



EMPLOYMENT TRIBUNALS

Claimant: Ms Natasha Witele
Respondent: The London Borough of Hillingdon

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford **On:** 12 December 2022
Before: Employment Judge Alliot (sitting alone)

Appearances

For the claimant: In person
For the respondent: Mr Jalal Farhat (solicitor)

JUDGMENT

The judgment of the tribunal is that:

1. It would be just and equitable to extend time in relation to the claimant's complaint of race discrimination concerning the decision not to give her a reference.
2. It would not be just and equitable to extend time for all the other claims of race discrimination and the same are dismissed as there is no jurisdiction to hear them.
3. It was reasonably practicable for the claimant to bring her claims of detriment/dismissal for health and safety reasons within three months and the same are dismissed as there is no jurisdiction to hear them.

REASONS

4. This open preliminary hearing was ordered by Employment Judge Lewis on 18 June 2022 to determine the following issues:

“The claim appears to be out of time and/or it appears to have no reasonable prospect of success.”

Time issues

5. The claimant was employed by the respondent on 19 December 2014 as a Night Residential Support Worker.
6. Although her claim form asserts that her employment ceased on 1 July 2020 the claimant accepts that she resigned with immediate effect on 11 May 2020. Some

of the dates in her claim form are inaccurate, in particular the assertion that she informed the respondent of her new address in August 2020. This should be August 2019. The reference to contacting her employer on 10 July 2020 in relation to her return to work should have been a reference to February 2020. Assuming all events prior to the claimant's resignation were connected with the claimant's resignation, then time would have started running in relation to those matters on 11 May 2020 when she resigned. The three month primary limitation period for bringing a claim would therefore have expired on 10 August 2020.

7. The claimant notified Acas on 1 July 2021 and the certificate is dated 6 July 2021.
8. The claimant presented her claim on 6 August 2021. That is four days short of one year out of time.
9. The claimant's claim in relation to not being given a reference arises out of a letter sent to her dated 11 August 2020. Unfortunately, that letter was sent to her previous address and she did not receive it until sometime in 2021. In her claim form it is suggested that she received the letter in March 2021. In her oral evidence to me she suggested it may have been February 2021 and then recollected that it was during the summer and put the date as June 2021. Clearly, the decision not to provide the claimant with a reference had been taken prior to the letter dated 11 August 2020 and that consequently, the primary limitation period would have expired by 10 November 2020. However, if the claimant only became aware of the decision not to give her a reference in or about June 2021, then she did bring her claim within three months of that date.

The law

10. As far as the claim for detriment/dismissal for health and safety reasons, is concerned the claim must be brought within three months of the act or omission that is complained about or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.
11. As far as the race discrimination claims are concerned, the primary limitation period is three months but this may be extended if it is just and equitable to do so.
12. Both jurisdictions require me to exercise my discretion taking into account all the circumstances of the case.
13. As regards just and equitable extensions, as per the IDS Employment Law Handbook on Practice and Procedure:-

“While Employment Tribunals have a wide discretion to allow an extension of time under the just and equitable test in s.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in *Robertson v Bexley Community Centre t/a Leisurelink* [2003] IRLR 434,CA, that when Employment Tribunals consider exercising the jurisdiction under what is now s.123(1)(b) equality Act, “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 the discretion is the exception rather than the rule”. The onus is therefore on the claimant to convince the Tribunal that it is just and equitable to extend the time limit.”

14. Further, concerning ignorance of rights:

“Although the discretion is wide, it seems that it will only apply where the claimant’s ignorance is reasonable.”

The facts

15. Although the claimant complains in her claim form about being subjected to the disciplinary process without her knowledge, the respondent’s response form quotes an email sent by her to the respondent on 11 May 2020 which states the following:-

“Thank you for your email Sarah regarding a disciplinary hearing.”

16. It is thus clear to me that the claimant was aware that she was being subjected to the disciplinary process prior to 11 May 2020. Whether or not the claimant’s email was in response to a letter dated 22 April 2020 inviting her to a disciplinary hearing to be held on 4 May 2020 is not known. But clearly she was aware of the disciplinary process.

