Neutral Citation Number: [2024] EAT 2

Case No: EA-2022-000744-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 January 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER
EMMA LENEHAN
CHARLES EDWARD LORD OBE

- -

Between :

DR NICHOLAS JONES **Appellant**

- and -

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE **Respondent**

- -
- -

JEFFREY JUPP (instructed through the auspices of Advocate) for the **Appellant**
MARIANNE TUTIN (instructed by Government Legal Department) for the **Respondent**

Hearing date: 4 January 2024

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JUDGMENT

SUMMARY

RACE DISCRIMINATION

The Employment Tribunal did not err in law in refusing to extend time for a claim of direct race discrimination. Extension of time on just and equitable grounds considered [27-37].

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. The claimant brought a claim in which he contended, so far as is relevant to this appeal, that he had been subject to direct race discrimination because he was not appointed to the role of Assistant Business Development Manager by Public Health England (to which we will refer to as the respondent). The claim was dismissed on the merits and was also found to have been submitted out of time.

2. The claimant applied for the role of Assistant Business Development Manager on 8 March 2019. There was an initial paper sift that the claimant passed along with six other candidates. The claimant was interviewed by Mr Darren Clehane, Senior Business Development Manager, and Mrs Carolyn Johnston, Assistant Business Development Manager, on 28 March 2019. The candidates were asked standard questions and scored against a matrix.

3. The claimant was considered to be appointable and scored the second highest of the four candidates. The candidate who received the highest score, Candidate B, was offered and accepted the role on 2 April 2019.

4. The claimant described himself in his ET1 claim form as being of African-Caribbean descent having being born in Bridgetown, Barbados. The successful candidate ("Candidate B") is white, as are the candidates who came third and fourth.

5. The Employment Tribunal concluded that as a result of a genuine error, the claimant, and the other unsuccessful candidates, were not told that they had not been appointed for just over three months after the interviews.

6. The primary three month limitation period expired on 1 July 2019.

7. It was not until the claimant had chased on a number of occasions, that Mr Clehane wrote on 3 July 2019:

> "Dear Nicholas
>
> Very many apologies – I believed I had sent feedback on your interview, previously. It did take us quite a while to complete things. It was a very strong bunch of applicants and we felt all of you were appointable (you

> were our "reserve"). We offered to someone who had broader and more directly relevant experience but I have asked that you are kept on our lists – and I would hope that you would apply for any similar posts in the future. My best guess is that at least one very similar position will arise in about six months' time. There is a possibility that one – with greater emphasis on marketing – may appear sooner. In terms of feedback, I'll keep it simple and stress there were no negatives – it was just on the day there was a stronger candidate. Again, many thanks for taking the time to apply. And, again, I am so sorry that this did not get to you, sooner. Do get in touch (use this direct email rather than go through the system) if you want further details. All the best, Darren."

8. On 24 July 2019, the claimant sent an email asking a number of questions, including:

> 5. **Can you confirm whether any other candidate(s) representing a minority group was/were considered for this role?**
>
> 6. **Can you kindly describe the profile characteristics of the successful candidate to include age, gender and ethnic origin?**
>
> I would ask that these queries be now considered as part of an official grievance which I am raising today with your office. I would also ask, with the utmost respect, that you provide me with a response ASAP, as I hope make a decision, on the basis of your response, whether or not I shall escalate this to the employment tribunal for consideration as to whether any specific violations occurred here. As a decision was made on May 9th, 2019, **I believe I have until August 9th, 2019 to submit a claim**. [emphasis added]

9. Correspondence ensued in which the respondent contended that because of GDPR issues they could not tell the claimant the protected characteristics of the other candidates, but suggested that he could make an application under the Freedom of Information Act. The Employment Tribunal concluded that the claimant was not told the ethnic origin of the successful candidate because he did not comply with the FOI policies of the respondent:

