



EMPLOYMENT TRIBUNALS

Claimant: Mr A Anderson

Respondent (1): Ministry of Defence
Respondent (2): Sergeant Chris Hughes
Respondent (3): Sergeant Ian Shaw
Respondent (4): Sergeant Mike Foody
Respondent (5): Major Craig Watson
Respondent (6): Captain Mark Machin
Respondent (7): Captain Hedley Midgley

HELD at Newcastle CFCTC

ON: 2 March 2023

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: In person (accompanied by his partner Ms Rachel Bergin)
Respondent: Miss L Amartey of Counsel

JUDGMENT

1. The claimant's complaints of unlawful disability discrimination against all seven respondents are dismissed upon withdrawal by the claimant.
2. The claimant's complaints of unlawful race discrimination against all seven respondents are dismissed as having no reasonable prospects of success. Those claims were brought after the end of the period of six months starting with the date of the acts to which these proceedings relate and the Tribunal is not satisfied that it would be just and equitable for that time limit to be extended.

REASONS

1. This matter came before me this morning by way of a public preliminary hearing, the purpose of which was to consider applications made on behalf of the respondents to either strike out all of the claims on the grounds that they have no reasonable prospect of success or alternatively that the claimant be ordered to pay a deposit as a condition of being permitted to continue with all or any of those claims, on the grounds that they have little reasonable prospect of success.
2. The claimant attended in person and was accompanied by his partner Ms Bergin. The respondents were represented by Miss Amartei of counsel. There was an agreed bundle of documents marked R1, comprising an A4 ring binder containing 302 pages of documents. During the course of the hearing the claimant introduced some further documents which are referred to below.
3. By a claim form presented on 24 May 2022 the claimant brought complaints of unlawful disability discrimination and unlawful race discrimination against the Ministry of Defence. Permission was subsequently granted for the second – seventh respondents to be joined into the proceedings.
4. The claimant was a soldier serving in the British Army from 27 January 2004 until his discharge on medical grounds on 2 March 2022. The claimant alleges that he was subjected to numerous acts of race discrimination between 2017 and 2020; that these acts of race discrimination led him to suffer from clinical depression and that as a result of that, he was discharged from the army on medical grounds.
5. A private preliminary hearing took place on 29 September 2022. Orders were made requiring the claimant to provide further information about his complaints of unlawful race discrimination and unlawful disability discrimination. That further information was provided on 27 October 2022. On 27 January 2023 the seventh respondent presented his response form ET3 and on the same date there was served an amended grounds of resistance for the other respondents following the service of the claimant's further information.
6. At the preliminary hearing on 29 September 2022 counsel for the respondents requested a public preliminary hearing to consider applications on behalf of all respondents that the claims be struck out as having no prospect of success or alternatively that the claimant be ordered to pay a deposit as a condition of being allowed to continue with those claims, on the basis that they had little reasonable prospect of success. The basis of that application firstly is that the claimant's complaints fall foul of the provisions of section 121 of the Equality Act 2010, the effect of which is that members of the armed forces cannot present a complaint to the Employment Tribunal unless they have first made a service complaint about those matters. The second ground of the strike out application is that the complaints fall foul of section 123 of the Equality Act 2010 in that the claims were brought after the end of the period of six months starting with the date of the act to which these proceedings relate.

7. By notice dated 12 October 2022 all parties were notified that there would be a public preliminary hearing to consider the respondent's applications and that the hearing had been allocated a time estimate of one full day to take place in person on 2 March 2023.
8. At the beginning of today's hearing, I pointed out to Mr Anderson and Ms Bergin that section 4(3) of Schedule 9 to the Equality Act 2010 excludes members of the armed forces from bringing proceedings under the Equality Act 2010 relating to age or disability discrimination. That was accepted by Mr Anderson and Ms Bergin who confirmed their agreement to the complaints of unlawful disability discrimination being dismissed upon withdrawal by the claimant. I so order.
9. Thereafter, the entire morning was utilised in dealing with the respondent's assertion that the claimant could only pursue allegations of unlawful race discrimination if those allegations had been included in a service complaint made by the claimant. The respondent's position is that the complaints referred to in the Employment Tribunal proceedings were not the subject of a relevant service complaint. The claimant's position is that he in fact raised two separate service complaints, the first dated 15 July 2021 and the second dated 7 July 2022. Miss Amartey for the respondent conceded that the claimant had indeed submitted those two service complaints, but argued that they did not include the allegations which form the subject matter of these Employment Tribunal proceedings. Miss Amartey made specific reference to 2 "admissibility letters" from the first respondent dated 16 December 2021 and 5 August 2022. Miss Amartey's submission was that unless the claimant's allegations were acknowledged in those letters as being "admissible" then they were not part of the service complaint and thus the Employment Tribunal did not have jurisdiction to consider them.
10. The claimant made reference to the further information about his claims which he had provided on 27 October 2022 in response to the Orders made at the preliminary hearing on 29 September 2022. The Tribunal took Mr Anderson and Miss Amartey through the claimant's original claim form, that further information and the two admissibility letters. After undertaking that fairly exhaustive exercise, the Tribunal found that there are a total of 33 individual allegations of unlawful race discrimination which are referred to in the claimant's pleaded case and the two admissibility letters. Those allegations were identified by the numbered paragraphs in the claimant's further information document. It is important to note that the first allegation refers to an incident on 5 June 2017 and the last allegation refers to an incident in March 2020.
11. The respondent's application to strike out the claimant's complaints of unlawful race discrimination on the grounds set out in section 121, namely that they had not been included in a service complaint, is dismissed.
12. The second part of the respondent's application was considered during the afternoon of today's hearing. That application is to strike out/order a deposit order because the complaints brought by the claimant fall foul of the time limit set out in section 123. In simple terms, section 123 requires a member of the armed forces to present his claim to the Employment Tribunal within six months of the date of the act to which the complaint relates. In the claimant's case, the first allegation is dated June 2017 and the last allegation relates to March 2020. The claimant entered into Acas early conciliation on 9 March 2022 and presented his

original claim form to the Employment Tribunal on 24 May 2022 having obtained the Acas early conciliation certificate on 19 April 2022.

13. Those dates were all agreed by the claimant. Under the provisions of section 123 of the Equality Act 2010, the claimant had to enter into Acas early conciliation by September 2020 and would then have the period of one month from the date when the early conciliation certificate was issued in which to present his complaint to the Employment Tribunal. Accordingly, early conciliation should have commenced by September 2020. Allowing one month for early conciliation and a further month thereafter for presentation of the claim to the Tribunal, that would bring us to the end of November 2020. On that timetable, the claims are at least 15 months out of time.
14. Mr Anderson and Miss Bergin accepted that the claims were out of time, but invited the Employment Tribunal to exercise its discretion under section 123, to extend time on the grounds that it is just and equitable to do so.
15. Consideration of whether it would be just and equitable to extend time in a particular case involves the Tribunal exercising its discretion, there have been a number of decisions of the higher courts which give the Employment Tribunal guidance as to how that discretion should be exercised. The decisions of those higher courts include the following:-
 - Robertson v Bexley Community Centre [2003 IRLR 434 – Court of Appeal].
 - Chief Constable of Lincoln Police v Caston [2010 IRLR 327 – Court of Appeal].
 - British Coal Corporation v Keeble [1997 IRLR 336 – Employment Appeal Tribunal].
 - Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021 ICR – D5 – Court of Appeal].

According to those cases, matters which the Employment Tribunal should take into account when considering whether to exercise its discretion to extend time should include:-

- (a) The length of and reasons for the delay.
 - (b) The extent to which the cogency of the evidence is likely to be affected by the delay.
 - (c) The extent to which the parties sued (the respondent) had co-operated with any request for information.
 - (d) The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.
 - (e) The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.
16. In Mr Anderson's case, the length of the delay is agreed. It is important to note that the claims involve separate allegations against 6 different officers. Some of those allegations go back to 2017, which means that 6 years will have elapsed from the date of those allegations by the date of any trial in the Employment Tribunal. The most recent allegations relate to March 2020 and are therefore likely to be at least three and a half years old by the time they come to trial.

17. The Tribunal spent some considerable time enquiring of the claimant as to the reasons for the delay. The claimant's explanation was based on two matters. Firstly, that his mental health condition made it impossible for him to engage with the Employment Tribunal process until May 2022 and secondly that he was unaware of the 6- month time limit because he was wholly unfamiliar with the Employment Tribunal process.
18. The claimant referred the Tribunal to the medical documentation which he had attached to his "disability impact statement" submitted on 27 October 2022. The claimant's medical records show that he was first diagnosed with "low mood" on 29 November 2019 and continued to be so diagnosed until September 2020. On 15 September 2020 he was diagnosed with a "depressive episode"; on 22 June 2021 with "anxiety disorder" and on 25 August 2021 with "other mood affective disorders". The medical records go on to show that on 23 November 2021 Mr Anderson was medically discharged from the forces and on 21 December 2021 was diagnosed with Post Traumatic Stress Disorder. That evidence was not challenged by Miss Amartey for the respondent.
19. The claimant also referred to a letter dated 17 August 2022 from Sheffield Health and Social Care which indicated "moderate depression" and "severe anxiety". The claimant also referred to a letter dated 12 December 2022 from the community mental health nurse Ms Chantelle Hague which appears at page 284-285 in the bundle. The relevant extract states as follows:-