17. In her claim form letter, the claimant refers to being advised by her Unison representative on a date that turns out to have been in February 2020 concerning her return after a period of sickness absence. I take from that, that the claimant has had at all times access to union advice and support.

18. The claimant told me that the reason she did not start her claim until August 2021 was that she did not know what the procedures were. Sometime in early 2021 the claimant told me that she began to research online how to bring a claim. She said that she called Citizen’s Advice Bureau in about April 2021 and was advised of the fact that claims had to be brought within three months. Because of that the claimant told me she did not go ahead. The claimant told me that in June 2021 she picked up the letter dated 11 August 2020 and it appears that that is what prompted her into notifying Acas on 1 July 2021 and issuing her claim form in due course on 6 August 2021.

19. The claimant told me that she delayed in researching bringing a claim after her resignation on 11 May 2020 due to being conflicted out of loyalty.

20. I have to consider the reason and length of the delay.

21. I find that the claimant did have access to trade union support prior to her resignation. I take account of the fact that it is universally known that claims for unfair dismissal or race discrimination can be brought to employment tribunals. Whilst ignorance of the time limit ;may have resulted in nothing happening in 2020, I do not consider that the claimant’s ignorance was reasonable. She had access to union advice and, when she decided to research the matter online, fairly quickly discovered that the time limit was three months. Further, the claimant had the capacity to call the Citizen’s Advice Bureau and discover the time limit. Further, having discovered about the time limit the claimant then delayed for a further two months before actually bringing her claim.

22. The length of the delay is very substantial at one year. In my judgement, given the delays in getting cases on, it is inevitable that the cogency of the evidence will have deteriorated due to the length of that delay.

23. The one exception, in my judgment, relates to the decision not to give the claimant a reference. The claimant was ignorant of this decision until some time in 2021 which may have been June 2021. At this stage I have no evidence to the effect that she did not discover that information in June 2021. Accordingly, in my judgment, it is just and equitable to extend time in relation to that single allegation of discrimination on the grounds of race. It is a fairly simple issue and one capable of being investigated by the respondent fairly easily. Either the respondent did or did not provide a comparator with a reference. If it did provide a reference to a manager who had been dismissed for gross misconduct, then it could well be that a tribunal would consider that a prima facie case of race discrimination had been made out and that the respondent was required to explain any difference in treatment. Consequently, I have decided to extend time on a just and equitable basis for that matter to be heard.

Application to strike out

24. The claimant told me candidly that she did not know but assumed that her comparator had received a reference notwithstanding being dismissed for gross misconduct.
25. Mr Farhat submitted that this was a speculative claim with no reasonable prospect of success.
26. In my judgment, the claim does have reasonable prospect of success. The claimant points to a white comparator who she says has been treated differently on the grounds of her race. In my judgment, this is not the sort of clear case that would warrant a strike out as, potentially, the respondent has a case to answer and explain. Consequently, I declined to strike out the claim.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Final hearing

All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting with Members at the **Employment Tribunals, Watford, 2nd Floor, Radius House, 51 Clarendon Road, Watford, WD17 1HP**, on **30 January 2023**, starting at **10 am** or as soon as possible afterwards.

2. The issues

The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

EQA, section 13: direct discrimination because of race.

2.1 The claimant describes her race as Black/African/British.

2.2 Did the respondent subject the claimant to the following treatment:

2.2.1 Informing the claimant that she would not receive a reference.

- 2.3 Was that treatment “*less favourable treatment*”, ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?
- 2.4 The claimant relies on the following comparator, namely a manager called Lee (surname unknown) who is white British, who was allegedly dismissed for gross misconduct and who allegedly received a reference.
- 2.5 If so, was this because of the claimant’s race.

Remedy

- 2.6 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.
- 2.7 By **4pm, 16 December 2022** the claimant is to send to the respondent a schedule of loss setting out all sums that she is claiming and how they have been calculated

3. Disclosure of documents

- 3.1 The parties are to disclose to each other all documents that are or may be relevant to the issues between the parties by **4pm, 23 December 2022**.

4. Witness statements

- 4.1 The parties are to exchange witness statements containing all evidence relied upon by **4pm, 16 January 2023**.

Employment Judge Alliott

Date: 16 January 2023

Sent to the parties on:

18 January 2023

For the Tribunal: