



## EMPLOYMENT TRIBUNALS

**Claimant**

Liam Stanton

v

**Respondent**

Leeds City Council

## PRELIMINARY HEARING

Heard at: Leeds (in public)

On: 28 October 2022

Before: Employment Judge R S Drake

**Appearances**

For the Claimant: Mr A Parascandolo (Solicitor)

For the Respondent: Mr M Farooq (Solicitor)

## JUDGMENT

1. The disability discrimination complaints (all of them) were not presented in time.
2. In this case, the complaints were presented outside the Primary Limitation Period and *not* within such period as this Tribunal finds just and equitable so as to extend time.
3. These proceedings are therefore dismissed.

## REASONS

- 1 This Decision and Reasons were reserved on the day of hearing and are being provided in accordance with Rule 62(2) and (3) of Schedule 1 to the ETs (Constitution & Rules) Regs 2013 (The "Rules").

2 The following is common ground: -

- 2.1 The last date on which the Claimant asserted in the present claim an act of discrimination occurred was 26 January 2022;
- 2.2 He accepts the final date upon which a Primary Limitation period might be construed as expiring (as extended by Early Conciliation process) was **19 May 2022**, making commencement of the current proceedings against the current Respondent on 26 May 2022 (for the purposes of Section 123(1)(a) EqA) out of time;
- 2.3 In short, he had presented a first claim initially against the wrong party;
- 2.2 Before he issued the current claim, he had commenced Early Conciliation process (on 1 April 2022, completed on 19 April 2022) and then issued a defective claim on 6 May 2022 against an NHS Trust which had first employed him; these proceedings were nugatory as the Claimant should have issued against the current Respondents (as his then current employers) following a TUPE transfer; he has now subsequently withdrawn this first claim and is proceeding now under a new now current claim;
- 2.3 In the current claim, he started and completed Early Conciliation process on 26 May 2022 and presented the current claim on the same date, which as indicated above he accepts is out of time;

3 The law to be considered is at Section 123 EqA and is as follows:

- “... Proceedings on a complaint within Section 120 may not (*my emphasis*) be brought after the end of -
- (a) the period of three months starting with the date of the act to which the complaint relates (*in this case I find as based on common ground that was 26 May 2020*) (the “Primary Period”) – or
  - (b) such period as the Employment Tribunal thinks just and equitable (the “Extended Period”) ... “

4 I had a bundle of agreed documents to consider plus written skeleton arguments from both sides, and I heard detailed and extremely helpful submissions from the parties’ representatives. I record gratitude to both sides for the detail, cogency, and high level of advocacy throughout the hearing and preparation for it. I applaud the spirit of co-operation between both sides. I also had the benefit of seeing the very structured way in which EJ Lancaster (at a preliminary hearing on 10 August 2022) had set out the issues and the order in which they were to be taken in my consideration today. I am first to determine whether it is just and equitable to extend time for presentation of the claim so as to validate it, bearing in mind the last act complained of, whether as a discrete act or as the last of a continuing set of acts, was 26 January 2022 and the claim presented only on 26 May 2022. If I were to determine that it is just and equitable to extend time, then I am to consider whether the complaint about the act on 26 January 2022 has little or no reasonable prospect

of success either in and of itself or as part of a series of acts. The issues of whether here be little or no reasonable prospect of success is to be considered subsequent to whether it is just and equitable to extend time, as if it is not, the Tribunal may not hear the claim as currently pleaded at all pursuant to Section 123(1) EqA.

5 The case law (of which I was already aware) and to which I directed the parties included the following: -

5.1 **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379** from which I note that the time limit for issue of proceedings "... is a jurisdictional and not a procedural issue ... "which means that if a case is out of time and time is not extendable, the Tribunal simply has no power or jurisdiction to hear the claim;

5.2 **Palmer & Saunders v Southend BC [1984] IRLR 119** from which I note inter alia that I am to consider the substantial cause (if shown) of the Claimant's failure to issue within the Primary Period, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of her right to issue a claim, whether the Respondent has done anything to mislead or impede the Claimant issuing her claim, whether the Claimant had access to advice, and lastly whether delay was in any way attributable to that advice.