> 35. **The material finding of fact which we made from all of that evidence is that the respondent did not refuse to provide the information in the way that the claimant asserts. Rather, they were following their own procedures to ensure, as they saw it, compliance with the requirements of data protection law.** Thus, where there was doubt about what was disclosable Mr Dwyer referred the matter to the Freedom of Information team and followed their guidance about what he could (or could not) disclose. He gave clear evidence that he would follow the guidance he was given. He would not refuse information that he was told by the team was disclosable. It is not relevant to the issues in this case (and the claimant's Equality Act claims) to decide whether or not the respondent did or did not understand the GDPR correctly. What matters is what caused them to act as they did: to exclude or disadvantage the claimant, or to follow the proper process as they understood it to be.

> Indeed, at one point the respondent said it would provide the documents if the claimant provided proof of identification. The claimant objected to doing this and so the parties were left at an impasse. At this stage, the factor which prevented the disclosure was not the respondent at all. Rather, it was the claimant's refusal to follow, what we consider to be a reasonable identification procedure. **The respondent had a genuine concern that if they disclosed information about the profiles of the other candidates in such a small pool, it would render them identifiable. Whether this was right or not is certainly an arguable point and discloses the reason why they acted as they did. It shows that there was no conspiracy or desire to deliberately keep the claimant in the dark or cover up wrongdoing by the respondent.** [emphasis added]

10. It was not until 30 September 2019 that the claimant commenced ACAS early conciliation; just under 3 months from the date on which he was notified that he had been unsuccessful in his application. He mistakenly believed that he had until 9 August 2019 to bring a claim.

11. An ACAS early conciliation certificate was issued on 14 October 2019. This could not extend the period within which a claim could be submitted, unless an extension of time on just and equitable grounds was granted, because ACAS conciliation occurred after the primary limitation period had expired.

12. The claimant submitted a claim form that was received by the Employment Tribunal on 29 October 2019. In the attached "statement" the claimant wrote:

> **It is therefore based on the suspiciously and unexplained long period of time that it took to make a decision in this recruitment, and <u>primarily</u> comments made by Darren Clahane in his July 03rd, response on this matter, that I submit this claim of direct and/or indirect discrimination by the PHE in the violations of my civil and statutory rights and protections as a minority candidate on the basis of my race and/or age.** I should make clear here that I have sought and requested pertinent information regarding my suspicions and the allegations being made here from the PHE which I intended to include as further evidence to support my allegations. They however have not been cooperative and instead have sought to withhold said information which has served to obstruct the fair pursuit of justice in this regard. I made a complaint to the information Commissioner's Office with regard to their refusal to release the information … [emphasis added]

13. On 4 December 2019, the respondent submitted an ET3 response. The respondent contended that the claim was submitted out of time, denied discrimination and asserted that the claim was misconceived:

> Further or in the alternative, the Respondent asserts that the claim is misconceived and has no reasonable prospects of success The Claimant has advanced no prima facie case for the claims of race and/or age discrimination in his ET1 and simply says he is 'suspicious that PHE are "hiding something". The claim is entirely without foundation. It is submitted that the claim should be struck out.

14. Surprisingly, the respondent stated that the other unsuccessful candidates were white but did not mention that the successful candidate was also white.

15. On 27 December 2019, the claimant submitted a document responding to the ET3 in which he contended that the claim had been submitted within time. He also stated:

> The Respondent has previously refused to release information pertaining to the profile characteristics of the shortlisted candidates which were requested by the Claimant as early as July 24th, 2019 and again as late as October 08th, 2019 by email communication. As noted in the ET1, the Claimant has even raised a complaint with the Information Commissioner concerning a Freedom of Information request to access this information which the Respondent continued to refuse to release despite direction from the IC to do so by a specified date. The Respondent eventually responded to a SAR out of time.
>
> Yet, the Respondent disingenuously claims that the Claimant has no evidential basis to make his claim because they are conscious of the fact that they have deliberately withheld this information from the Claimant. Notwithstanding, the Respondent has now confirmed for the first time at point 16 of the ET3 that the other two unsuccessful candidates were white British. Yet, there is nowhere in the ET3 where the Respondent has thought it appropriate, even at this stage of litigation, to acknowledge the ethnicity of the successful candidate, information which is directly pertinent to this case. At this point of escalation therefore, as the Respondent continues to withhold evidence even as they attempt to make their case, **the Claimant will go ahead and assume that the successful candidate is also white British (based on a non-denial of this fact by the Respondent).**
>
> **If we are to conclude therefore that the successful candidate is white British, then this does substantiate the fact that the Claimant was treated differently, as the Respondent thought it appropriate to inform the white British applicant who allegedly scored the highest at the interview, but thought not to inform the Black Caribbean applicant who similar to the successful candidate**, likewise made a genuine application to the PHE, scored second highest, but whose application, for no apparent reason, was processed differently. Inasmuch as it is significant that there was one minority candidate in a field of four who was highly qualified and experienced and assumed 'appointable' as the Respondent acknowledges, but he was not offered the position, the focus must therefore turn to the difference in treatment between the two top scoring candidates, one a minority candidate and the other a majority candidate, and how that impacted and affected the ultimate decision, in order to understand the violation and the discrimination. [emphasis added]

16. It was only at a preliminary hearing on 23 June 2020, at which the respondent continued to argue that the claim should be struck out, that the respondent confirmed that the successful candidate is white. The Employment Judge asked Counsel for the respondent to take instructions, which he did and stated that the successful candidate was white.

The Employment Tribunal Hearing

17. The claim was considered by the Reading Employment Tribunal at a hearing held remotely on 14-17 December 2021. The claimant appeared in person and the respondent was represented by Ms Tutin of counsel. The Judgment was sent to the parties on 22 January 2022. Written reasons were provided on 22 April 2022.

18. The Employment Tribunal dismissed the claim on the merits. In summary, the Employment Tribunal concluded that Candidate B could not be an actual comparator because "there are too many differences in material circumstances", stating that this was "particularly so given what the claimant says about the alleged inferiority of candidate B's qualifications and experience". The Employment Tribunal did not conduct a detailed analysis of the claimant's assertion that he should have scored higher than Candidate B in interview. The claimant provided detailed tables in which he analysed the notes of his answers against those of Candidate B and set out the marks he contended should have been awarded if they had both been properly assessed against the marking matrix. The Employment Tribunal concluded that a hypothetical white candidate would have scored the same as the claimant. The Employment Tribunal stated that there was "nothing in the evidence we have heard which leads us to draw an inference of discrimination", including that there was "no evidence of any conscious or sub-conscious consideration of racial characteristics", that the respondent "genuinely chose those who they assessed as the best candidate for the role based on their performance at interview" and there was "no material breach of procedure from which the Employment Tribunal could draw an adverse inference of discrimination". The Employment Tribunal stated that they did not "feel the need to rely on the burden of proof provisions in this case" because it was able to "make actual findings on the evidence as to the reasons why the respondent acted as it did".