"Andre was reviewed by our team consultant at that time Dr Briffa in January 2022 and given the diagnosis of PTSD with a moderate depressive disorder. Andre was initially referred to our team in July 2020, having been struggling with low mood and associated anxiety for over a year. He was assessed by the team in August 2020 having experienced prolonged unhappiness with a military environment. He struggled with symptoms of pervasive depression, recurrent tearfulness and agitation, loss of energy, poor motivation, insomnia, early morning waking ruminations, irritability, vastly reduced functioning at work, anxiety and avoidance of triggers within the military environment. He attended approximately six sessions of behavioural activation and low level CBT and continued with prescribed anti-depressants. Due to a continuation of persistent symptoms, Andre's care was escalated to Step 3 for more intensive treatment and formulation. His care focused on compassionate therapy and cognitive behavioural therapy to aid recovery of anxiety and depressive symptoms. It was reviewed by the team consultant psychiatrist Dr Blower in March 2021 and a recommendation for a medical discharge was made due to opinion that he was vulnerable to further deterioration should he remain within the military and a return back to work was not recommended."
20. The claimant's evidence to the Tribunal was that his depressive disorder made it difficult, if not impossible, for him to engage with the Employment Tribunal process between March 2020 and April 2022. Mr Anderson insisted that he was not acquainted with the Employment Tribunal process and was not aware of the 6 month time limit for presenting complaints. Mr Anderson's evidence was that he believed he had to exhaust and complete the internal service complaint procedure before he could present the claim to the Employment Tribunal. Mr Anderson did however except that throughout that period he had engaged with the respondent's internal service complaints procedure. He had been able to submit two separate complaints on 15 July 2021 and 7 July 2022. He had also

been able to engage with the appeal procedure to the Ombudsman when some of those complaints had been rejected as inadmissible. Mr Anderson accepted that he had access to professional advice and had in fact engaged a HR consultant (Miss Katie Thorpe of HR Active) who had assisted him in completing the Employment Tribunal claim form. Mr Anderson further accepted that he had the benefit of support and assistance from his partner Miss Bergin throughout the relevant period. Mr Anderson accepted that he was educated to degree level. Mr Anderson further accepted that throughout the relevant period he had access to the internet and would thus have been able to make the appropriate enquiries about the Employment Tribunal process.

21. The Tribunal found that Mr Anderson's explanation to the effect that he was unable to engage with the Employment Tribunal process because he was medically unfit to do so, was wholly inconsistent with his ability to engage with the respondent's internal service complaints procedure. Mr Anderson accepted that the Employment Tribunal claim form ET1 is not a difficult form to complete. The information which he had provided as part of the service complaints procedure would simply have to be duplicated into the Employment Tribunal claim form. Whilst the Tribunal accepted that the claimant suffered from low mood, depression, anxiety and post traumatic stress disorder, the Tribunal was not satisfied on the claimant's evidence or the medical evidence submitted by him, that his mental health condition amounted to such an impairment that he was unable to engage with the Employment Tribunal process.
22. The Tribunal did not accept Mr Anderson's explanation that he was unaware of the Employment Tribunal process and in particular the existence of the time limits. The Tribunal found that the claimant had access to expert advice, had access to considerable support and had the means to make the appropriate enquiries about what was necessary to commence Employment Tribunal proceedings.
23. The Tribunal was not satisfied with the claimant's explanation for the delay.
24. This is not a case where there has been any obstructive behaviour by the respondents, the effect of which was that the claimant had missed the deadline for presenting his claim to the Employment Tribunal. The respondent's internal service complaint procedure is notoriously slow, but that of itself did not prevent or adversely affect the claimant's ability to present his claim to the Employment Tribunal. The claimant did not act promptly when he decided to instigate Employment Tribunal proceedings, as is shown by the further delay between the issue of the early conciliation certificate and the presentation of the claim form. Finally, many of the claimant's complaints go back several years. Whilst there has been an investigation as part of the internal service complaints procedure, in which statements were taken and recorded, the Tribunal found it likely that memories will have faded over that period of time to such an extent that there is likely to be considerable prejudice to the respondent in collating the appropriate evidence in response to the claimant's allegations of unlawful race discrimination.

25. In all the circumstances, the Tribunal was not satisfied in this case that it would be just and equitable to extend the six month time limit for the presentation of the claim form by some 15 months. The claims are out of time and the Employment Tribunal does not have jurisdiction to hear those allegations. Those allegations are therefore struck out and dismissed.

Employment Judge Johnson

Date: 8 March 2023