



EMPLOYMENT TRIBUNALS

Claimant: Mr Matthew Coverley

Respondents: Ministry of Defence

RECORD OF A PRELIMINARY HEARING

Heard at: Watford (CVP)

On: 4 & 5 July 2024

Before: Employment Judge S Moore (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr S Crawford, Counsel

JUDGMENT

It is just and equitable to extend time in respect of the complaints of race discrimination relating the Claimant's applications for employment in both 2020 and in 2022, which will now proceed to a full hearing.

REASONS

Introduction

1. On 2 August 2023 the Claimant brought a complaint in the tribunal alleging direct discrimination on grounds of race pursuant to s.13 Equality Act 2010 (EqA). Early Conciliation had taken place between 27 July and 31 July 2023.
2. At a Preliminary Hearing on 23 February 2024 the complaints of alleged discriminatory treatment were identified as follows:
 - In 2020 the Respondent rejected the Claimant's application for employment

- In 2022 the Respondent rejected the Claimant's application for employment
 - In 2023 the Respondent failed to address the Claimant's service complaint.
3. This Preliminary Hearing was set down to determine whether the Tribunal lacked jurisdiction to determine the claims:
- (i) By operation of sections 120 & 121 of the EqA and/or
 - (ii) Because they were presented outside the applicable statutory time limit in s.123 EqA.
4. The Respondent since accepted that as the Claimant was not serving as a member of the armed forces when the acts giving rise to the complaints were done s. 21 EqA does not apply. Accordingly, the only issue before me today was the time limit issue. At the outset of the hearing, it was further clarified that the time limit issue only applied to the first two complaints, the third complaint being in time.
5. The Claimant provided a witness statement and was cross-examined. There was also an agreed bundle of documents of over 500 pages. On the basis of that evidence, I make the following findings of fact for the purposes of this hearing.

The Facts

6. The Claimant served in the Army from 1996-2018 where he achieved the rank of Warrant Officer and became a flying instructor graduate of the Central Flying School.
7. Between 2014 to 2018, he served with the RAF as attached personnel, holding the position of Lead Army Pilot/Instructor.
8. In 2017 he expressed his interest in joining the RAF, though sought a civilian job as a backup, for when his service in the army came to an end. That application to the RAF does not form part of the Claimant's case other than for background purposes.
9. Subsequently, the Claimant took the civilian job in question, joining Ascent Flight Training, a company providing military training to the RAF through civilian instructors.
10. In early 2020 he reapplied to join the RAF. The Claimant's evidence was that he had positive conversations about his application, and documents in the bundle indicate that as at 1 July 2020 the Claimant had been placed in the Pilot allocation pool. However further documents show that on 25 November 2020 he was removed from the pool and his application rejected on the grounds that he needed "phase 1 training" because he was not a commissioned officer pilot. The Claimant maintained that after the initial positive conversations he never heard anything more about his application, not even that it had been closed, and submitted that the stated reason for closing his application was disingenuous because he didn't need "phase 1 training". He submitted his position in respect of training was supported by documentation in the bundle and further by the fact that in July 2020 he had been placed in the Pilot allocation pool. Those are matters which it is not for me to determine today.

11. On or about 15 July 2022 the Claimant reapplied to the RAF but on 27 July 2022 received an email that aircrew were not being recruited by the RAF and that his application had been closed. The Claimant said that at the time he considered this a strange response but could only accept the decision, however later he discovered the RAF had not stopped recruiting aircrew in 2022.
12. On 4 August 2022 Group Captain Lizzy Nicholl, then head of RAF recruiting, resigned in protest at a recruitment policy to give priority to female and ethnic minority recruits over white men, as well as bullying she said she suffered to implement this policy.
13. Her resignation attracted some media attention.
14. On 16 and 17 August 2022 Sky and the BBC ran news stories with the headlines "RAF pauses job offers to white men to meet "impossible" diversity targets" and "Senior female recruitment officer resigns over targets".
15. Following the resignation of Gp Capt Nicholl the RAF conducted an internal investigation. The terms of reference of the investigation were agreed on 14 October 2022 and included whether over the period from the start of the recruiting year 2020/2021 to "the present time" positive acts of discrimination had taken place.
16. On 1 February 2023, while the investigation was still ongoing, Air Chief Marshal Sir Mike Wigston appeared in front of the Defence Select Committee and, amongst other matters, was asked about the alleged policy of positive discrimination. The Defence Select Committee was told there had been no discrimination and the policy had never been implemented.
17. The appearance of Air Chief Marshal Wigston also generated some media coverage.
18. On 1 and 3 February 2023 Sky ran news stories with the headlines "RAF admits mistakes over discrimination against white men" and "RAF criticized for "cringeworthy" response over order to prioritise female and ethnic candidates".
19. The RAF's internal report was completed in April 2023.
20. Paragraph 2.4 of the report concludes "We determined that prior to the former Gp Capt R & S's appointment 161 Ethnic Minority and female candidates had been pulled forward onto Phase 1 training ahead of other candidates....We found that the former Gp Capt R & S received legal advice in May and June 2022 that indicated that the pull forward of candidates based on protected characteristics was contrary to the Equality Act 2010, which provided reasonable justification for the former Gp Capt R & S to say that acts of positive discrimination had taken place in RY20/21."
21. Paragraph 4.3 of the report provides "The Defence Diversity and Inclusion Strategy 2018-2030 set the goal of increasing representation of under-represented groups at all levels...". The report also refers to specific targets having been set in terms of percentages of recruitment of women and ethnic minorities.
22. Although the report is dated 27 April 2023 no public statement was made until 29 June 2023.