5.3 **British Coal v Keeble [1997] IRLR 336** from which I note inter alia that I am to consider the length and reasons given for delay, the extent to which delay may affect cogency and recollection of evidence, any promptness of action by the Claimant once, after the Primary Period had expired, she became aware of the alleged facts which gave rise to his cause of action, the steps she took once she knew of the possibility of taking action, and lastly the balance of prejudice to the Claimant of not allowing the claim to proceed and to the Respondent in allowing it to do so;

5.4 **Robertson v Bexley Community Centre [2003] IRLR 434** from which I note that application of S123(b) involves the exercise of a discretion which is an exception rather than the rule; this point is augmented by the EAT's decision in **Simms v Transco [2001] All ER 245** which is authority for the proposition that whilst the fact a fair trial is impossible will most likely preclude extension of time, it does not follow that merely because a fair trial is still possible time should be extended – each case is fact specific; In short the guidance in Bexley includes the point that time limits are to be construed strictly and there is no presumption in favour of extension. However, it is argued by the Claimant that this does not mean he has always to advance a good reason for delay or that time cannot be extended in the absence of an explanation; this latter point is reinforced by supporting findings by the CA in **Abertawe Local Health Board v Morgan [2018] EWCA Civ 640**

The following were cases referred to me by the parties' representatives, so I added them to my consideration: -

5.5 **Afolabi v Southwark BC [2003] ICR 800** from which I note that it is my duty to ensure no significant circumstance is left out of my consideration when

considering whether to exercise my discretion or not and also that if I fail to take account of prejudice to a Respondent of allowing a claim to proceed out of time, I will be in error;

5.6 **DCA v Jones [2008] IRLR 128** in which the Court of Appeal held that a tribunal had been entitled to consider that a Claimant's own inability to admit to himself that he was mentally ill, and disabled was a factor potentially justifying delay in presenting a claim;

5.7 **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** in which the CA held in relation to complaints involving continuing acts, that an Employment Tribunal had not erred in law in construing acts extending over a period as continuing acts of discrimination. It advised that concentration on concepts such as policy, rule, scheme, regime, or practice were too literal, whereas what should be considered was the actual content of different acts and whether they were distinct from each other as a succession of unconnected or isolated specific acts;

5.8 In a most recent CA decision **Adedeji v University of Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, it was held that the factors "... almost always relevant to consider when exercising discretion are (a) length of and reasons for delay and (b) whether the delay has prejudiced the Respondent by for example preventing or inhibiting it from investigating the claim while matters were afresh ... " (my emphasis showing that it is both length and reasons for delay construed together, not disjunctively);

5.9 The cases of **Sterling v United Learning Trust [2015] UKEAT 0439** and **Cranwell v Cullen [2015] UKEAT 0046** (heard by Langstaff J) both show that if a party is incorrectly cited in an Early Conciliation process, this can be corrected but only if a new process is commenced before the Primary Period expires.

- 6 I noted that because it was common ground that the claim is ostensibly out of time, the evidential burden rested with the Claimant, but I heard no evidence (either orally or by written statement) other than by hearing oral argument distinct from evidence which Mr Pascandorolo sought to rely upon as if it were evidence. He argued that what was pleaded amounts to evidence because of its cogency as argument, though I pointed out this was subject to such pleadings coming upto proof on appropriately examined testing. A Scott Schedule prepared by the Claimant was before me setting out detailed clarification of each allegation leading upto the last act and I noted the content of what was thus pleaded as to this last act in order to gauge its cogency and whether it raised a triable issue in and of itself. Nonetheless, despite absence of oral evidence, I considered all this material and what was orally submitted in my deliberations.
- 7 I am satisfied that the submissions made on behalf of the Claimant were made sincerely and in the belief, they would come upto proof when tested.

