

THE INDUSTRIAL TRIBUNALS

CASE REF: 247/13

CLAIMANT: Thomas McConaghy

RESPONDENT: Chief Constable of the Police Service of Northern Ireland

DECISION ON A PRE HEARING REVIEW

The proceedings are dismissed because they are out of time.

Constitution of Tribunal:

Chairman (sitting alone): Mr P Buggy

Appearances:

The claimant was represented by Mr T Warnock, Barrister-at-Law, instructed by Liam Vallely & Co Solicitors.

The respondent was represented by Ms N Murnaghan, Barrister-at-Law, instructed by The Crown Solicitors Office.

REASONS

1. The claimant was a serving officer in the RUC Reserve and PSNI Reserve on a continuous basis from July 1994 until September 2005.

The claim

2. In these proceedings, the claimant asserts that, when he was in the Reserve, his terms and conditions of employment were inferior to those enjoyed by comparable permanent officers of the RUC and PSNI.
3. His claim is made under regulation 3 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 ("the 2002 Regulations"). Regulation 3 is in the following terms:

- “(1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee—
- (a) as regards the terms of his contract; or
 - (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
- (2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to—
- (a) any period of service qualification relating to any particular condition of service,
 - (b) the opportunity to receive training, or
 - (c) the opportunity to secure any permanent position in the establishment.
- (3) The right conferred by paragraph (1) applies only if—
- (a) the treatment is on the ground that the employee is a fixed-term employee, and
 - (b) the treatment is not justified on objective grounds.
- ...”

4. The claimant claims that the acts complained of (as specified at paragraph 2 above) constituted a breach of regulation 3, in that “the employer” was treating him less favourably than an appropriate comparator: (1) as regards the terms of his contract or (2) by subjecting him to an “other detriment”.

The issue

5. The issue to be determined in this Pre Hearing Review is whether the claimant’s claim is out of time.
6. The parties are agreed that the claimant’s cause of action in these proceedings had accrued, at the latest, by the time the claimant left the Reserve.

The procedural legislation

7. Regulation 7(1) entitles a claimant to present a complaint to an industrial tribunal that his employer has infringed a right conferred upon him by regulation 3 of the Regulations.
8. Paragraphs (2) and (3) of Regulation 7 are in the following terms:

- “(2) Subject to paragraph (3), an industrial tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—
- (a) in the case of an alleged infringement of a right conferred by regulation 3(1) or 6(2), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;
 - (b) in the case of an alleged infringement of the right conferred by regulation 3(6), with the date, or if more than one the last date, on which other individuals, whether or not employees of the employer, were informed of the vacancy.
- (3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.”

The evidence

9. I received sworn oral testimony from the claimant. I also took account of the contents of documents in an agreed bundle which were drawn to my attention.
10. I regarded the claimant as a truthful witness.
11. In the claim form, it was suggested that the claimant did not know some of the facts which have given rise to the present claim, until late last year. However, during the course of this hearing, it was accepted by and on behalf of the claimant that he did indeed know of those facts, throughout his period as a Reservist. I accept that the inclusion of the relevant material (regarding the alleged lack of knowledge of facts) in the claim form was a result of a communications breakdown between the claimant and the lawyer who drafted the claim form.

The facts

12. In the immediately following paragraphs, I have set out findings of fact which are relevant to the issues which I have determined during the course of this Pre Hearing Review. For ease of reference, and in order to avoid unnecessary duplication, I have also set out some relevant facts elsewhere in this Decision.
13. The claimant was unaware of the possibility of taking a claim based upon less favourable treatment as a fixed-term worker, throughout his service as a Reservist, and he only became aware of that right as a result of an article published in the Newsletter newspaper on 9 August 2012. That newspaper article was only brought to the claimant’s attention by a former colleague in October 2012, when the article was shown to him by that colleague. As a result of that encounter with the former colleague, the claimant sought legal advice on or about 14 November 2012. A claim form was issued on the instructions of the claimant on 16 November 2012. There was a technical defect in that claim form. That claim form was the subject of

an industrial tribunal review hearing on 22 January 2013. As a result of the outcome of that hearing, the claimant presented the claim form in the present proceedings. That claim form was presented on 30 January 2013.

14. The relevant newspaper article included the following information:

“Former police reservists have been paid almost £2 million in an out-of-court settlement over claims they performed the same role as regular officers for less pay.

Around 200 ex-officers ... were involved in the action against the chief constable and PSNI.

The overwhelming majority of claimants opted to take the offer of £10,000 for each former full-time reservist.

...

[As] the RUC, and then the PSNI, became increasingly sophisticated, the claimants say many hundreds of reservists were required to perform routine policing roles in place of the regular officers being transferred from local police stations to a wide variety of specialist departments.”

15. The litigation referred to in the Newsletter report was litigation which was sponsored by the Police Federation. The claimant had been a member of the Federation throughout his period of service as a Reservist. The claimant had not been informed, at any material time, by the Federation, of the plans for, or the pursuit of, that litigation. It was suggested during the course of the hearing that the Federation might have been at fault in failing to provide the claimant with timely information about the litigation. However, I consider that I have no adequate evidential basis to conclude that the Federation was in any way at fault.
16. Until November 2012, the claimant never sought advice, from any source, on the question of whether he had legal entitlements in respect of the disparity between his terms and conditions and the terms and conditions of permanent policemen.

The arguments

17. I had the advantage of receiving excellent oral and written submissions on both sides of the case. Although I have taken account of all of the elements of those submissions, I have highlighted below some of those arguments which seem to me to be of central significance in the context of this case.
18. Since I have felt constrained to decide the issue against the claimant, I have thought it appropriate to annex the claimant’s Skeleton Arguments to this decision. I draw particular attention to paragraphs 14-23 inclusive of that Argument.

The law

19. The provisions in respect of the time limit in the 2002 Regulations are analogous, in the circumstances of this case, to the time limit provisions which are contained in

other employment discrimination legislation, (all employment discrimination legislation, with the exception of the gender equal pay legislation).

20. Paragraph (2) of regulation 7 of the 2002 Regulations contains what amounts to a primary time limit. It is accepted, on both sides of this case, that the claimant did not present his claim within the primary time limit.
21. Paragraph (3) of regulation 7 provides what amounts to a secondary time limit. The issue in this case is whether or not the claimant has met that secondary time limit.
22. The regulation 7 time limit provisions are in broadly similar terms to the time limit provisions which are provided for, in the context of personal injuries cases, in section 33 of the Limitation Act 1980.
23. Section 33(1) makes reference to the provisions of the 1980 Act which contains the primary time limits, and provides as follows:

“(1) if it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

- (a) the provisions of section 11 or 12 of this Act prejudice the plaintiff or any person whom he represents; and
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.”

24. Accordingly, the effect of section 33(1) is that a court has a discretionary power to disapply a relevant primary limitation time limit if, but only if, it is satisfied that it would be “equitable” to do so.
25. Subsection (3) of section 33 provides as follows:

“(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”

26. Case law shows that the exercise of the discretion under section 33 is not reserved for the “occasional hard case”, nor is it to be reserved for cases of an unusual nature; and that, instead, the relevant provision gives courts a wider general discretion to extend time.
27. Case law on the employment discrimination time limit provisions which are analogous to the time limit provisions of regulation 7 shows that it is appropriate, in exercising the regulation 7(3) discretion, to have regard to the matters which are referred to at subsection (3) of section 33 of the 1980 Act.
28. However, in having regard to those matters, it is also appropriate to note that the primary time limit for presenting the relevant employment discrimination claims is only three months, as distinct from the primary time limit of three years in personal injury cases. Accordingly, in considering the section 33 “check-list”, I must have regard to the consideration that the legislator has prescribed a very short primary time limit in employment discrimination cases, which indicates a legislative policy that employment discrimination proceedings should be begun quickly.
29. In the context of employment discrimination cases, the matter already referred to above (at paragraph 26) has been the subject of comment by Sedley LJ in *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327. I have carefully noted the comments of Sedley LJ, in that case which are quoted at paragraph 15 of Mr Warnock’s Skeleton Argument.
30. As Mr Warnock has pointed out, in the case of *Southwark London Borough v Afolabi* [2003] IRLR 220, the Court of Appeal in England and Wales upheld an extension of time granted to a claimant who did not discover the evidence which led to his race discrimination claim until nine years after the expiry of the primary employment discrimination time limit.
31. However in *Afolabi*, the claimant could not possibly have brought his claim earlier than the date on which he did bring it, simply because he was unaware of the facts which provided him with a viable basis for that claim.
32. As Mr Warnock has also pointed out, in *Mills and Crown Prosecutions Service v Marshall* [1998] IRLR 494, Morison P asserted (at paragraph 21 of the judgment that the words “just and equitable”, in employment discrimination time limits, “ ... could not be wider or more general.”

33. However, I consider that it is useful to quote the entire contents of paragraph 21, having regard to the issues in this particular case:

“In this legislation, the Sex Discrimination Act, the court’s power to extend time is on the basis of what is just and equitable. These words could not be wider or more general. The question is whether it would be just or equitable to deny a person the right to bring proceedings when they were reasonably unaware of the fact that they had the right to bring them until shortly before the complaint was filed. That unawareness might stem from a failure by the lawyers to appreciate that such a claim lay, or because the law ‘changed’ or was differently perceived after a particular decision of another court. The answer is that in some cases it will be fair to extend time and in others it will not. The industrial tribunal must balance all the factors which are relevant, including, importantly and perhaps crucially, whether it is now possible to have a fair trial of the issues raised by the complaint. Reasonable awareness of the right to sue is but one factor.”

I note that, according to paragraph 21 of *Mills*, the issue there was whether or not it would be just and equitable to deny a person the right to bring proceedings when they were reasonably unaware of the fact that they had the right to bring them until shortly before the complaint was filed.

34. Unfortunately, I do not regard the claimant’s ignorance in this case as being reasonable ignorance. It would have been open to him at any time, during the period beginning with the end of his service as a Reservist, to have sought legal or other expert advice as to his entitlements. The perceived entitlements which have caused him to bring the present claim were entitlements which were as clear in 2005 as they are now. These proceedings have not been prompted by any unforeseen developments in case law. I note that, at paragraph 26 of his judgment in *Mills*, Morison P states the following:

“Further there may well be cases similar to the present one where a tribunal holds that the applicant should have been aware of [his] rights earlier than [he] asserted”.

35. In this case, the claimant does not rely on any new interpretation of the law, in seeking an extension of time. He simply had not appreciated, until October 2012, that he might be able to make a claim under the 2002 regulations.
36. I am satisfied that it would be improper for me to take account of the loss of the limitation defence, as a prejudice to the respondent. In this context, see *Cain v Francis* [2009] 2 All ER 579.
37. I note that in *A v H* [2008] EWHC 1573 (a case brought under section 33 of the 1980 Act) time was extended. The defendant had attempted to rape the claimant, but was initially not worth suing, so the claimant did not issue proceedings. Sixteen years later, the defendant won £7 million in the National Lottery and, hearing of this, the claimant then issued proceedings against him. Coulson J allowed the claim to proceed, mainly, it seems, on the basis that there was a good reason for the delay (that good reason being the pointlessness of the claimant making a claim against somebody who could not pay any amount that might be awarded against him).

38. I turn now to the section 33 check-list which has already been set out above (at paragraph 25). Of the factors listed there, I regard factors (c) and (d) as being irrelevant in the context of this case. That leaves factors (a), (b), (e) and (f) for consideration.
39. It is appropriate to consider factors (a) and (f) together.
40. Factor (a) refers to the length of, and the reasons for, the delay on the part of the claimant. Factor (f) refers to the steps, if any, taken by the claimant to obtain legal or other expert advice.
41. The length of the delay was very considerable. (See factor (a) of the check-list).
42. The reality here is that the claimant did not promptly take steps to obtain any legal advice as to his possible entitlements in relation to the disparity between his terms and conditions and the terms and conditions of equivalent full-timers. He did not take any steps to obtain any such advice until November 2012. As a result, he was left in ignorance as to his entitlements. I do not regard that ignorance as reasonable ignorance. (See factor (f) of the check-list).
43. The cogency factor is factor (b) of the check-list. On behalf of the respondent, Ms Murnaghan asserts that the cogency of evidence in relation to comparability issues would be adversely affected, by the delay in taking these proceedings, if the proceedings were to be allowed to go ahead. The respondent has presented no evidence in relation to that contention. However, I accept that the cogency of the evidence in relation to comparability would be significantly reduced. I have no doubt that, as a result of the lengthy period of delay, memories will have faded, it will not be as easy to get access to relevant witnesses, and relevant documentation may have been destroyed or become less accessible. However, although cogency would no doubt be significantly affected, I do not consider it would be very substantially affected. I am sure that, if it was necessary, the respondent would be able to assemble appropriate material (in the form of oral and documentary evidence) which would show clearly whether the claimant was in a truly comparable position to those who he would wish to cite as his comparators.
44. Factor (e) refers to the extent to which the claimant acted promptly and reasonably once he knew whether or not the relevant act or omission of the respondent might be capable of giving rise to proceedings for compensation. I accept that the claimant did act promptly and reasonably once he had had the conversation with the former colleague in October 2012. I do not regard the period between November 2012 and January 2013 as being of any significance in deciding the just and equitable issue.
45. I have decided that the claimant's claim is out of time, with considerable regret. It is unfortunate that what might well have been a viable claim on the merits is now dismissed because of delay.
46. If this case had been allowed to go ahead, there could still have been a fair hearing of the proceedings. I have not regarded the effect of the delay on the cogency of the evidence as being of great importance in the context of determining the just and

equitable issue. I have however regarded the duration of the delay, and the lack of a good reason for the delay, as being of central significance in that context.

Chairman:

Date and place of hearing: 23 May 2013, Belfast.

Date decision recorded in register and issued to parties:

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

THOMAS MCCONAGHY

CLAIMANT

AND

CHIEF CONSTABLE OF THE
POLICE SERVICE OF NORTHERN IRELAND

RESPONDENT

CLAIMANT'S SKEKETON ARGUMENT

Introduction

1. The Claimant presented a claim form to the Office of the Industrial Tribunals and Fair Employment Tribunal on 16th November 2012 claiming that the Respondent had been in breach of the Equal Pay Act (Northern Ireland) 1970. The claim was given a pre-registration number of 296/12 IT.
2. The claim was not accepted by the Tribunal on the basis that the claim was out of time. The non-acceptance was communicated to the Claimant's solicitors by way of letter dated 3rd December 2012.
3. An application for a review of the decision was made by the Claimant's solicitors and the review hearing was listed for 22nd January 2013.
4. At the review hearing on 22nd January 2013, which was heard by the President, the Claimant's then Counsel withdrew the application for the review. The withdrawal appears from the record of proceedings to have been predicated on the basis that the claim made out by the

Claimant read as one based upon discrimination/equal pay and that it was not apparent from the claim form that a claim was being made pursuant to the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 ("the 2002 Regulations").

5. The claim was withdrawn without prejudice to the right of the Claimant to lodge a claim pursuant to the 2002 Regulations.
6. Subsequent to the review hearing, the Claimant (by way of his solicitors) then presented the instant claim on 30th January 2013. It is apparent from the claim form that the Claimant alleges that the Respondent breached the 2002 Regulations by reason of alleged less favourable treatment of the Claimant as compared to regular full time officers. The skeletal details of the Claimant's claim in this regard are set out at paragraph 7.4 of the ET1 and for present purposes it is sufficient to note that the claim is based upon the contention that the Claimant was afforded less favourable contractual terms and remuneration.
7. At case management discussion on 15th April 2013, a pre-hearing review was ordered to deal with the time based jurisdictional issues arising.

The Issue to be Determined

8. It is common case that the Claimant's claim is "out of time" given that it was presented outside the three month time limit as provided for by Regulation 7(2) of the 2002 Regulations. However the issue of dispute between the parties is whether or not time for the presentation of the complaint should be extended utilising the power enshrined in Regulation 7(3) which provides that a Tribunal:

"may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so".

Circumstances Pertaining to the Delay

9. The Claimant asserts that he did not have cognizance of the possibility of taking a claim based upon less favourable treatment as a fixed term

worker whilst serving as a Full-Time Reserve during the period of his service and only became aware of the right as a result of an article published in the Newsletter newspaper on 9th August 2012. The newspaper article was only brought to the Claimant's attention in October 2012 when the article was shown to him by a former colleague. A copy of the article is served herewith and marked "A3".

10. Subsequent to becoming aware of the differential treatment as a result of the newspaper article and subsequently speaking with colleagues, the Claimant sought legal advice on or about 14th day of November 2012.
11. Subsequent to seeking legal advice, a claim for was issued on the Claimant's instructions on 16th November 2012.
12. Given the technical defect in the first claim form, subsequent to the review hearing of 22nd January 2013, the Claimant caused the instant claim to be presented on 30th January 2013.

The Claimant's Application to Extend Time

13. The Claimant respectfully requests that the Tribunal extend time for the presentation of his complaint pursuant to Regulation 7(3) of the 2002 Regulations on the grounds that it is just and equitable to do so in the unusual circumstances of the case.

Relevant Case Law

14. The leading authorities in relation to "just and equitable" extension will be well known to the Tribunal. It is trite law that time limits should be observed and are not "at large" and that there is no presumption of extension in favour of a Claimant and that the onus is on the Claimant to persuade the Tribunal to exercise its discretion to extend time. It is also well established that whilst exercise of discretion is the exception rather than the rule, the discretion given to the Tribunal in cases involving "just and equitable" extension is much broader than that discretion which prevails pursuant to the 'not reasonably practicable' formula, see for example *Hawkins v Ball and Barclays Bank plc* [1996] IRLR 258, EAT and *British Coal Corpn v Keeble* [1997] IRLR 336, EAT.

15. In *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327, Lord Justice Sedley usefully clarified the import of the oft cited case of Robertson when he asserted at paragraph 31 that:

"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.

16. The question is really one for the Tribunal on the facts, looking at the circumstances of the case as a whole without the Tribunal trammeling itself with too much resort to bare legal principle.
17. The Respondent unsurprisingly takes issue with the length of time passing between the termination of the Claimant's service and the lodging of his claim form. However, it is crucial to recognize that passage of time prior to lodging a claim is not determinative of an application for an extension of time. Ultimately the question remains whether in all the circumstances of the case whether an extension of time is just and equitable.
18. By way of cogent example, the Court of Appeal in England and Wales upheld an extension of time granted to a Claimant who did not discover the evidence which led to his race discrimination claim until nine years after the expiry of the time limit in the case of *Southwark London Borough v Afolabi* [2003] EWCA Civ 15, [2003] IRLR 220.
19. *Afolabi* is also useful in that it clarifies that whilst the checklist employed in deciding whether to grant an extension of time in personal injury actions may be useful, see *British Coal Corp v Keeble* [1997] IRLR 336, the Tribunal has no legal requirement to analyse the factual scenario in any given case by reference to the checklist (*at para 33, per Peter Gibson LJ*).

20. In any event, regardless of the need to robotically go through a "checklist", it is submitted that the Claimant has explained the length and reasons for the delay; that there is no evidence that the cogency of the evidence would be effected so as to prevent a fair trial and that the Claimant acted promptly once learning of the facts relating to the cause of action and promptly obtained legal advice.

21. In *Mills and Crown Prosecution Service v Marshall* [1998] IRLR 494, Mr. Justice Morrison (then President of the EAT) asserted at paragraph 21 that the words "just and equitable" could not be "wider or more general" in extending time for a transsexual Claimant who was reasonably unaware of her right to bring a sex discrimination claim until the ECJ gave its judgment in *P v S and Cornwall County Council* [1996] IRLR 347, notwithstanding that her claim was made some three years after the expiry of the limitation period.

22. It is not accepted that the Claimant's representatives acted in any way inappropriately however even if the Tribunal were to be critical of the process by which the instant claim ultimately arrived before the Tribunal, it should not affect the Tribunal's exercise of discretion because the authorities are clear and settled that if it is the claimant's solicitors who are at fault in presenting the claim, then such fault cannot be laid at the door of the claimant; accordingly, if the solicitors are negligent, the mere fact that the claimant may have a potential claim against them will not justify the refusal of an extension of time *Virdi v Comr of Police of the Metropolis* [2007] IRLR 24, EAT.

Conclusion

23. The reality is that whilst authorities may provide useful guidance, ultimately the exercise of the discretion to extend time is a fact sensitive issue and the Tribunal is afforded a wide discretion in and about its exercise of that discretion. The Tribunal is asked to extend time in the unique circumstances of the case and allow the Claimant access to the seat of justice in a situation in which he acted promptly after becoming aware of the information necessary to bring the instant claim and in a situation in which a fair trial is still possible. Whilst the length of delay is one factor to take into account it is not determinative and it is submitted that a fair trial is still possible.



Timothy Warnock
Bar Library

22nd May 2013