



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R. Archie

**Respondent:** Home Office

**Heard at:** London South ET in public by CVP **On:** 24 October 2023

**Before:** EJ Rea

## **Representation**

Claimant: In person

Respondent: Mr Bershadski

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The Respondent made an application for strike out of, or in the alternative deposit orders in relation to, those alleged acts of discrimination which took place prior to 20 April 2022.
2. The Tribunal therefore had to determine whether the Claimant had any reasonable prospect of establishing:
  - a. That these acts were part of a course of conduct continuing over a period that ended after 20 April 2022; or
  - b. That it was just and equitable to extend the time limit for bringing complaints of discrimination in relation to those acts.

### Continuing act of discrimination

3. The Claimant submitted lengthy written submissions in advance of the Preliminary Hearing. Both the Claimant and the Respondent's representative made oral submissions and the Tribunal asked questions to clarify both parties' positions.
4. The Respondent put forward in its oral submissions that the Claimant's allegations of disability and race discrimination, harassment and victimisation extended over a lengthy period of more than 4 years with some dating back to as early as August 2018. The allegations were about several different employees and managers of the Respondent and related

- to a disparate range of issues. The Respondent submitted that there was nothing to factually connect these allegations to one another.
5. The Claimant maintained that the allegations pre-dating April 2022 were all connected by virtue of having been investigated by the Respondent in the same grievance process instigated by him. Furthermore, the Claimant maintained that several of the individuals who he complained about (Mr Miller, Ms Lambert, Ms Popat) had the same overall manager, Mr Parker, and this therefore linked their acts together. He accepted that this did not apply to Ms Fotheringham as she had been brought in to investigate his grievance precisely because she had no previous involvement. However, the Claimant maintained she had deliberately sought to cover up the Respondent's wrongdoing.
  6. The Claimant also submitted that the Respondent's significant delay and failure to adequately deal with his grievance constituted a continuing act of discrimination.
  7. The Tribunal found that the Claimant submitted a grievance regarding the earliest allegations of discrimination. These were investigated by Ms Fotheringham at a grievance interview with the Claimant on or about 6 February 2019. The grievance process itself was then the source of a large number of additional allegations of discrimination made against Ms Fotheringham, as well as Mr Diggle and Mr Duffy who were the managers involved in hearing his grievance and grievance appeal respectively.
  8. The grievance process spanned a lengthy period which concluded when the Claimant received the outcome of his appeal against the original grievance outcome on 14 September 2021.
  9. The Claimant later sought to re-open this grievance in April 2022 in connection with a stress impact assessment and the management of his sickness absence but the Respondent confirmed this matter was closed.
  10. The Tribunal carefully considered the relevant case law on this point. In particular, the case of *Barclays Bank plc v Kapur & ors* 1991 ICR 208, HL is authority for the proposition that there is a distinction with a continuing act and an act with continuing consequences. The case of *Aziz v FDA* 2010 EWCA Civ 304, CA observes that one relevant factor is whether the same or different individuals are involved in the alleged acts of discrimination. *Lyfar v Brighton and Sussex University Hospitals Trust* 2006 EWCA Civ 1548, CA confirms the Tribunal should look at the substance of the complaints in question and determine whether they can be said to be part of one continuous act by the Respondent or an ongoing state of affairs.
  11. Applying the law to the facts, the Tribunal determined that the earliest allegations of discrimination were all about separate unconnected events and could not be obviously linked together. However, the Tribunal determined that the Claimant had a reasonable prospect of establishing that there was a continuing act linking the complaints about the way his grievance was dealt with by the Respondent. Although this involved different managers, the Tribunal accepted that that they could be deemed to be part of an ongoing state of affairs throughout the period from February 2019 to September 2021.
  12. However, the Tribunal determined that the Claimant did not have a reasonable prospect of establishing that the allegations about the grievance process were linked with the later allegations post-dating 20 April 2022 in such a way as to be a continuing act. The fact that the Claimant sought to revisit his grievance did not mean that there was any

factual connection with the allegations he made about the stress impact assessment, the way his sickness absence was managed by the Respondent, or the issues that arose regarding his requests to take annual leave. Although the Claimant saw his grievance as an issue that remained live because it had not been resolved to his satisfaction, in reality this was an example of an act that had continuing consequences for him rather than a continuing act.