## Findings of Fact and application of Law

8 My findings on the evidence significant to the guidance set out above by statute and case law are as follows:

8.1 The Claimant agrees that the last date on which anything happened giving him cause for complaint was 26 January 2020. In his pleading and Scott Schedule, he says that the act complained of was an expectation for him to pay a course fee despite having cancelled him from the course and of itself that this administrative failing was because of his sexual orientation – he does not say how or why he makes this connection so this is a bare assertion and in the absence of oral evidence he does not clarify such basis of belief in there being causal nexus; Before this date, the last date upon which an act complained of occurred was 17 December 2021 making the eventual presentation of the current claim even further out of time;

8.2 He is and was at all material times following this last event very comprehensively represented by a very reputable source of specialist legal advice;

8.3 The only explanation before me as to the events leading upto the eventual presentation of this claim is as follows and I confirm I am prepared to accept the facts of this explanation despite not accepting the consequences urged upon me by the Mr Parascandolo:

8.3.1 The Claimant had worked initially for Leeds Community Health NHS Care Trust (“the Care Trust”) at Adel Beck Secure Children’s Home until and undisclosed date some time before the acts complained of, when apparently his employment transferred to the local authority being the current Respondent, presumably by way of TUPE transfer on the Respondent taking over responsibility for this location from the Care Trust - neither side challenged this when I raised this point;

8.3.2 At the time of the acts complained of it was common ground that he was paid his salary by the current Respondents, so can be taken to know by which body he was employed, or to be able to furnish his advisors with such evidence so that they could infer the correct identity of his employer which I would expect them to ask to see when taking instructions;

8.3.3 Notwithstanding this, the Claimant commenced early Conciliation (inexplicably against the Care Trust i.e. the wrong Respondent) and completed it on 19 April 2022 following which he presented the first but defective claim (now withdrawn) on 6 May 2022 – there was a slight delay between these dates which, though not making the first action out of time, was unexplained to me today; This is a case of the wrong party being cited, not just a mistake being made in naming the right party correctly – the two Respondents are completely different corporate entities which are not connected other than by arms-length contractual relations;

8.3.4 The Claimant on the same date sent a copy of the claim to the current Respondent thus signifying awareness of the relevance of their involvement in his employment, but without explaining today why he thought that necessary – I conclude he was aware that they were or are his employer at the time he presented his first claim; What is not explained to me today is why he presented

his first claim against the Care Trust and not the current Respondent in the first place;

8.3.5 17 May 2022 and a few days within time, the Claimant was contacted by a representative of the Care Trust explaining they were the wrong Respondent; I have no explanation before me as to why the Claimant did not immediately issue the second now current claim before 26 May 2022; By that date the Primary Conciliation Period had expired and could not be revived by issuing new proceedings before then;

8.3.6 Rather than issue a new claim which would be the proper course of action, the Claimant chose a different course of action by writing to the Tribunal 20 May 2022 seeking amendment of the first claim by changing the name of the Respondent – this would have necessitated re-serving and would be a no better way of remedying the defective situation than starting a new claim, but this perhaps unwise choice was not explained to me today notwithstanding the fact the Claimant was competently represented;

8.3.7 Already out of time, the Claimant then re-commenced Early Conciliation process on 26 May 2022 which was completed same day and immediately followed by presentation of the current claim – the Tribunal had not by that time responded to his request referred to in 8.3.6;

8.4 The Claimant seeks to argue that the Respondents were aware since 8 May that they may be in the frame as the first claim had been copied to them as if for information, and that thus they are not prejudiced by any technical delay as he would have me conclude in actually issuing the claim against them. I note that he must have been receiving legal advice from as early as April to know it was necessary to undertake Early Conciliation process.

8.5 There was no evidence before me of any obstacle preventing the Claimant from issuing his claim against the right party within the Primary Period save for the fact he issued against the wrong party and simply and in my finding inexplicably did not present against the right party until after the Primary Limitation period expired. There is no evidence that the current Respondent caused any delay - this addresses the points in **Palmer & Saunders** and also **Keeble**.

8.6 Two points are particularly raised for the Claimant: -

8.6.1 The Claimant's complaint is not limited solely to the events of 26 January 2022 and if his claim is struck out on the basis it is out of time in relation to the most recent event complained of, he would lose the opportunity to pursue that claim and claims in relation to preceding events on their merits; In contrast, if the claim were allowed to proceed, the Respondent would be put to the task of defending itself in relation to events which are it is not contested are prima facie out of time, but which are clouded by there being no evidence before me today of their connectivity, such as to indicate undeniably strong merits favouring the Claimant; When considerable what is just and equitable, I have to take

account of any imbalance in this respect but seen together with all other relevant matters as found above;

8.6.2 Similarly, I am to take account of the actual duration of time which flowed after expiry of the Primary Period which was from 24 April 2022 to 26 May i.e., 28 days; Mr Parascandolo argues that taking account of the dates of the first Early Conciliation process, issuing a new claim 26 May 2022 was only one day out of time.

