



EMPLOYMENT TRIBUNALS

Claimant: Miss S Jones

Respondent: Imperial London Hotels Ltd

PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (by video)

On: 19th January 2024

Before: Employment Judge McKenna

Appearances

For the claimant: in person

For the respondent: Mr. Raizon, Counsel

JUDGMENT

The judgement of the Tribunal is that:

1. The complaints of direct race discrimination were not made in time.
2. It is not just and equitable to extend the time limit.
3. The complaints are therefore dismissed.

Written reasons were requested by the claimant at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided. These written reasons describe the procedural history and explain the legal authorities applied by the Tribunal in greater detail than at the preliminary hearing.

REASONS

Introduction and background

1. The summary of the case is set out in Employment Judge Glennie's case

management orders dated 1st August 2023.

2. The complaints have a complicated procedural history and required a number of preliminary hearings. A summary of the relevant procedural history to 23rd October 2023 is contained in EJ Klimov's case management orders of that date.
3. EJ Klimov noted at the preliminary hearing on 23rd October 2023 that it appeared that all of the claimant's complaints under the Equality Act 2010 were out of time and ordered a further preliminary hearing to be held in public to consider strike out applications by the respondent.

Application to amend

4. The claimant said at the October hearing that she wished to amend her claim for £500 notice pay replacing it with a claim for accrued but untaken holiday pay. EJ Klimov explained to her that she needed to make an application to amend which could be considered at the forthcoming public preliminary hearing.
5. He had made the following case management order regarding amendment of the claim:

If the claimant wishes to amend her claim to replace the claim for notice pay with a complaint for holiday pay, she must send her application to the Tribunal and the respondent no later than 21 days before the hearing. She must explain: (i) what she says the respondent owes her by way of pay for accrued but not taken holiday, (ii) how she calculates the sum owed, (iii) why she did not bring that complaint earlier, and (iv) why she says it will be in the interests of justice to allow her to amend her claim to include that complaint

List of issues

6. At the October hearing, EJ Klimov also formulated a list of issues with the parties. This comprised 15 allegations of less favourable treatment of the claimant by the respondent.

Deposit orders

7. Deposit orders were issued in respect of 13 of those allegations. The claimant was required to pay £5 in respect of each allegation.
8. The claimant failed to pay the deposits by the required time including an extension of that time and the claims were struck out by EJ Klimov on 15th December 2023.
9. At the preliminary hearing on 23rd October 2023, EJ Klimov encouraged the claimant to seek legal advice and directed her to possible sources of free legal advice in employment tribunal cases.

Preliminary hearing (open) on 19th January 2024

10. The Notice of Hearing issued on 12th December 2023 said that today's hearing would consider:

- a. the claimant's application to amend (if made) regarding holiday pay,
- b. any renewed strike out application by the respondent,
- c. whether the tribunal has jurisdiction to consider the claimant's discrimination complaints under s.123(1) Equality Act 2010, and
- d. case management and listing of the claim for a final hearing (as appropriate).

11. In the event, the claimant had not made an application to amend and the only application before the Tribunal was the respondent's renewed application to strike out the two remaining complaints on the basis that they were out of time and that the Tribunal therefore had no jurisdiction to consider them.
12. The Tribunal had a bundle of 58 pages. Time was allowed for the claimant to locate the bundle and read it. She confirmed that she had received the bundle from the Respondent the day before the hearing. She did not immediately have it to hand this morning as she did not understand that she would need it at today's hearing. The significance of today's hearing in relation to the continuation of her claim was explained to her at the start of the hearing. She was informed that if the two remaining allegations were struck out that her discrimination claim would be at an end.
13. The respondent drew the claimant's and the Tribunal's attention to the only pages which had been added to the bundle since its last version for the October preliminary hearing. These were EJ Klimov's judgment of 15th December 2023 (pp.55-57) striking out the 13 discrimination allegations in respect of which the claimant had failed to pay deposits by the extended deadline of 5th December 2023.
14. I heard submissions from the respondent and allowed a 20-minute break for the claimant to consider her submissions. Mr. Raizon, to assist the claimant, couched his submission in terms of general legal principles which he sought to express in laypersons' language. The claimant was directed by the Tribunal to focus her submission on the reasons for late submission of the claims on three occasions. These were before the 20-minute adjournment, at the beginning of her submissions and again before the conclusion of her submissions.
15. The claimant was keen however to focus on the allegations which had been struck out by EJ Klimov and to raise wider issues relating to the Human Rights Act. The Tribunal explained the purpose of the preliminary hearing and the impact on her discrimination claim in the event of the Tribunal being persuaded by the respondent that it should strike out the remaining discrimination allegations and that she should therefore concentrate on the reasons for her delay in bringing her Tribunal claim.
16. The claimant did not furnish a witness statement but gave an account of the sequence of events leading to the late submission of her claim.

The law

Time limits in relation to the discrimination claim

17. Section 123 Equality Act 2010 states:

123 Time limits

- (1) Subject to sections 140A and 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.
- ...
- (3) For the purposes of this section—
- (a) conduct extending over a period is to be treated as done at the end of the period.

18. As noted by EJ Klimov on 23rd October 2023, the claim form did not contain any in time allegations and therefore the Tribunal did not need to consider any continuing acts under s.123(3) of the Equality Act 2010.

19. The Tribunal reminded itself of the Court of Appeal judgment in **Robertson v Bexley Community Centre [2003] EWCA Civ 576 (para 25)**:

“It is ... 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.”

20. There is therefore no presumption that the Tribunal should exercise its discretion in favour of the claimant. Rather the onus is on the claimant to persuade the Tribunal that it is just and equitable to extend time.

21. In the same case, the Court of Appeal noted that the question of whether or not it is just and equitable to extend time to bring a discrimination complaint is a question of fact and judgment for the Tribunal to determine (paragraph 23) and that the Tribunal’s discretion is a wide one (paragraph 24). Nonetheless, time limits are to be strictly observed in Employment Tribunals; **Miller and others v Ministry of Justice and others EAT 0003/15**.

22. The Tribunal took note of the five factors under s. 33 of the Limitation Act 1980 which are characterized in the Employment Tribunal setting as the **Keeble** factors based on the decision in **British Coal Corporation v Keeble [1997] IRLR 336**. In summary those five factors are the length and reason for delay, the extent to which the cogency (or power) of the evidence is likely to be harmed by delay, the extent to which the respondent co-operated with any request for information, the promptness with which the claimant acted once aware of the facts giving rise to the possibility of taking a claim in the Employment Tribunal, the steps taken by the claimant to take advice once she knew of the possibility of taking a claim.

23. In considering the **Keeble** factors, the Tribunal reminded itself of Lord Justice Underhill’s guidance in **Adedeji v University of Birmingham NHS Trust [2021] EWCA Civ 23** that the above factors are not to be applied by the Tribunal in a mechanistic manner. Instead, the best approach for a Tribunal is to:

“assess all the factors in the particular case which it considers relevant as to whether it is just and equitable to extend time, including in particular the “length of and reasons for delay”, If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.”

24. LJ Underhill reiterated the importance of the reminder given by Lord Justice Legatt in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** that:

“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 the matters were still fresh”

25. As confirmed by Mrs Justice Laing (as she then was) in **Miller and others vs Ministry of Justice and others EAT 003/15**, a respondent may suffer two types of prejudice if time is extended- first, the forensic prejudice which will result where the primary limitation period is extended by months and years thus requiring the respondent to investigate historic matters and, in the second place, the obvious prejudice of having to defend a claim which would otherwise have been eliminated by a limitation defence.

26. The Tribunal was directed by Mr. Raizon to consider the more recent authority of the Employment Appeal Tribunal in **Thompson v Ark Schools UKEAT/0244/17/DM**. In that case HHJ Eady (as she then was) not only restated the principles described above but indicated that failure by a Tribunal to have regard to those factors that are significant in the particular case before it may amount to an error of law (paragraph 18).

27. Finally, the Tribunal must take account of the merits of the case when considering the balance of prejudice as failure to do so will be an error of law; **Bahous v Pizza Express Restaurant [Ltd] UKEAT/0029/11/DA**. The relevance of the potential merits of the case when considering whether it is just and equitable to extend time were addressed by the EAT more recently in **Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132**

“...the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal’s approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse.”

Findings of fact

28. The claimant should have brought her claim regarding the alleged comments made by Monica on 30th October 2022 by 1st January 2023. Early conciliation began on 17th March 2023. The ACAS early conciliation certificate was issued on 20th March 2023 and the claim was lodged on 21st April 2023. This complaint was therefore 3.5 months outside the prescribed time limit.

29. The second allegation regarding the alleged comments by Adrian between 6th and 22nd November 2022 were brought 2.5 months after the three-month time limit as they should have been presented by early February 2023 at the earliest and towards the end of that month at the latest.
30. Early conciliation did not preserve the time limit as it began after the primary time limit had expired.
31. The claimant contacted ACAS on 20th January 2023.

Submissions

32. For the respondent, Mr. Raizon submitted that the claims were out of time and that it was not just and equitable to extend time. He argued that time limits should be exercised strictly, that the onus was on the claimant to persuade the Tribunal that time should be extended, that the decision to extend time was fact sensitive and while the Tribunal's discretion was wide, the balance of prejudice weighed against the claimant being able to run hopeless allegations.
33. The claimant's primary concern was with the complexity of the three previous preliminary hearings and with the most recent preliminary hearing which had led to EJ Klimov's striking out of 13 discrimination allegations for failure to pay the deposit orders. She asked the Tribunal to look into aspects of the previous hearings. She was reminded on several occasions by the Tribunal that today's hearing was concerned only with the lateness of her claims.
34. The reasons given by the claimant for lateness were threefold. Firstly, that she was having meetings with her employer and assumed that as she was "having meetings within that time frame that (she) was not aware that this would be an issue for the Tribunal case".
35. Second, she said that she was waiting to hear from her employer.
36. Finally, she said that she was waiting for a response from ACAS in order to have a conciliation officer allocated to her case and in fact she is still waiting to have one assigned.
37. She also told the Tribunal that the two remaining allegations were "of no particular relevance or importance to my case."
38. She did not advance any reasons for delay due to personal circumstances such as illness, disability or personal crises.
39. In reply, Mr. Raizon submitted that the claimant had sat on her hands and assumed that matters should be resolved in her favour. He said that justice and equity do not favour a passive litigant. The claimant's lack of knowledge about time limits was not reasonable and that she could have made use of online resources which would have drawn her attention to the Tribunal's time limit. He observed that the two allegations before the Tribunal did not form part of the claimant's original claim and had been added at the third preliminary hearing. Finally, the balance of prejudice was weighted against the claimant's wish to bring frivolous claims

Discussion and conclusion

40. The factors which the Tribunal considered to be relevant are as follows:

Reason for delay

41. The claimant was aware of her right to pursue a complaint to the Employment Tribunal to the extent that she understood the need to contact ACAS. She is intelligent and articulate as shown by her detailed 7-page email to the respondent's HR department which she sent on 25th January 2023. She is resourceful having clearly researched legislation including the Human Rights Act. The Tribunal found that it was open to her to have carried out internet searches confirming the time limits for Tribunal.
42. Her oral evidence showed her awareness of the time limits to invoke a grievance and a grievance appeal with her former employer. This demonstrated to the Tribunal that she should have understood that time limits were even more likely to apply to formal Tribunal proceedings.
43. In the circumstances the Tribunal found that it was not reasonable for the claimant to rely on her ignorance of the three-month primary time limit.
44. The Tribunal also finds that it was not reasonable for the claimant to have delayed bringing proceedings while pursuing a grievance and then an appeal against the outcome of her grievance. It noted that delay due to awaiting completion of an internal process is only one factor to be considered; ***Robinson v Post Office [2000] IRLR 804, EAT.***

Length of delay

45. The Tribunal concluded that the delay while shorter than some of the delays in the authorities cited was potentially significant in the context of an industry with high turnovers of staff. This was a factor weighing in favour of the respondent's strike out application.

Impact on cogency of evidence

46. The Tribunal considered that the delay was likely however to have limited impact on the cogency of the evidence. The claimant's employment was of short duration. Performance issues had been formally raised fairly early on in her employment and it was likely therefore that there was some supporting documentation on the background to the claims. For example, the grounds of resistance record that the respondent's Training Manager noted on 18th November 2022 that the claimant "needed close management". Formal performance management meetings were held on 27th December 2022 and 15th January 2023.
47. Additionally, the claimant had been involved in grievance and grievance appeal proceedings until 15th March 2023. The respondent was likely to have preserved records and to have some contemporaneous statements on the matters raised by the claimant's grievance. Accordingly, the Tribunal placed less weight on this factor.
48. The absence of forensic prejudice is not however decisive in favour of an extension as observed by Mrs Justice Laing in ***Miller.***

Promptness with which acted/steps taken to secure advice

49. The claimant said that she decided to submit her claim once she realised that ACAS would not be contacting her. The Tribunal found her evidence contradictory on this point as she also said at the hearing that she still expected ACAS to be in touch. In relation to her delay associated with the internal proceedings, it noted that she did not issue her claim form until over two months after the refusal of her grievance and more than one month after the refusal of her grievance appeal. The Tribunal does not consider that the claim was brought within a further reasonable period.

Merits

50. Within the necessary limitations of the preliminary hearing, the Tribunal considered the claims to be weak. It noted in particular that the allegation concerning Adrian the kitchen chef appeared to amount to background only. Of significance also was the importance which the claimant attached to these allegations. The Tribunal did not however go so far as to characterise her allegations as frivolous as Mr Raizon had.

Balance of prejudice

51. The Tribunal put in balance the prejudice which would result to the respondent were it required to defend the allegations as against the prejudice which would result to the claimant were she barred from pursuing her claim. The respondent relied upon the fact that it had expended legal fees in a number of preliminary hearings. Mr. Raizon described the claimant's allegations as frivolous and hopeless.

52. As against this, the claimant told the Tribunal that she did not regard the two remaining allegations as either important or significant to her claim. Her primary concerns remained with the allegations dismissed by EJ Klimov. She clearly regarded the two remaining allegations as peripheral and barely addressed them during the hearing.

53. Taking all the above factors into consideration, the Tribunal found that the relevant factors weighed in favour of refusing an extension of the claims on just and equitable grounds. While there was little forensic prejudice, the respondent would be prejudiced by having to defend claims which were not brought within the primary time limit. The balance of prejudice was with the respondent who would be forced to defend allegations which were not only out of time.

54. The Tribunal did not have jurisdiction to hear the claimant's discrimination claims and they would be struck out.

55. The claim for notice pay will be listed for hearing.

Employment Judge McKenna

8th February 2024

20 February 2024
Sent to the parties on:

For the Tribunal Office:

Notes

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.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>