



EMPLOYMENT TRIBUNALS

Claimant: Mr E Bayo

Respondent: Ministry of Defence

HELD AT: Leeds (by CVP) ON: 8 July 2022

BEFORE: Employment Judge Buckley

REPRESENTATION:

Claimant: Mr Roberts, Counsel

Respondent: Mr Smith, Counsel

JUDGMENT having been delivered orally on 8 July 2022 and written reasons having been requested at the hearing the following reasons are provided:

REASONS

1. I find that it is necessary in the interests of justice to reconsider my decision of 22 October 2019. New evidence became available subsequent to my decision which satisfied the test in Ladd v Marshall.
2. It is not disputed that the evidence satisfies the test in Ladd v Marshall, but in any event I conclude that the evidence could not have been obtained with reasonable diligence for use at the tribunal, it is such that it would probably have had an important influence on the result of the case, as is apparent from my reasons below, and that it is apparently credible. Even taking account of the importance of finality of justice, I find that it is necessary in the interests of justice to reconsider my decision in the light of that new evidence.
3. Having considered the new evidence I conclude that it is appropriate to revoke and remake my decision. I heard submissions on what any fresh decision should be at the same time as the submissions on reconsideration. I have concluded that it is just and equitable to extend time, taking into account the new evidence that

was not available to me at the original hearing. The reasoning for those decisions is set out below.

4. I have not heard new evidence from Mr. Bayo. I adopt the findings of fact that I made on the previous occasion. I also confirm the determinations set out at para 1-7 of my judgment of 22 October 2019 on matters such as the scope of the complaint/strike out etc. These were not subject to the application for reconsideration.
5. Whilst not all the evidence that I heard on the previous occasion is set out in my judgment of 22 October, I included all the matters that I considered relevant in my reasons and findings of fact. Accordingly it is not necessary for me to take account of any additional evidence that was given at the hearing but was not recorded in the judgment or did not lead to a finding of fact contained in that judgment. For that reason I have not gone back to look at my notes of the evidence given on the previous occasion.
6. Unhelpfully I did not set out my findings of fact separately to my conclusions in my previous judgment, but I think it is clear, and should be clear to the parties who are legally represented, what was a finding of fact and what was a conclusion based on those facts.

Additional findings of fact

7. The respondent sent the service complaint appeal outcome to the claimant by letter dated 22 October 2019 - the day after the previous preliminary hearing.
8. That appeal was decided on the balance of probabilities There is no suggestion in the appeal outcome that the evidence on behalf of the respondent considered by the appeal body had been impaired by the passage of time, either by the unavailability of witnesses or that recollections had been impaired. The appeal body was able to reach reasonably detailed conclusions on balance of probabilities as to what had and what had not happened.
9. There is a substantial overlap between what is complained of in the service complaint and what is complained of in the ET1.
10. The appeal outcome letter sets out the following relevant conclusions:
 - 10.1. Mocking of prayer attire – The appeal body found that the claimant’s account and that of his witness was credible. It found on the balance of probabilities that the claimant was subjected to inappropriate comments due to his prayer attire and that this amounted to religious discrimination.
 - 10.2. Other derogatory comments because of race and relegation – The appeal body accepted that these were made on the balance of probabilities but found that they were not directed at the claimant.

- 10.3. Singled out for ID checks – This was not upheld on the balance of probabilities. The appeal body concluded there was no difference in treatment.
- 10.4. Catering during Ramadan – The appeal body accepted that there was a failure to cater properly but found this was due to indifference rather than malice or religion based discrimination.
- 10.5. Leave to attend mosque – Although this was only partly upheld, the appeal body found that it was unlikely that there was a serious operational imperative to justify denying the claimant's rights to attend the mosque but found that this was not due to discrimination.
- 10.6. Finally, the appeal body made the finding that there was a regrettable anti-Islamic bias both conscious and unconscious within the unit.

The relevant law

11. The relevant law is set out in the skeleton argument of Mr. Roberts and was not disputed by Mr. Smith.

Length of delay

12. All the alleged acts of discrimination occurred before 19 September 2017. The preliminary hearing in October 2019 was originally listed and determined on the basis that the last act complained of took place on 19 September 2017.
13. I accept that some of the acts are earlier and I accept that if they did not form part of a continuing act, the claim would be even further out of time. The length of the delay is already significant, and even more significant if the earlier acts are not part of the continuing act.
14. For the reasons set out below, even if I assume that those earlier acts are not part of a continuing act, I conclude that it remains just and equitable to extend time for all the alleged acts, despite the fact that the longer delay weighs heavier in the balance in the respondent's favour.

Reason for delay

15. The reason for delay was that the claimant was waiting for the service complaint to be concluded. I take account of the fact that the claimant knew, at an early stage, that he had the basis for a claim in the employment tribunal and that he knew that the clock was ticking in terms of time limits. In those circumstances I conclude that the fact that the internal proceedings were ongoing was not a good reason for a delay of this extent. However, there is an explanation, which is better than no explanation for the delay.

Promptness of acting

16. The claimant knew he had to right to bring a claim in the tribunal at an early stage. He did not act promptly to issue his claim. I accept that he acted promptly

within internal proceedings, and acted promptly once those internal proceedings were concluded, but I find that he could and should have issued his claim in the tribunal sooner given his state of knowledge.

17. I do not accept that the respondent's delays are relevant – the claimant did not need to await the outcome of the service complaint before issuing his claim.
18. Overall, I find that the length of delay, the lack of a good explanation for the delay and the claimant's failure to act promptly weighs fairly heavily against it being just and equitable to grant an extension of time. This is particularly so in relation to the earlier acts, where the delay would be significantly longer, assuming for today's purposes that they are not part of a continuing act.

Cogency of evidence

19. There has been no evidence adduced by the respondent in relation to any prejudice in terms of, for example, the effect on availability of witnesses or any difficulties with recollection. With a delay of this extent, I would generally be prepared to assume that there would be some effect on availability of witnesses and recollection, given this passage of time. The weight that could be attached to that supposition would be lower than if evidence had been produced by the respondent.
20. In this case the new evidence which was not before me on the previous occasion leads me not to make that supposition. The appeal outcome decision letter is clear evidence that the relevant witness evidence is still available and that detailed factual evidence is still available, meaning that it was possible for the appeal body to reach reasonably detailed findings on balance of probability.
21. No problems are identified in that document in relation to witness availability, availability of other evidence or problems of recollection.
22. I conclude on this basis, in the absence of an evidence to the contrary from the respondent, that the respondent is still in a position to defend the claim and that any impact on the cogency of evidence caused by the passage of time is limited.

The effect of a stay

23. Mr Roberts submitted that the claim would have been stayed until the service complaint had concluded in any event, and therefore any prejudice is not caused by the delay in issuing the claim. I cannot conclude that the claim would have been stayed if issued in time. I do not know what the relevant judge would have decided. I accept that there is at least a possibility that it might have been stayed, given the appellate authorities indicating that this is the usual course of action. Given that I have concluded that there is only a limited impact on the cogency of evidence in any event, this has not affected my judgment.

Merits

24. Ordinarily I would proceed on the basis that a claim has reasonable prospects of success. In this claim there is clear evidence in the appeal outcome letter that the prospects are good in relation to at least part of the claim. The relevant part is that relating to the mocking of prayer attire. I also take account of the findings of the appeal body of anti-Islamic bias, both conscious and unconscious, within the unit which in my view, increases the claimant's prospects of persuading a tribunal to infer a discriminatory reason for any less favourable treatment.
25. In relation to most other parts of claim, the appeal board, save for the matter of ID checks, found that the matters occurred but did not infer that the reason for the treatment was religion. This does not, in my view, suggest that those parts of the tribunal claim do not have at least reasonable prospects of success in the tribunal, which has the benefit of hearing oral evidence from all parties.
26. I accept that the appeal outcome letter concluded that the claimant was treated the same as others in relation to ID checks, which suggests that the claimant may have some difficulty in relation to that aspect of the claim.
27. Looked at overall, I consider that the appeal outcome letter suggests that the claimant's claim has, in general, good rather than reasonable prospects of success.

Conclusions and the balance of prejudice

28. I take into account the fact that the claimant would be deprived of a claim that has, in general, good prospects of success. Not allowing the claim to proceed would cause extremely significant prejudice. I do not accept that the fact that the claimant's service complaint appeal was upheld means that he suffers no or reduced prejudice in being deprived of the opportunity to have an oral public hearing and a finding of discrimination by an employment tribunal, with the opportunity of being awarded compensation and having recommendations made. That is a substantially different remedy.
29. On the other side, I find that there is limited prejudice to the respondent in allowing the claim to proceed. There will always be some prejudice caused by delay, and I accept that the respondent will have to deal with a case that would better have been dealt with earlier. However I have found that there is likely to be only limited impact on the quality of the evidence that the respondent can call. In those circumstances I find that the prejudice to the respondent is significantly less than that to the claimant.
30. Taking account of all the factors set out above, including those matters which weigh heavily against extending the time limit, and bearing in mind the balance of prejudice, I find, looked at in the round, that it is just and equitable to allow the claim to proceed.

Employment Judge Buckley

Date 8 July 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.