23. When it was made on 29 June 2023 that public statement generated considerable media attention. On 29 and 30 June 2023 the BBC and Sky ran news stories with the headings “RAF diversity targets discriminated against white men” and the “Royal Air Force unlawfully discriminated against white male recruits in bid to boost diversity”.
24. The Claimant was made aware of these news stories by a friend at which point he began to research the matter himself.
25. On 11 July 2023 the Claimant he filed a service complaint with the internal complaints’ procedure of the armed forces.
26. On 25 July 2023 he was informed that the Service Complaint Policy (SCP) only applied to serving or former personnel in respect of complaints that arose within their service period. The Claimant therefore decided there was no point pursuing the SCP and did not attend the interview scheduled on 26 July 2023.
27. In any event, as stated above the Claimant applied to Tribunal on 2 August 2023.

Conclusions

28. Section 123(1) EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the tribunal thinks just and equitable.
29. It follows that the complaint in relation to the Claimant’s 2020 application is approximately 2 & ½ - 3 years out of time and the complaint in relation to the Claimant’s 2022 application is approximately 9 months out of time.
30. The question is therefore whether the complaints in question have been brought within such other period as is just and equitable and should be allowed to proceed.
31. In *Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now s.123(1)(b) EqA, “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 claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.” However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds, simply that an extension of time should be just and equitable.
32. In this case the reason for delay relied on by the Claimant is that he did not know about the Respondent’s discriminatory policy until June 2023 and prior to that had no reason to believe the rejection of his applications in 2020 and 2022 were, or might have been, tainted with discrimination.
33. The Respondent’s case is that the Claimant must have been aware of the media coverage in August 2022 and February 2023, or at least the matters covered in those stories. He had been a member of the armed forces for 22 years and had been very keen to join the RAF. His friendship circle was with present and past members of the armed forces and on the balance of

probabilities he would have known about the news stories and discussion of an alleged discriminatory policy. Further, the Claimant's written submissions were drafted in a way that suggested he had had some knowledge of the discriminatory policy prior to June 2023 and that his awareness had simply crystalized in June 2023 due to the public statement and associated media coverage.

34. Alternatively, even if the Claimant hadn't known about the discriminatory policy prior to June 2023 it was reasonable to expect him to have known.
35. The Claimant was adamant that he hadn't known about the policy or news coverage until June 2023 when a friend alerted him to it. His submissions had been drafted that way because he was trying to express the idea that even if he had known about the news stories in August 2022 and February 2023 at that stage they were just matters of speculation - indeed the existence of such a policy had been denied by Air Chief Marshal Sir Mike Wigston before the Defence Select Committee - and so he wouldn't have considered there was any basis for bringing a claim before the public statement (following the conclusion of the internal investigation) in any event. Further at the time of the February 2023 news coverage he was on a course at Gatwick learning to fly a Boeing 737 and wouldn't have been looking at online news stories.
36. I accept that evidence. I found the Claimant an honest and compelling witness. It is very easy to miss news reports that are not main headline news and/or are short-lived in duration. Further the news stories in August 2022 and February 2023 were less impactful than the news stories in June 2023, being based, respectively, only on the resignation of Group Captain Nicoll and Air Chief Marshal Wigston's appearance before the Defence Select Committee, compared to the outcome of the internal investigation when it was found that a discriminatory policy had in fact been applied and a public statement made to that effect. And the fact that the Claimant had been engaged in an intense training course over the relevant week in February 2023 is a very plausible explanation as to why he didn't see the news stories on 1 and 3 February 2023.
37. I therefore accept the Claimant didn't know until on or about 29 June 2023 that the RAF had applied the policy in question or that he had reason to suspect it might have done.
38. Further, there is no reason why the Claimant should have known about the policy earlier than he did. He had no reason to believe there was anything discriminatory about the fact his applications had been unsuccessful, and it would not be reasonable to expect him to have been actively on the lookout for evidence of possible discrimination.
39. I also note that once the Claimant became aware of the policy he acted quickly, filing a service complaint with the internal complaints' procedure of the armed forces on 11 July 2023 and, on being informed on 25 July 2023 that the SCP only applied to serving or former personnel in respect of complaints that arose within their service period, initiating the Early Conciliation process on 27 July 2023.
40. These are strong factors that weigh in favour of exercising discretion to extend time.

41. As regards the factors against extending time, and in particular the prejudice to the Respondent, while the delay – particularly in respect of the Claimant’s 2020 application – is considerable, I note that much of the evidence relevant to the discriminatory policy will have been preserved and already considered in the context of and for the purposes of the Respondent’s internal investigation, and further that much of the evidence specific to the Claimant’s applications appears to be a matter of documentary record.
42. Finally I note that whilst at one point Mr. Crawford appeared to suggest that it could be seen from the documents that the Claimant’s case was weak, which was a factor that weighed against extending time, I’m bound to say that on the evidence drawn to my attention – and without of course the benefit of any witness evidence other than that of the Claimant – the documents in fact suggest that there are questions to be answered by the Respondent.
43. Accordingly, I find it is just and equitable to extend time in respect of the Claimant’s complaints relating to both his 2020 and his 2022 applications, which means the Tribunal does have jurisdiction to hear them and they will now proceed to a full hearing.

Employment Judge S Moore

Date: 5 July 2024

Sent to the parties on:
23 August 2024

For the Tribunal: