowing about the time limit for pursuing an employment tribunal claim and wanting to wait to see if her concerns could be resolved via her employer's internal grievance process.
44. The claimant's evidence was that she did not learn about the time limits for employment tribunal claims or that she needed to initiate the Acas early conciliation process before presenting a claim until 29 November 2021 when she spoke to someone at the head office of her union. That was not challenged and I have found this as a fact.
45. Ms Robinson invited me to find that this does not justify the claimant's delay because she could have found the relevant information out far earlier through a simple internet search. She could also have sought legal advice at a much earlier stage. This is true, but in this case, the claimant was being supported by a trade union representative who was encouraging her to follow the internal grievance procedures and have faith in them rather than seek legal advice. She was following that advice and it was therefore understandable that she did not undertake her own research.
46. When she found out there was a deadline to pursue a claim, the claimant did not take any urgent steps to present a claim straight away. Instead, she consciously calculated the three month deadline based on the grievance outcome date and decided to wait to see if her appeal would lead to that outcome being overturned before the deadline. When it wasn't, she did not delay at that stage, but acted promptly to protect her legal position by initiating the Acas process. When her appeal outcome was known and there was no prospect of a conciliated outcome, she submitted her claim straight away.
47. In my judgment, this was a reasonable course of action for her to take in relation to a claim pursued against her employer. At the time the claimant learned about the time limits, her employer was actively engaged in investigating and considering her concerns. It was sensible to let them do that and see where that process would lead before presenting a claim. Had I been required to decide the time point in a claim against the claimant's

employer, I would have extended time because I do not consider it just and equitable that she should be penalised for allowing the internal process to reach a conclusion.

48. I have had to decide the position in relation to Ms Bogue, however. Having reminded myself that I must consider the application of the just and equitable test against this particular respondent I have reached a different conclusion.
49. I consider that where a claimant wants to pursue a claim against an alleged individual perpetrator, in order to have them held personally liable for an act of discrimination, there is far less justification for waiting to find out what the employer thinks about the matter. In such circumstances, justice and equity require that the claim is raised against that individual at the earliest opportunity. If the normal time limit is missed through ignorance, a claimant must act as quickly as possible once they understand the position.
50. In this case, despite learning on 29 November 2021 that there were short time limits to pursue claims to the employment tribunal, the claimant waited a further two months (until 21 January 2022) to take any litigation steps against Ms Bogue personally. Given the already lengthy delay, this additional delay was too long, in my view, to be fair to Ms Bogue in circumstances where she was being accused of discriminatory acts dating back to February 2020, around two years earlier.
51. I have therefore decided not to permit the claim against Ms Bogue to proceed.

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**Employment Judge E Burns  
25 August 2022**

Sent to the parties on:

21/09/2022

For the Tribunals Office