19. The Employment Tribunal went on to consider the time issue:

> 67. The question would therefore have been whether it is just and equitable to extend the time limit. We would have to look at the balance of prejudice between the parties. We find, based on the facts that we have cited above and the oral evidence the claimant gave us, that the claimant was aware in August that he had the raw material to make a claim. Looking at the documents, even on 24 July he mentions having until 9 August to present a claim. There was clearly an awareness on his part of time limits for presentation of a claim. If the claimant had been thinking of expiry of a time limit in August it is not at all clear why he did not then present his claim until the end of the following October. We conclude, in fact, that he put this off because he was on an information gathering exercise. He was looking for the evidence to bolster his claim. However, there was no good reason why he had to await the outcome of this process before putting the claim to the Tribunal. He had sufficient information and knowledge about the basis of the claim when he was informed on 3 July that he had not got the job. He was already suspicious (even on his own account) by that point in time. We do not consider that the information gathering exercise was a good enough explanation for the delay in presenting the Tribunal claim.
>
> 68. Considering the balance of prejudice, it is also important to look at the cogency of the evidence. We think there was a disadvantage to the respondent in terms of the impact of the delay upon the cogency of the evidence. An earlier claim would have resulted in earlier disclosure and a greater preservation of documents. It would also, importantly, mean that the witnesses who were giving evidence about oral answers given at an interview would be doing so much closer in time to the events that they had to recall and with a better recollection of the detail of what was said by the claimant and the other candidates.
>
> 69. As things are, the respondent has had to do its best to respond to these elements of the claim. Despite the claimant's criticisms, the respondent did in fact provide him with information and an explanation of its actions quite early on in the chronology. It gave him enough information to know that there was a claim for him to make if he wanted to present it to the Tribunal. The respondent certainly did not hamper or prevent the presentation of the claim in a timely manner after 3 July. On balance we would have concluded that it was not just and equitable to exercise our discretion to hear the claim outside the primary time limit.

The Appeal

20. The claimant, acting in person, submitted a very lengthy notice of appeal, which was rejected on the sift. In the original grounds of appeal the claimant did not specifically assert that he had delayed in submitting his claim because he did not know the race of the successful candidate.

21. I permitted the appeal to proceed at a Rule 3(10) hearing on 23 March 2023, at which the claimant had the benefit of representation under the ELAAS scheme by Mr Jupp. I considered, in

particular, that it was arguable that the Employment Tribunal erred in law in assuming that "a reasonable and honest assessment of performance in interview meant that there could not have been any race discrimination" and that there were arguable issues in respect of the approach the Employment Tribunal had adopted to the hypothetical comparator.

22. In respect of the time point, I considered it was arguable "that the employment tribunal failed to take into account the fact that the respondent failed to tell the claimant the ethnicity of the successful candidate until the first preliminary hearing in the claim" as this "might have been a factor of considerable importance in considering a just and equitable extension if the employment tribunal had concluded that the race discrimination claim had merit".

23. Mr Jupp drafted concise grounds of appeal that were substituted for the grounds originally submitted by the claimant when acting in person.

24. Both parties dealt first with the time point as they accepted that if the appeal against the decision not to extend time on just and equitable grounds was unsuccessful the appeal as a whole must fail. We shall adopt the same approach.

The Time Limit Ground of Appeal

25. The amended ground in respect of the refusal of the extension of time was:

> 8. The ET's refusal to extend time was perverse.
> (1) The act of discrimination was the appointment of candidate B on 2 April 2019 (as the ET held at [J99]).
>
> (2) In this case the Claimant was only notified of the outcome of the recruitment exercise on 3 July 2019. Indeed, he was not notified of the date of the decision, and therefore the date of the discriminatory act, until a year later on 19 June 2020 (2 days before the first PH) (The ET3 being silent on this.) the Claimant was not at that stage told anything about the successful candidate's race. As the ET observed [J67] he sought to gather information about the process (the ET gives details of this at [J31] to [J32]). That was entirely reasonable. It was the refusal and failure of PHE to answer basic questions relating to the process that caused him to consider that race may have been a factor. Indeed this refusal continued up the first PH when the Respondent applied for a deposit order despite withholding from the Claimant the fact that the successful candidate was white (again this fact was not mentioned in the ET3).

26. Accordingly, the ground of appeal was put fairly and squarely as an assertion that the Employment Tribunal was perverse in refusing to exercise the discretion to extend time.

The Law

27. Section 123 of the Equality Act 2010 ("EQA") provides that:

> 123 Time limits
>
> (1) Subject to section 140B proceedings on a complaint within section 120 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.

28. Section 140B EQA permits an extension of time where ACAS early conciliation is undertaken in certain circumstances not relevant to this appeal.

