



EMPLOYMENT TRIBUNALS

Claimant: Mr G Kipeleka

Respondent: Amazon UK Services Ltd

Heard at: Cardiff (CVP)

On: 25 April 2022

**Before: (1) Employment Judge A.M.S. Green
(2) Ms A Burge
(3) Mr P Pendle**

Representation

Claimant: In Person

Respondent: Ms G Palmer - Counsel

REASONS

Introduction

1. The Claimant has requested written reasons for our judgment dated 25 April 2022.
2. The Claimant was employed by the Respondent as a warehouse operative from 24th April 2020 until 23rd January 2021. On 30th December 2020 the Claimant was asked to see Jordan Madeley, Area Manager, and was informed that he was alleged to have smoked cannabis. He was taken to the changing rooms and he says that a search of his jacket was made publicly. He was then subjected to a drugs test and was kept in a room for two hours without being able to go to the toilet. He was suspended pending the results. The drugs test came back negative. He feels that he was selected on the basis of an assumption that black people smoke cannabis and that his selection and subsequent treatment was on the grounds of his race. He filed a grievance on 10th January 2021 which was dismissed after a hearing. He received an outcome on 13th February 2021 and then appealed and his appeal was dismissed. The Claimant **is not** alleging that the grievance investigation and appeal were discriminatory.
3. The Claimant is claiming direct race discrimination pursuant to the Equality Act 2010, section 13 ("EQA").

4. The Claimant presented his claim form to the Tribunal on 3rd June 2021 following a period of early conciliation which started on 5th May 2021 and ended on 10th May 2021.
5. At a case management hearing on 27th of January 2022, Employment Judge Frazer set out the issues that the Tribunal was required to decide at this hearing. These were as follows:

Time limits

6. was the discrimination complaint made within the time limit in EQA, section 123? The Tribunal will decide:
 - a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - b. If not, was there conduct extending over a period?
 - c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - i. Why were the complaints not made to the Tribunal in time?
 - ii. In any event, is it just and equitable in all the circumstances to extend time?

Direct race discrimination

7. Did the Respondent do the following things:
 - a. Select the Claimant to undergo a drugs test?
 - b. Search his jacket publicly in the changing room?
 - c. Keep him in a room for two hours without having the opportunity to go to the toilet?
8. Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The Claimant has not named anyone in particular who he says was treated better than he was.

9. If so, was it because of his race?
10. The Claimant had considerable difficulties connecting onto the CVP platform. Eventually, it was decided to adjourn the hearing to 2 PM to enable the Claimant to travel from Swansea to Cardiff and to use facilities at the hearing centre so that he could have a reliable CVP connection.
11. It was agreed that the Tribunal would determine the time limit issue as a preliminary matter.
12. We worked from a digital bundle. Although the Claimant had not prepared a witness statement, he adopted his particulars of claim set out in section 8.2 of the ET 1 as his evidence in chief. He gave oral evidence. Ms Palmer and the Claimant made closing oral submissions.

Findings of fact

13. Having considered the evidence, we make the following findings of fact:
 - a. The three alleged acts of unfavourable treatment identified above took place on 30th December 2020. Shortly after this, the Claimant joined the GMB union and was only able to receive advice by email and to have a representative at his grievance hearing. He was unable to have representation at any Tribunal hearing. This was because he joined the union after the alleged acts of unfavourable treatment.
 - b. On 10th January 2021, the Claimant submitted a grievance about bullying, harassment and discrimination to Mr Challis [94].
 - c. On 21st January 2021, the Claimant attended a grievance hearing with Mr Tanner [97-104].
 - d. On 13th February 2021, Mr Tanner wrote to the Claimant dismissing his grievance [128-133].
 - e. On 13th February 2021, the Claimant appealed the grievance outcome [140].
 - f. On or around 18th February 2021, on his own evidence, the Claimant was aware that he needed to obtain legal advice. However, he wanted to exhaust his rights under the grievance procedure because he was reluctant to pursue the Respondent through the Tribunal unless it was absolutely necessary. The Respondent had been his sole source of income.
 - g. On 3rd March 2021, the Claimant attended a grievance appeal hearing and was accompanied by Ms Beaton, a GMB union representative [146-154]. The hearing was chaired by Mr Pietzrak.
 - h. On 15th March 2021, Mr Pietzrak wrote to the Claimant dismissing his appeal [167]. The Claimant admitted that he conducted

research on the Internet about his rights. In particular, he visited the CAB website and told the Tribunal that he researched time limits for presenting a claim. He also approached five or six solicitors to see if they would represent him. However, he could not afford the proposed fees that were being suggested by those solicitors. When pressed to give further details about how much time he spent researching his rights, he eventually responded that it was approximately three days after 15th March. He also suggested that matters had been frustrated with his communication with the solicitors because of the pandemic.

- i. On 5th May 2021, ACAS Early Conciliation commenced [1]. The Claimant did this on his own volition as he did not have any representation.
- j. On 10th May 2021, ACAS Early Conciliation ended and a certificate was issued [1].
- k. On 3rd June 2021, the Claimant submitted his claim to the Tribunal. He did this himself without representation. The Claimant suggested that he attempted to contact another solicitor seeking representation and to present his claim but was told that he would be required to provide the Early Conciliation certificate. We did not find that credible as he had emphatically stated earlier in his oral evidence under cross-examination that he had exhausted his enquiries for potential representation before he first notified ACAS on 5th May 2021.

Applicable law

14. EQA, section 123(1) provides that proceedings of this nature 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.
15. EQA, section 123 and its legislative equivalents do not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.
16. Previously, the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in section 33(3) of the Limitation Act 1980 (**British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT**). That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the

decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant 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.

