



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr S THOMAS

Respondent
UNITED REFORM CHURCH

OPEN PRELIMINARY HEARING JUDGMENT AND REASONS

HELD AT: London Central (CVP audio video call)

ON: 23 NOVEMBER 2020

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:

Claimant: MS. THOMPSON, Solicitor

Respondent: DR. MORGAN , Counsel

Judgment

The Tribunal has no jurisdiction to hear the Claimant's claims which were presented out of time and , as it is not just and equitable to extend time, they are dismissed

Reasons

Background

1. The Claimant remains employed by the Respondent but now as a part time Ecumenical Officer as a result of the Respondent Church's policy of preventing its ministers and other officers (the issue of whether the Claimant was also a worker or an employee remained in dispute) from taking up full time positions once reaching normal retirement age (NRA) . Which had been set by the Respondent's General Assembly in 2012 as 68 years of age and this was the Claimant's age when she reached the end of a fixed term post at the end of October 2019 by which time she had already worked for the Respondent for 27 years .
2. Before the end of her fixed term contract she complained as to the detrimental effect of the Respondent's retirement policy but applied for a part time role from July 2019 and subsequently accepted this whilst communicating with the Respondent as to its policy and seeking (without success) to have it reviewed. She presented her complaint to the ET of direct age discrimination on 27 February 2020.
3. A full 3 hearing was then listed for 23-25 November but at a preliminary hearing on 1 July 2020 this was then converted to an Open Preliminary Hearing to deal , initially ,

with the Claimant's status (office holder, employee , worker etc) and whether her discrimination claims were brought in time under s123 Equality Act 2010. By correspondence the issues to be dealt with at today's hearing were amended to exclude the status point (held over to any full hearing) , retain the jurisdictional point but to now also include the Claimant's application to amend her claim through further and better particulars supplied to the Tribunal by order of E J Nicole on 1 July 2020. Along with any other case management orders needed for the future progression of the case.

4. The Claimant chose not to give evidence on oath but I heard submissions from her (briefly and to ensure fairness on a point of uncertainty) and her representative and the Respondent's representative on the issues to be determined .Both had a chance to respond to each other prior to my determination which I gave to the parties with oral reasons around 12.30 pm.

Findings of Fact

5. The last act of claimed discrimination was 24 January 2019 when the Claimant was told as a certainty , as a result of a meeting of the Accreditation Sub Committee of the Respondent (having found out about the policy on 2 September 2018), that the Respondent's retirement policy would not allow her to apply for a full-time position once she was 68 years of age.
6. The Respondent policy was set on the basis that , to the extent this was a potentially discriminatory policy , this was a proportionate means of achieving a legitimate claim specifically the involvement of younger ministers and other officers. I do not make or seek to make any findings on these issues other than to accept that such considerations would have formed part of the evidence to be heard at any full hearing but I do find that the Claimant did want to apply for a full time position and felt prevented from doing so by the existence of the NRA.
7. The Claimant delayed her ET application partly in the hope that the Respondent might change its mind. She also had to wait until September 2019 to see the written retirement policy despite requesting sight of this at an earlier date. But she knew its content many months before and applied for a part time role in the summer of 2019 to have a smooth transition from her fixed term contract even though she would have preferred a full-time role. She did not attempt to apply for a full time role (understandably as she would no doubt have been rejected) and the Claimant does not rely on any discriminatory acts by the Respondent between the 24 January 2019 and the ET being presented on 27 February 2020 albeit she continued to be prejudiced by the existence of the retirement policy during this time given her preference (and I accept she had such a preference) to work full time for the Respondent and delay her retirement.
8. The Claimant did have and accepts that she had specialist employment law advice during 2019 and certainly by July 2019 when she chose to delay making a claim. She was also represented by her current union solicitors when she filed her ET1 as they were named as her representatives on the claim form and it is likely that she had their advice from around December 2019. And the advice did include or certainly should have included the Claimant being told , and /or reminded ,that she

only had 3 months in which to make his ET claim from the last act of discrimination and if she did not comply with this time limit should file the claim as soon as possible after this. Yet she did not do so until many months after the time limit expired and has given no medical evidence or other substantive reason for that failure. This amounts to an excessive delay.

9. The Claimant's further and better particulars assist the tribunal and the parties to understand the Claimant's case but do also seek to introduce new claims and as such seek to amend the ET1. At present however the Claimant's claims are limited to Direct Age Discrimination and do not include Indirect Age Discrimination.

Legal Findings

Time Limits for a Direct Discrimination Claim (under section 13 EqAct 2010)

"Section 123(1) Equality Act 2010

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"

10. The burden rests with the Claimant on the time limit issue and "the exercise of discretion is the exception rather than the rule" *Robertson v Bexley Community Centre [2003] IRLR 434*. However the test of whether to extend time is wider than that with e.g. an unfair dismissal complaint and in the case of the discrimination complaint I have to consider if it was just and equitable to extend time.
11. In nevertheless determining that there are no just and equitable grounds for extending time I have taken account of the case authorities of *British Coal v Keeble [1997] IRLR 336* and *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA* including the factors set out in that case to be taken into account in determining whether to exercise my discretion or not.
12. I have taken into account the prejudice which each party would suffer as a result of granting or refusing an extension, and had regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once she knew of the possibility of taking action. Although I also remind myself that whilst, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement for a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (*Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220*). And I have not.
13. I do of course accept that the Claimant is potentially prejudiced by not being able to pursue her complaint to a full tribunal. And this is unfortunate and has given me

pause for further thought . But this is true in nearly all claims which are dismissed for lack of jurisdiction and in this case my principal and greater concern is the length of, and lack of reasons for , the (excessive) delay without any good reason .This delay counts significantly against the Claimant who knew of but chose to ignore the applicable time limits for at least 7 months. Her claim is not just out of time (a slight delay might well have been justified) but significantly out of time despite legal advice and there was no need for this to be the case. Even though one must empathise with the fact she was no doubt reluctant to engage in litigation with the Respondent after so many years of a working relationship.

14. The Claimant's representative claims there was conduct extending over a period to bring the claim in time (or nearer to be in time) but it is important to distinguish between the continuance of the discriminatory act itself, and the continuance of the consequences of a discriminatory act. And it is only in the former case that the act will be treated as extending over a period (*Barclays Bank plc v Kapur [1989] IRLR) 387 at 392*). I do not consider that is a continuing act in this case however frustrating the situation remained for the Claimant .
15. And the Claimant has provided no explanation as to why the present proceedings were not presented sooner than they were. There are not , in my judgment, good grounds for presenting claims outside of the 3 month time limit still less for issuing proceedings over a year after what I find to be the last act of discrimination complained of with no substantive explanation as to why they were not issued sooner other than the reasons that I have identified above and these (including any mistaken belief that the discrimination itself was continuing) are insufficient.
16. In the circumstances I do not consider that it is just and equitable to extend time.
17. As a result there is no need for me to consider the Claimant's application to amend the complaint though for completeness my determination on that would have been that the ET1 stands as it is, with the further and better particulars simply clarifying the claim made and not amending it. Under the *Selkent Bus Co Ltd v Moore [1996] ICR 836* principles and with particular regard to time limits a new claim to run alongside the one made of direct discrimination would not have been justified . In any event further case management orders in this case are not now necessary as for the reasons given the Claimant's claims are dismissed as the Tribunal has no jurisdiction to hear them.

EMPLOYMENT JUDGE

23 November 2020
Order sent to the parties on

23/11/2020

for Office of the Tribunals