Just and equitable extension of time

13. The Tribunal questioned the Claimant about the reasons why he did not bring a claim sooner in relation to the allegations of discrimination which pre-dated 20 April 2022. The Claimant stated that he believed he had a viable discrimination claim from the outset of the issues he complained about but wanted to give the Respondent an opportunity to resolve things. He emphasised the fact that the Respondent took a very lengthy period to deliver an outcome to his appeal against the original grievance decision.
14. The Claimant accepted that he received the outcome to his grievance appeal on 14 September 2021 but did not take any steps to bring a claim or contact ACAS then. This was despite his receipt of advice from a union representative. The Claimant said he wanted to bring a claim but did not do so because he subsequently became unwell. The Claimant also stated that he only contacted ACAS once he understood the Respondent was refusing to reopen his grievance. He did so on 29 April 2022 which was a few weeks after his meeting with the Respondent about a stress impact assessment.
15. The Respondent submitted that the cogency of the witness evidence was severely impacted by the delay. Some allegations related to acts which will have taken place more than 5 years ago by the time of the final hearing in this case. It was emphasised that some of these allegations would require the Tribunal to determine the accuracy of written records made and the motivation of individuals who made them which would rely heavily on oral witness evidence. The disparate nature of the allegations pre-dating 20 April 2022 also meant that a large number of witnesses would be required to give evidence adding significantly to the complexity of the final hearing and the expense for the Respondent in preparing and attending it.
16. The Tribunal carefully considered the body of relevant case law regarding the discretion to extend time where this is just and equitable in accordance with section 123 of the Equality Act 2010. Although this is a wider and more generous test than the 'not reasonably practicable' test which applies to other types of claims including unfair dismissal, it should still be the exception rather than the rule (*Robertson v Bexley Community Centre t/a Leisure Link 2004 IRLR 434, CA*). This does not mean that exceptional circumstances are required before the time limit can be extended, the law simply requires that the extension of time should be just and equitable (*Pathan v South London Islamic Centre EAT 0312/13*). The onus is on the claimant to convince the Tribunal that it is just and equitable to extend the time limit in the particular circumstances of that case.
17. The Tribunal must weigh up the balance of prejudice to the Claimant and the Respondent and should consider relevant factors such as the length of and reasons for the delay in bringing the claim, the cogency of the evidence affected, whether the Claimant acted promptly when he knew the

- facts giving rise to the claim and, any steps taken by the Claimant to get appropriate advice.
18. The Tribunal found that the Claimant knew all of the facts pertinent to these allegations and that he could bring a claim many months prior to 14 September 2021 but that this was the point at which he formed the intention to do so. The Claimant accepted that he had told as much to his union representative at that point. However, he took no steps to bring a claim until 29 April 2022 when he contacted ACAS. The Claimant's reason for not doing so was that he subsequently became unwell. However, the Tribunal was not satisfied that either the duration or severity of his ill health adequately explained this lengthy delay. The Respondent's process had come to an end by 14 September 2021 and so there was no reason to wait any longer.
  19. The Tribunal was persuaded that the cogency of the evidence was affected by the delay in the Claimant bringing his claim. The Tribunal acknowledged that the Respondent's lengthy grievance process at the appeal stage may also have been a factor in so far as it might explain the reason for the Claimant not bringing his claim prior to 14 September although this did not prevent him from doing so. However, ultimately the cumulative delays meant that it would be very difficult for cogent evidence to be given at the final hearing about alleged inaccuracies in written records and the motivation of the individuals who made those records. This would affect the ability for the parties to have a fair trial.
  20. Granting an extension of time in relation to these allegations pre-dating 20 April 2022, would prejudice the Respondent in relation to its ability to put forward its case and the additional expense involved in calling so many witnesses. Refusing to grant an extension of time would prejudice the Claimant in denying him the opportunity to have these allegations determined at a final hearing and meaning in particular that his age discrimination complaint would not proceed. However, the Claimant would still be able to pursue his remaining allegations of disability and race discrimination, harassment and victimisation as well as his constructive unfair dismissal complaint.
  21. Having carefully considered these factors and weighing up the balance of prejudice, the Tribunal determined that the Claimant did not have a reasonable prospect of establishing that it was just and equitable to extend the time limit for bringing complaints of discrimination in relation to those acts.
  22. The Tribunal therefore decided to strike out the following allegations:
    - a. 5.1.1 to 5.1.11 relating to direct disability discrimination
    - b. 5.1.4 to 5.1.11 relating to direct race discrimination
    - c. 7.2 in its entirety relating to direct age discrimination
    - d. 5.1.2 and 8.1.2 to 8.1.13 in relation to race or disability harassment
    - e. 5.1.2, 5.1.12 to 5.1.15, 8.1.4, 8.1.7 to 8.1.10 and 9.3.2 to 9.3.12 relating to victimisation.
  23. The remaining allegations of discrimination, harassment and victimisation will be heard at the final hearing together with the other remaining claims which are unaffected by this judgment.

Employment Judge Rea

1 March 2024