29. Strictly speaking, section 123 EQA does not set out a primary time limit that may be extended but a time limit of three months **or** "such other period as the employment tribunal thinks just and equitable". Where the Employment Tribunal decides that a period other than three months is just and equitable that is the time limit. Nonetheless, the use of the term "primary time limit" for the three months period (with an extension for ACAS early conciliation where appropriate) is a useful shorthand.

30. It remains a common practice for those who assert that the primary time limit should not be extended to rely on the comments of Auld LJ at paragraph 25 of **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576, [2003] IRLR 434, that time limits in the Employment Tribunal are "exercised strictly" in employment cases and that a decision to extend time is the "exception rather than the rule" as if they were principles of law. Where these comments are referred to out of context, this practice should cease. Paragraph 25 must be seen in the context of paragraphs 23 and 24:

> 23. I turn now to the second issue. The decision by the employment tribunal not to exercise its discretion to consider the claim on just and equitable grounds. There are a number of basic propositions of law to which Miss Outhwaite has referred us which govern the way in which this exercise has to be undertaken. If the claim is out of time, there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine, as it did here, having reconvened for the purpose of hearing argument on it.

> 24 The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in *Daniel v Homerton Hospital Trust* (unreported, 9 July 1999, CA) in the judgment of Gibson LJ at p.3, where he said:
>
> > 'The discretion of the tribunal under s.68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong.'
>
> 25 It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

31. The propositions of law for which **Robertson** is authority are that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere. The comments of Auld LJ relate to the employment law context in which time limits are relatively short and makes the uncontroversial point that time limits should be complied with. But that is in the context of the wide discretion permitting an extension of time on just and equitable grounds.

32. In **Chief Constable of Lincolnshire Police v Caston** [2009] EWCA Civ 1298, [2009] IRLR 327 Wall LJ stated:

> 24 Mr Rose placed much reliance on paragraph 25 of Auld LJ's judgment …
>
> This paragraph has, in turn, been latched onto by commentators as offering 'guidance' as to how the judgment under the “just and equitable” provisions of the Race Relations Act and DDA fall to be exercised. In my judgment, however, it is, in essence, an elegant repetition of well established principles relating to the exercise of a judicial discretion. **What the case does, in my judgment, is to emphasise the wide discretion which the**

> **ET has** – see the dictum of Gibson LJ cited above – and articulate the **limited basis upon which the EAT and the court can interfere**. [emphasis added]

33. Sedley LJ stated:

> 30. I agree with Mr Justice Underhill and Lord Justice Wall that the EJ's decision, while it could have been (and, had it been reserved, no doubt would have been) a great deal better expressed, was not vitiated by any error of law.
>
> 31 **In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised**. **In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that limitation is not at large**: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. [emphasis added]

34. Longmore LJ agreed, and added, pithily:

> I agree and would only reiterate the importance that should be attached to the EJ's discretion. Appeals to the EAT should be rare; appeals to this court from a refusal to set aside the decision of the EJ should be rarer. Allowing such appeals should be rarer still.

35. Without meaning any disrespect to Auld LJ, there might be much to be said for Employment Tribunals focusing rather less on the comments in **Robertson** that time limits in the Employment Tribunal are "exercised strictly" and an extension of time is the "exception rather than the rule"; and rather more on some of the other Court of Appeal authorities, such as the concise summary by Leggatt LJ in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, [2018] ICR 1194 at paragraph 17-19:

> 17 The board's other grounds of appeal all seek to challenge the decisions of the employment tribunal that it was just and equitable to extend the time for bringing (a) the claim based on a failure to make adjustments and (b) the claim alleging harassment by Ms Keighan. Before turning to those grounds, the following points may be noted about the power of a tribunal to allow proceedings to be brought within such period as it thinks just and equitable pursuant to section 123 of the Equality Act 2010.
>
> 18 First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike

> section 33 of the Limitation Act 1980, section 123(1) of the Equality Act 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corpn v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2009] 1 WLR 728, paras 30–32, 43, 48 and Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] 2 AC 72, para 75.
>
> 19 That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

36. As noted recently by HHJ Auerbach in **Owen v Network Rail Infrastructure Limited** [2023] EAT 106 Leggatt LJ went on to state at paragraph 25:

> As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.