17. The relevance of the factors set out in **British Coal Corporation v Keeble and ors** was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**. In that case, the Court of Appeal upheld an employment judge's refusal to extend time for a race discrimination claim presented three days late. It noted that the judge had referred to the factors set out in section 33(3) of the Limitation Act 1980, following **Keeble**. As to the first factor, the length of and reasons for the delay, the judge had been entitled to take into account that, while the three-day delay was not substantial, the alleged discriminatory acts took place long before A's employment terminated, and that he could have complained of them in their own right as soon as they occurred or immediately following his resignation. As for A's assertion that he had mistakenly believed that he could benefit from an automatic extension of time under the early conciliation rules, the judge was entitled to take the view that this did not justify the grant of an extension, given that A had left it until very near the expiry of the primary deadline to take advice and then chose not to act on that advice because he thought that the solicitors had misunderstood the position. With regard to the **Keeble** factors, the Court pointed out that the EAT in that case did no more than suggest that a comparison with section 33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. In the Court's view, it is not healthy for the **Keeble** factors to be taken as the starting point for tribunals' approach to 'just and equitable' extensions, as they regularly are. 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 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 is to assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in **Keeble** – the length of, and the reasons for, the delay. The Court noted that, while it was not the first to caution against giving **Keeble** a status that it does not have, repetition of the point may still be of value in ensuring that it is fully digested by practitioners and tribunals.
18. The Court of Appeal's approach in **Adedeji** was followed by the EAT in **Secretary of State for Justice v Johnson 2022 EAT 1**. There, an employment tribunal had concluded that J's harassment claim was issued only a few weeks out of time at the most and that it would be just and equitable to extend time. In doing so, it decided that a lengthy delay in the

claim being brought to trial, which was neither party's fault, was not relevant. The delay in question was due to J's concurrent personal injury claim, which resulted in the harassment claim being stayed for several years. On appeal, the EAT held that the tribunal had erred in directing itself that it was only the period by which the complaint was out of time that was legally relevant. It was clear from Adedeji that tribunals should consider the consequences for the respondent of granting an extension, even if it is of a relatively brief period. Those consequences included whether allowing the claim to proceed would require the tribunal, for whatever reason, to make determinations about matters that had occurred long before the hearing. Accordingly, in the instant case, although it was neither party's fault that there had been a considerable delay in the claim being heard, this was nevertheless a factor that the tribunal was required to consider.

19. In considering whether it is just and equitable to extend time we also must weigh up the relative prejudice that extending time would cause to the respondent.
20. As the complaint relates to three alleged acts of unfavourable treatment on 30th December 2020, the primary time limit for the Claimant to present his claim to the Tribunal would be three months less one day (i.e. 29 March 2021). ACAS Early Conciliation operates to extend the time limit but the Claimant would have been required to have first notified ACAS on or before 29 March 2021. Had he done so, the period for presenting his claim to the Tribunal could have been extended by up to 6 weeks. However, the Claimant did not contact ACAS until 5th May 2021 and, consequently, the time limit for presenting his claim to the Tribunal was not extended by early conciliation. His claim, was, therefore, presented out of time by 66 days or 2.17 months.

Discussion and conclusion

21. We are not satisfied that it would be just and equitable to extend time to accept the claim for the following reasons:
 - a. We do not accept the Claimant's explanation for the delay in presenting his claim form to the Tribunal based on his hope of instructing a solicitor to represent him for a fee that he could afford, or on a pro bono basis or on a contingent fee basis. Whilst we have some sympathy with the difficulties that people often face with the cost of instructing a solicitor, in this case, we believe that the Claimant would have been in a position to present his claim to the Tribunal or initiate ACAS early conciliation on or before 29th March 2021. On 15th March 2021, he had become appeal rights exhausted according to the Respondent's grievance procedure. We accept his sincere belief that he considered tribunal proceedings to be something of the last resort. He had reached that point by 15th March 2021, and on his own evidence, he had already started conducting his own research on his rights which included time limits

as well as attempting to instruct a solicitor. Furthermore, he had appealed the original grievance outcome on 18th February 2021 which was over one month before the primary time limit. He said that his research took about 3 days. We believe that he could easily have presented his claim by 29 March 2021. Furthermore, we agree with Ms Palmer's assessment that the Claimant is an intelligent and articulate person. That was the distinct impression that we also formed when we observed him giving his evidence.

- b. As we clearly explained to the Claimant, time limits for this type of claim are strict. There is no presumption that the time limits for presenting the claim will be extended on just and equitable grounds. It is for the Claimant to convince the Tribunal that discretion should be exercised in his favour. We are not satisfied that the Claimant has adequately explained why he delayed until 3rd June 2021 for presenting his claim. He knew or ought to have known that the claim should have been presented by 29th March 2021 (assuming early conciliation had completed by that date). Alternatively, if he wanted to extend time, he would have known or ought to have known that he should have first notified ACAS no later than 29th March 2021.
- c. We also note that this is not a case where the Claimant was waiting for the completion of the grievance appeal before presenting his claim to the Tribunal. In some cases, employment tribunals have allowed claims to be presented late in such situations. In this case, the Claimant was notified of his appeal outcome on 15th March 2021 which was 14 days before the 29th March 2021 deadline.
- d. There will be some, albeit limited, prejudice to the Respondent if time is extended and this is a factor that we must consider. We agree with Ms Palmer that should discretion be exercised in favour of the Claimant; the Respondent will be put to the time and expense of a further two days of a final hearing.

22. The Tribunal does not have jurisdiction to hear the claim.

Employment Judge Green

Date 3 May 2022

JUDGMENT SENT TO THE PARTIES ON 4 May 2022

FOR THE TRIBUNAL OFFICE Mr N Roche