Mr Parascandolo argued that these two points in and of themselves sounded in the Claimant's favour when considering all the circumstances;

8.7 Mr Farooq argued they did not, but that in any event all the other factors I have noted above favoured the Respondent or at least demonstrated that the Claimant could not establish he had issued his proceedings within a further period after expiry of the Primary Period such as could be characterised as just and equitable; Mr Farooq further argues that it cannot be said that pleadings pure and simple amount to self-proving cogency, as they are at the time of presenting them merely assertions seeking to disclose a triable prima facie case but that they await evidential testing. He asserted and I agree (to the extent that I find) that the pleading of the last event as showing a triable prima facie case of discrimination lacks any degree of statement of causal connection or raising of any presumption thereof and is a bare assertion of belief there is causal connection between protected characteristic and detriment.

### Further Conclusions

9 Applying the law to these findings and taking account of the guidance referred to above, I find that the Claimant had access to advice both on the earliest dates in April 2022 and thereafter and was not indisposed as may have been but not clearly argued on his behalf such as to be unable to take advice and act upon it, since he has shown that he did do so. He did not issue his claim until after he took legal advice but was not incapable of taking advice before the Primary Period expired which was on 25 April. Nothing seems to explain satisfactorily why he did not issue against the right Respondents in time despite having access to competent legal advice until the date on which he did i.e., 26 May. He appears to rely on the Early Conciliation process in the first claim as a basis for validating his second claim, but that cannot be – taking account of both **Sterling** and **Cranwell**.

10 Therefore, I conclude that a delay as long as 28 days beyond the Primary Period is such that it would not be just or equitable to extend the Primary Period at all. I have considered the balance of prejudice and though I recognise that a Claimant whose claim is struck out at this stage is disadvantaged substantially, I also recognise that a Respondent which is put to the time, trouble and cost of defending a claim based on an as yet unsubstantiated allegation of discrimination is also substantially disadvantaged, and this outweighs the Claimant's prejudice, so the balance of prejudice does not favour the Claimant as much as he says it does, or that it upsets and clearly outweighs the other significant and many points referred to in paragraphs 8.1 to 8.7 above. This addresses the points in **Robertson** , **Simms** and **Afolabi**.

11. In further consideration of the **Robertson** and other related guidance, I note that

the so-called list of factors set out in those cases are not to be treated as limiting but that they usefully act as guidance only and include considering such things as “cogency” of evidence as likely to be affected by delay. Mr Pascandorolo valiantly sought to persuade me that the pleadings are to be taken as cogent. I recognise this argument but that only goes part way as it is referable to pleadings and whether they disclose a triable prima facie case in respect of the overall merits, but they do not comment upon or constitute cogency of evidence since they are not evidence as such.

12. What I have to look at anyway in this hearing is cogency of evidence as to cause of delay and whether any explanation is satisfactory. I find that there is an absence of the sort of evidence I believe I would need to consider as to such delay apart from what is apparent from the chronology and explanations set out in the pleadings and Submissions. As indicated above, I find them insufficient.

13 Accordingly I find that the claim was issued out of time for not being issued within the Primary Period and that in the circumstances as found in this case and bearing in mind the principal guidance that extending time is the exercise of a discretion which should be exceptional, it would not be just and equitable to extend time beyond the Primary Period. Thus, the claim is dismissed as the Tribunal has no jurisdiction to hear it. This deals with both the Dedman and again the Robertson points.

14. I recognise that as I cannot exercise discretion to validate the claim in respect of the last act complained of, and all acts preceding it being out of time whether or not they were connected for the purposes of Section 123(2), I do not have jurisdiction to consider them, Apart from concluding on the basis of my findings in paras 8.1 and 8.7 above, I I cannot find anything other than the Claimant’s complaint about the act on 26 January 2022 no prospect of success. Further, as has not shown it is not open to me to consider the alternative issues reserved to me by EJ Lancaster’s comprehensive Orders, I must therefore dismiss the claim as the last event complained of is out of time.

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Employment Judge **R S Drake**

Date: 28 October 2022