37. In our turn, judges of the EAT will be assisted by what Leggatt LJ said at paragraph 20:

> 20 The second point to note is that, **because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal**. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle—for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant—or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre (trading as Leisure Link)* [2003] IRLR 434, para 24.

38. A factor that may be of importance in considering an extension of time on just and equitable grounds where there is a potential comparator is when the claimant knew the race of the comparator. In **Barnes v Metropolitan Police Commissioner and another** UKEAT/0474/05 HHJ Richardson held:

> 18. In Mr Barnes' case, there was no doubt that the acts complained of were more than three months before proceedings had commenced. His case was concerned with the second stage: s 68(6). Knowledge of the existence of a comparator at that stage may be relevant to the discretion to extend time. In *Clarke v Hampshire Electroplating* [1991] UKEAT 605/89/2409, the Appeal Tribunal said:
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> > "Under section 68(6) the approach of the tribunal should be to consider whether it was reasonable for the Applicant not to realise he had the cause of action or, although realising it, to think that it was unlikely that he would succeed in establishing a sufficient prima facie case without evidence of comparison."
>
> 19. It follows that a tribunal will be entitled to ask questions about a Claimant's prior knowledge: when did he first know or suspect that he had a valid claim for race discrimination? Was it reasonable for him not to know or suspect it earlier? If he did know or suspect that he had a valid claim for race discrimination prior to the time he presented his complaint, why did he not present his complaint earlier and was he acting reasonably in delaying? These, of course, are far from being the only questions which the tribunal may ask in order to decide whether it was just and equitable to consider the complaint. The tribunal has to consider all the circumstances. We single out these questions because this appeal turns on the tribunal's finding about Mr Barnes' state of mind.

Analysis

39. Mr Jupp argued that it was unreasonable to expect the claimant to commence proceedings while he did not know the race of the successful candidate and that the Employment Tribunal was perverse in failing to extend time to take into account the delay in the respondent informing the claimant that he had been unsuccessful in his application and the time taken up by his attempts to establish the race of the successful candidate before bringing his claim.

40. Mr Jupp particularly criticised the comment of the Employment Tribunal at paragraph 67 that the claimant "had sufficient information and knowledge about the basis of the claim when he was informed on 3 July that he had not got the job". Mr Jupp argued that it was perverse of the Employment Tribunal to expect the claimant to bring a claim while he remained in ignorance of the

race of the successful candidate because a difference of race is a necessary component of a valid claim of race discrimination.

41. The difficulty with this argument is that it does not reflect the manner in which the claimant put the matter at the Employment Tribunal. The focus of the Employment Tribunal on the date of 3 July 2019 is understandable when one recalls that the claimant stated in his ET1 "It is therefore based on the suspiciously and unexplained long period of time that it took to make a decision in this recruitment, and primarily comments made by Darren Clahane in his July 03rd, response on this matter, that I submit this claim of direct and/or indirect discrimination." The claimant stated that the primary reason for his submission of the claim was the comments made by Mr Clahane in his email of 3 July 2019. This provides the context to the decision of the Employment Tribunal to focus on the date of 3 July 2019 and its further finding at paragraph 67 that "He was already suspicious (even on his own account) by that point in time." While the respondent had not told the claimant the race of the successful candidate they had answered a significant number of the questions that the claimant had asked about the process and the Employment Tribunal concluded "It gave him enough information to know that there was a claim for him to make if he wanted to present it to the Tribunal."

