An erroneous decision to extend time under s.123(1)(b) Equality Act 2010

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Karen Moss appears for successful appellant in the EAT - ***Leeds and Yorkshire Housing Association Limited v Fothergill*** UKEAT/0211/20/LA

1. The Honourable Mrs Justice Ellenbogen, sitting in the EAT, held that a tribunal had erred in extending time under **s.123(1)(b) Equality Act 2010** ("**EqA 2010**"), by failing to determine whether a claimant's ignorance of his right to claim direct race discrimination was reasonable.

2. The claimant in the tribunal hearing ("IF") brought direct race discrimination complaints relating to the decision of the Respondent, Leeds and Yorkshire Housing Association ("LYHA"), not to recruit him into the position of Property Surveyor, once on 15th January 2018 and again, for a second vacancy, on 18th/19th February 2018. IF did not notify ACAS of Early Conciliation ("EC") until 25th June 2019 (Date A) and received his ACAS EC certificate on 27th June 2019 (Date B). He issued his ET1 form on the same day. The latest primary time limit therefore expired on 17th/18th May 2018. As IF did not contact ACAS until over 13 months later, on 25th June 2019, the claim issued on 27th June 2019 was considerably out of time.

3. The tribunal, EJ Shulman sitting in Leeds ET, exercised what was conceded to be very wide discretion to extend time where the tribunal considered it just and equitable to do so (in accordance with the Court of Appeal's decision in ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** 2018 ICR 1194, CA) and allowed the claims to proceed.

The law applied

4. Only a week or so before the EAT hearing, Lord Justice Underhill had handed down the judgment of ***Adedeji v University Hospitals Birmingham NHS Trust*** [2021]

EWCA Civ 23 in the Court of Appeal, which was also referred to and applied in the judgment of Ellenbogen J. This case confirmed that the list of factors in **s.33(3) Limitation Act 1980,** which a civil court in a personal injury case is required to consider when deciding whether to extend time, does not constitute an obligatory checklist, or even necessarily a framework, for employment tribunals determining whether it is just and equitable to extend time in a discrimination claim. Previously, the EAT in ***British Coal Corporation v Keeble and ors*** 1997 IRLR 336, EAT set out that these factors may be relevant to the consideration of whether it is just and equitable to extend time to allow a discrimination claim in the employment tribunal to proceed.

5. Following ***Perth and Kinross Council v Townsley*** (EATS 0010/10) and ***University of Westminster v Bailey*** EAT 0345/09, tribunals should only extend time where the claimant's ignorance of rights is reasonable. There are three aspects of knowledge of rights required for a claimant (i) that a claim can be made; (ii) how that claim can be made (i.e. through an employment tribunal); (iii) time limits for those claims (see ***Wall's Meat Co v Khan*** [1978] IRLR 499). Reasonableness of such ignorance all depends on the circumstances. If it is reasonable for a claimant to have been ignorant of his right to claim, it is also likely to be reasonable that s/he was ignorant of the time limits; but if a claimant should reasonably have been aware of such a right, it is likely to be expected that how to claim should have been investigated. Reasonableness of ignorance should be assessed by tribunals throughout the period between the act of alleged discrimination and the claim being issued. Although it may have been reasonable not to have known about time limits, for example, immediately after the first act of discrimination during a claimant's employment, that ignorance would be less reasonable after the claimant alleges a number of discriminatory acts and/or after that employment ends. The claimant in ***Bailey***, though technically a litigant in person, was intelligent and articulate, lectured in human resources matters, and was surrounded at work by people with knowledge of employment law. His ignorance (of a man's right to claim direct sex discrimination under the **EqA)** was found not to have been reasonable in his particular circumstances, especially as a "*misapprehension of such elementary equality*" required "*searching examination"*. In ***Bowden v Ministry of Justice and anor*** EAT 0018/17, however, a claimant's ignorance that the exclusion of part-time recorders from the pension scheme was unlawful part-time worker discrimination was considered reasonable.

The Tribunal's findings

6. The tribunal in ***Fothergill***, heard evidence from IF that:

> *"Evidence of discrimination became apparent to me when [LYHA] informed me that I didn't get either of the two vacancies left by the two previous Technical Officers…"*

7. In its factual findings about IF's ignorance of the right to claim direct race discrimination, the Tribunal found it

> *"was because he was not aware that he had any rights. He said that shortly after the incidents which are the subject of the claims he was being considered by* [LYHA] *for the job of a contracts' manager. He had no knowledge of discrimination laws in this country. Then he qualified this "to some degree" but not to do with employment. In general terms he said as a member of an ethnic minority he was aware of these things. But his real awareness did not come until after the termination of his arrangement with the Respondent, which took place on 3 May 2019 when, in early to mid-May, a friend told him about such things, as that friend had experience of employment discrimination. It also appears that he did after speaking to the friend look at the internet".*

8. In addition, the Tribunal recorded that,

> *"the Claimant says that he never took legal advice as he was not aware of any of his rights until June 2019. He says time was not mentioned…"*

9. In the Further Written Reasons provided by the Tribunal to the EAT, the Tribunal simply repeated that IF was unaware of his legal rights until June 2019 without citing any evidence on which the conclusion that his ignorance was *reasonable* could be based.

10. The Tribunal said expressly that it was:

> "*not concerned with the time from termination (3 May 2019 to 27th June 2019) but much more with the length of time since what we call the Bennett incident* (mid-February 2018)".

11. In any event, the Tribunal found that IF's ignorance ceased around May / June 2019. The judgment included a bare assertion that the ignorance was reasonable.

The EAT judgment in *Fothergill*

12. Ellenbogen J found that, although the Tribunal had identified the correct law, there was a failure to apply that law. There was no assessment of the evidence as to whether IF's ignorance of his rights was reasonable throughout the period from the alleged act of discrimination to the date of issue. Although IF was not a sophisticated and knowledgeable claimant, like the claimant in ***Bailey***, nevertheless the right of a man of colour to claim direct race discrimination did have an "elementary quality". Various phases of time had elapsed since the alleged act complained of and those phases ought to have been analysed separately because of a material change in circumstances. The Tribunal ought to have considered whether it was reasonable for IF not to have asked a friend for advice sooner. There had been a wholesale failure to consider reasonableness at all. The Tribunal judgment was found to have been perverse and not ***Meek***-compliant.

13. The second ground of appeal, that the Tribunal's consideration of the balance of prejudice was perverse, also succeeded. The Respondent made clear to the Tribunal that it had destroyed some of the contemporaneous evidence (e.g. interview notes) a year after the selection exercise complained of. Given the extraordinary delay (over 16 months) in issuing the claim, the Tribunal should have made clear how it balanced this prejudice against the Claimant's excuse for failing to issue earlier.

14. The matter was remitted to a differently constituted ET to decide whether just and equitable to extend time.

Karen Moss represented the successful Appellant before the EAT on 28th January 2021 and judgment was read out on 5th February 2021.

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