EAT makes it clear that when considering whether or not it would be 'just and equitable' to extend time limits, it is not only the period of delay prior to the issuing of the claim that is relevant

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Secretary of State for Justice v Johnson [2022] EAT 1

Background facts

1. The Claimant was employed as a prison officer at HMP Frankland. In October 2011 he attended the scene of a brutal murder of a prisoner who had been mutilated and disembowelled, which was very distressing for him. He alleged that he was compelled by his employer to submit an application for ill-health retirement ('IHR') on 20 February 2013, despite being empathically opposed to this. He was advised by his trade union in early September 2013 that in fact the IHR application would be to his benefit. It was argued by the Respondent that as harassment had to be unwanted conduct, when he accepted the trade union advice, the 'conduct' complained of was no longer unwanted.

2. He issued proceedings on 19 December 2013 alleging harassment on the grounds of disability. The Respondent denied harassment and argued that the claim was 7 months out of time given that the application had been made in February 2013. It was also argued by the Respondent that as harassment had to be unwanted conduct, when the claimant accepted the trade union advice that it was in his interests to make the application, the claim could only relate to conduct prior to early September 2013.

3. These proceedings were stayed for a number of years whilst the claimant's personal injury claim was brought and resolved.

4. After the stay was lifted the matter was heard by the employment tribunal sitting in North Shields from 17 to 19 February 2020. The tribunal upheld the claim of harassment and found that time started to run from September 2013, holding that the delay was "only by a few weeks at most". As regards the 6 to 7 year passage of time between the matter coming to trial, the tribunal found that this was irrelevant because it was not the "fault of either party".

5. The Respondent appealed, arguing that the tribunal ought to have made findings of fact as to what conduct had taken place after 21 February 2013 which led to the conclusion that time started to run from early September. It was also argued that it was an error of law to hold that the 6 to 7 year passage of time from the claim being issued and the trial was "irrelevant" because it was not the fault of any party.

EAT judgment

6. The matter came before HHJ Tayler. Unsurprisingly he agreed with the Respondent that it was incumbent on the tribunal to identify the specific conduct which had constituted harassment, and if it was more than the original pressure to submit an application for IHR, to set out what ongoing conduct occurred.

7. As regards the extension of time issue, HHJ Tayler referred to the Court of Appeal case of Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23 which considered whether an employment tribunal in analysing a claim that had been submitted a matter of days outside the statutory time limit was entitled to take into account the fact that allowing an extension of time would result in consideration of matters that had happened a considerable time before the submission of the claim, given that the claim included complaints which went back a long time. The Court of Appeal held that:

   As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago. On the facts of this case the Judge clearly had in mind both the respects in which the events of late 2016 were historic, as identified at para. 22 above; and she also had in mind the fact that the Appellant could have complained of them in their own right as soon as they occurred or in May, immediately following his resignation… (I would add, while acknowledging that this does not appear to have been the Judge's approach in this case, that the fact that the grant of an extension will have the effect of requiring investigation of events which took place a long time previously may be relevant to the tribunal's assessment even if there is no reason

to suppose that the evidence may be less cogent than if the claim had been brought in time.)"

8. HHJ Tayler found that it was clear from this decision that one of the relevant factors to consider was whether, if the extension were granted, it would require the tribunal having to make determinations, *for whatever reason*, about matters which occurred long before the hearing. It mattered not that the delay was not due to any fault on the part of the parties [paragraph 23]. As the tribunal had found that this factor was irrelevant, they had erred in law and thus the appeal was allowed.

Commentary

9. A helpful reminder that a tribunal should not focus only on the period of delay between the conduct complained of and the submission of the ET1. Generally speaking, this is of course the period of time which is concentrated on for obvious reasons and one can see the attraction in the argument that non-fault delay after this period should not lead to a claim being struck out, as on the face of it this would appear to be an unjust result for a claim, who is being deprived of litigating a potentially meritorious claim. However, in a case such as this, where there is a very substantial delay between the conduct complained of and the trial taking place, it is clear that the cogency of the evidence is likely to be adversely impacted, thus causing potential injustice to the respondent. It is worth bearing in mind that, even if an extension of time was granted in such a case, it seems very likely that an application to strike out the claim on the basis that a fair hearing would no longer be possible [in accordance with rule 37(1)(e) of the Rules of Procedure] would be successful, which arguably detracts from any sense of injustice which a claimant may feel in such circumstances.

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