42. A further difficulty with the assertion that the claimant could not bring a claim until he knew the race of the successful candidate is that he did bring the claim before he knew the race of the successful candidate. The argument then has to be revised to assert that the Employment Tribunal erred in law in not extending time to allow a reasonable period while the claimant sought to ascertain the identity of the successful candidate. It is notable that the claimant submitted the claim more than three months after he was informed that he had been unsuccessful in his application. It would be unrealistic to conclude that the Employment Tribunal lost sight of the fact that the claimant did not know the race of the successful candidate until long after he submitted the claim as the Employment Tribunal considered the circumstances of the decision of the respondent not to provide details of the protected characteristics of the other candidates at paragraph 35, quoted above. The main focus of the claimant's argument was that the respondent's withholding the race of the successful candidate was evidence of discrimination. The Employment Tribunal also concluded that the claimant could have

known this information at a much earlier date had he been prepared to follow the respondent's Freedom of Information Act procedure. While this is not specifically referred to in its conclusions, there is no reason to believe that the Employment Tribunal forgot the findings of fact it made about this issue at paragraph 35.

43. This ground of appeal does not assert any error in the Employment Tribunal's direction as to the relevant law. While referring to **Robertson** and specifically noting the comments of Auld LJ that time limits in the Employment Tribunal are "exercised strictly" and an extension of time is the "exception rather than the rule" it is clear that the Employment Tribunal was aware of its wide discretion and did consider the length of, and reasons for, the delay, including the issues of the claimant obtaining information about the race of the successful candidate and the prejudice to the respondent that resulted from the delay in the claim being submitted, which **Abertawe Bro Morgannwg University** suggests will usually be relevant factors.

44. We conclude that the claimant cannot establish that the decision of the Employment Tribunal not to exercise its discretion to extend time on just and equitable grounds was perverse, which was the single ground of appeal pursued in respect of the time issue. Having reached this conclusion the appeal must necessarily fail. In those circumstances, we have not gone on to determine the other grounds of appeal. This appeal potentially raised issues about the extent to which the employment tribunal should have considered in detail the criticism that the claimant made about his scoring against the criteria in comparison to Candidate B, but we note that the Employment Tribunal concluded that part of the prejudice that the respondent suffered by the delay in the submission of the claim was the effect that it had had on its ability to put forward evidence about the answers given at the interview, in circumstances in which the notes were not verbatim.

45. The appeal also potentially raised issues about the approach that should be adopted to comparators, including what inferences may be drawn where there is an evidential comparator rather than an actual comparator, a matter recently considered in **Virgin Active Ltd v Hughes** [2023] EAT 130 [2024], IRLR 4 at paragraphs 58 to 69.

46. This case is an example of the challenges that face claimants when deciding whether to bring

a claim of discrimination in respect of matters such as recruitment exercises because they no longer have the option to use the repealed questionnaire procedure to ascertain matters such as the protected characteristics of the successful candidate. Information can only be requested under Rule 31 **ET Rules** once proceedings have been instituted.

47. Candidate B was potentially an actual comparator. It is troubling that the respondent thought it appropriate to apply for strike out of the claim on the basis that the claimant could point to nothing from which an inference of discrimination could be drawn when it was yet to inform the claimant of the race of the successful candidate. Adopting this approach runs the risk that the withholding of the race of the successful candidate might in appropriate circumstances be taken into account in determining whether an inference of discrimination could be drawn and could, at worst, risk misleading the employment tribunal. We do not suggest that the Employment Tribunal was misled in this case as it was not stated that the successful candidate was other than white, only that the claimant was bringing the claim without knowing the race of the successful candidate, and on questioning from the Employment Judge at the preliminary hearing the respondent swiftly gave instructions so that Counsel then instructed could tell the Employment Judge and the claimant that the successful candidate is white, but it would have been better if the matter had been clarified at a much earlier stage.

48. The problems faced by claimants as a result of the repeal of the questionnaire procedure are perhaps somewhat mitigated by the fact that failure to provide basic information, such as the protected characteristics of the successful applicant in an appointment case might, in appropriate circumstances, be taken into account in deciding whether an inference of discrimination should be drawn. Once proceedings have been commence such information can be requested under Rule 31 **ET Rules**.