



EMPLOYMENT TRIBUNALS

Claimant: Mr Tahir Bytyqi
Respondent: Arriva Kent and Surrey Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Reading Employment Tribunal **On:** 13 June 2023
Before: Employment Judge Chudleigh (sitting alone)

Appearances

For the claimant: Ms A. Khalafalla, friend
For the respondent: Mr B. Jones, counsel

Judgment

The claimant's claim of direct race discrimination was presented outside the time limit provided for in s.123(1) of the Equality Act 2010 and it would not be just and equitable to extend time. Accordingly, it is dismissed.

Reasons

1. This claim was presented on 1 November 2021. It was the subject of case management on 8 September 2022 by Employment Judge Tuck when the matter was set down for a preliminary hearing to consider:
 - a. Whether the claim of discrimination had been presented within the requisite time period.
 - b. If not, whether it is just and equitable to extend the time period.
 - c. Whether any of the claims have no prospect of success and should be struck out.
 - d. Whether any of the claims have little prospect of success and should be subject to a deposit order.
2. The hearing was listed for 3 hours which was only enough time to consider the first two of those issues.

3. Employment Judge Tuck gave directions for the preliminary hearing which included an order for the claimant to prepare a witness statement. The claimant failed to do so however, the claimant gave evidence orally and in doing so, explained his case, why he understood that the acts he complained of were discriminatory and why he did not present his claim form before 1 November 2021.
4. It transpired during closing submissions that there was a letter from the claimant's GP dated 30 November 2022 and associated documents that had not been received by the respondent and were not in the bundle. They were copied by the clerk; I was able to review them in full and the parties made submissions on the documents before the hearing concluded.
5. The claimant gave evidence as well as his witness, Mr L Goodfellow, his Trade Union Representative. I made the following findings of fact.
 - 4.1 The claimant commenced employment with the respondent on 13 October 2014 as a Bus Driver.
 - 4.2 On 9 June 2020 the respondent was contacted by a bus passenger's employer raising a complaint about the claimant. Meetings took place between the claimant and the respondent about that complaint on 10, 11 and 15 June 2020. Shortly thereafter the claimant was suspended from work. He did not return to work and in the intervening period has been on sick pay and on furlough.
 - 4.3 On 18 June 2022 the claimant raised a grievance. On 28 January 2021 Jason Jones, Operations Manager of the respondent issued an investigation outcome. In that letter it was indicated that Mr Jones met with the claimant on 2 September 2022 to investigate his grievance. In so doing he viewed the CCTV from the material time. Mr Jones found no evidence that the claimant had done anything to upset the passenger. Mr Jones also concluded that the investigation had not been conducted appropriately and in line with Arriva values. Accordingly, the claimant's grievance was upheld on the grounds that he was not treated appropriately and there was no evidence to confirm truth in the allegations justifying the subsequent suspension.
 - 4.4 Mr Jones gave the claimant a verbal apology during the meeting and followed up in writing on 28 January 2021 with a written apology. There was a further meeting between the claimant and the respondent in May 2021 which was also attended by the claimant's wife. Assurances were given that there was no case for the claimant to answer and a further apology was issued.
 - 4.5 On 18 August 2021 the claimant lodged a second grievance. In that grievance he complained of discrimination. On the same day the claimant's representative contacted Acas who issued an early conciliation certificate on 29 September 2021.

- 4.6 At the case management hearing on 8 September 2022 Employment Judge Tuck took time to identify the issues in the claim. The claimant told Employment Judge Tuck that the issues were as follows:
- 4.6.1 Mr Cooper telling the claimant in June 2020 that he had been the subject of a complaint of inappropriate behaviour towards an underage person.
 - 4.6.2 Mr Cooper subjecting the claimant to a three-day interrogation in June 2020.
- 4.7 In his evidence, the claimant confirmed to me that those were indeed his complaints. The three days in question were 10, 11 and 15 June 2020.
- 4.8 The claimant he first felt discriminated against by the respondent in February 2020 when Mr Cooper made comments to him in the context of Brexit about him travelling by donkey and going home. When the matters in question occurred in June 2020, he could feel that his treatment was discriminatory and that matters were to do with his race which is Kosovan.
- 4.9 The claimant said he delayed putting in a claim because he was devastated by the allegations and he was suffering from ill health. He was put on Sertraline by his doctor and maintained that the impact of that left him numb. He told me that he underwent counselling and he was not in the right frame of mind to bring a claim.
- 4.10 The medical evidence before me proved that the claimant was suffering with a mixed anxiety and depressive disorder from June 2020 and that disorder continued. The GP says in his report dated 30 November 2022 that in May 2021 the claimant reported that his condition got worse after he felt that other parties were discriminating against him. The GP indicated that the claimant required further mental health intervention with talking therapy and medication.
- 4.11 Mr Goodfellow in his evidence explained that he kept in contact with the claimant the entire time that he was suspended because of his welfare and he was not in a good place. He explained to the claimant two or three weeks after the events of June 2020 what his rights were in relation to bringing a tribunal claim for race discrimination. The claimant knew of his right to bring a claim and of the time limits from July 2020 at the latest.
- 4.12 The respondent's main witness for the full merits hearing will be a former employee called Mr Mark Haslett. He was the manager who conducted the alleged three-day interrogation. The respondent's depot was closed during 2021 and the respondent does not now have lines of communication with Mr Haslett. Accordingly, if this claim is to go forward to a hearing, the respondent would be prejudiced because the key witness would not be available. The claimant would also be prejudiced as he would not be able to bring his claim which he feels strongly about and the event that gave rise to it have undoubtedly had far-reaching consequences for him personally.

Submissions of the parties

- 5 On behalf of the respondent Mr Jones relied on written submissions dated 13 June 2023 which were supplemented orally. It was pointed out that the claimant believed the events he complained of were discriminatory long before he submitted his claim. Furthermore, he had support and advice during the period from his trade union, and more recently Ms Khalafalla, the friend who represented him at the hearing.
- 6 Furthermore, it was submitted that as the claimant was able to draft detailed correspondence to the respondent's managing director in August 2021, he could equally have presented a Tribunal claim. There was an unjustified and inexplicable failure to put in the claim in time; although the Claimant was on antidepressants for the whole of the material period, he was still able to function and could have presented his claim. It was also suggested that the claim was hopelessly weak, and the respondent's ability to defend it had been prejudiced by the claimant's delay, his depot having been closed with Mr Hazlet being amongst those made redundant.
- 7 Ms Khalafalla made helpful submissions on behalf of the claimant. She relied on the medical documentation submitted to the tribunal and argued that the claimant was not well enough to present his claim within the time limit. She made powerful submissions about the merits of the claim and argued that it was wrong to say that the claim was weak. The Claimant did not understand the depth of the situation until the meeting on 15 May 2021 with the respondent when he learned that a senior employee of the respondent had made a derogatory comment about him. He then approached Acas for early conciliation. Ms Khalafalla reminded me that the clock stops for the purposes of limitation during early conciliation. She also emphasised just how far-reaching the allegation have been and the impact on the Claimant, his personal life, and his health.
- 8 Ms Khalafalla relied on the GP's report dated 30 November 2022 which says that that in May 2021 the claimant's condition got worse as he felt that other parties were discriminating against him. She said that the Claimant was low, but having had therapy he had the courage to push forward with his case.

The law

- 9 Section 123(1) of the Equality Act 2010 provides that the time limit for a claim of race discrimination is the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. The time limit can be extended by s.140B if early conciliation is commenced within the time limit.
- 10 If the acts complained of are out of time there is a broad discretion to extend time. In **British Coal Corporation v Keeble [1997] IRLR 336** it was indicated by the EAT that a tribunal may take account the factors listed in s 33 of the Limitation Act 1980: prejudice which each party would suffer as a result of the decision reached, 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.

- 11 Of these issues the reasons for the claim not having been brought in time, the extent of and the reasons for the delay and the balance of prejudice have particular significance but all factors must be weighed into the balance.

Conclusions

- 12 The first question was when did time start to run. The events complained of occurred in June 2020. Time began to run from 15 June 2020 at the latest. This is not a case where there was any conduct extending over a period.
- 13 Time therefore expired for the purposes of limitation in mid-September 2020.
- 14 The claimant delayed until 18 August 2021 before contacting Acas for the purposes of early conciliation and did not put in a claim until 1 November 2021. There is evidence that the claimant had tried to put in a claim around 29 October 2021 but that there were technical issues which prevented him from doing so. That short period of technical delay did not make any material difference.
- 15 I had regard to the explanation for the delay. The claimant said that this was because of his ill health. However, the claimant has had the support of a trade union representative throughout and has been able to function and articulate his position at two different grievance meetings with the respondent. I accepted that the claimant was suffering from mental ill health at all material times, but it did not seem to me in the circumstances that the claimant's ill health was a good excuse for the delay particularly given that he believed in June 2020 that he was being discriminated against. This was before the claimant's condition worsened in May 2021. In my judgment, he was not too ill to bring a claim in time although I weighed the fact of the claimant's ill health into the balance in exercising my discretion.
- 16 It appeared that the claimant decided on around 18 August 2021 to explore the possibility of bringing tribunal proceedings as on that date a second grievance was raised with the respondent alleging discrimination and Acas was contacted for the purposes of early conciliation. As Ms Khalafalla said in her submissions, the clock stops for the purposes of limitation during early conciliation. The difficulty however for the claimant was that his claim was already out of time when early conciliation began. Despite Acas issuing a certificate on 29 September 2021, the claimant delayed until the end of October before seeking to put in his claim.
- 17 I had regard to the length of delay. The claim ought to have been commenced in around September 2020. The delay in this case exceeded one year.
- 18 It was also relevant that the claimant knew at all material times from two or three weeks after the events in question at the latest that his right to bring a claim and the appropriate time limits.

- 19 In relation to the balance of prejudice, I considered the prejudice to both parties if the other's position was adopted. Firstly, there was prejudice to the claimant if I did not to extend time because he feels very strongly that he was discriminated against and is keen to prosecute his claim. On the other hand, the respondent's main witness is unavailable given the delay.
- 20 Mr Jones invited me to have regard to the merits of the claim when considering limitation. I declined to do so as on the evidence available to me it was not possible for me to form a view about what was said during the alleged three-day interrogation and form a view about whether the claimant's case has merit. However, in weighting up all the other factors I have described, my view was that it would not be just and equitable to extend time. The balance of prejudice was pretty much equal, but the delay was considerable and there was no compelling excuse for it. In the circumstances, I declined to extend time and dismissed the claim.

Employment Judge Chudleigh

Date: 29 June 2023

Sent to the parties on:

12 July 2023

For the Tribunal:

GDJ