EAT considers the appropriate test to be applied when considering whether or not a claim has been brought within 'such time as was just and equitable'

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Jones v The Secretary of State for Health and Social Care EA-2022-000744-JOJ

Summary

1. In a judgment handed down by HHJ Tayler, a perversity appeal on the 'just and equitable' extension of time was dismissed, and a useful commentary on the correct test to be applied was provided.

The Facts

2. The claimant applied for the role of Assistant Business development Manager in March 2019. He was successful in a paper sift and he attended an interview on 28 March 2019. He scored second highest of the 4 candidates. The highest scoring candidate was offered and accepted the role on 2 April 2019. The claimant was of African-Caribbean descent, and the successful candidate was white.

3. The claimant and the other unsuccessful candidates were not told that they had been unsuccessful until just over 3 months after the interviews, which the tribunal found was due to a genuine error.

4. Primary limitation in respect of a claim arising out of the decision made on 2 April 2019 expired on 1 July 2019. However, the claimant (following a number of chasers) only received confirmation on 3 July 2019 that he was not successful. On 24 July 2019 the claimant sent an email asking a number of questions, including the ethnic origin of the successful candidate. Within that email, the claimant explained that as a decision was made on 9 May 2019, he believed that he had until 9 August to bring a claim, indicating

that he had some awareness of a three-month time limit. The respondent explained that they could not advise the claimant about the protected characteristics of the other candidates due to GDPR, but suggested that he could make an application under the Freedom of Information Act. The claimant did not make such an application.

5. The claimant entered into ACAS Early Conciliation on 30 September 2019, and the certificate was issued on 14 October 2019. As this process was started after time had already expired, the period spent in conciliation could not extend the time, such that the claim would only be in time if an extension on just and equitable grounds was granted. The claimant issued his claim for race discrimination on 29 October 2019. At that time, the claimant still did not know the race of the successful candidate. In his ET1, he stated that his claim was "*based on the suspiciously and unexplained long period of time that it took to make a decision in this recruitment, and primarily comments made by Darren Clahane in his July 03rd, response on this matter, that I submit this claim of direct and/or indirect discrimination.*"

6. The respondent denied the claim, disputing that there had been any discrimination and alleging that the claim was out of time. Whilst the respondent indicated in the ET3 that the other candidates were white, they did not specify that the successful candidate was white. This was only clarified at a preliminary hearing in June 2020, following Counsel taking instructions during the hearing. The claimant submitted a document responding to the ET3, alleging that the respondent had deliberately withheld information from him [namely, the ethnic origin of the other candidates].

The ET decision

7. The matter was listed for a 4-day trial in December 2021. The claim was dismissed on the merits, with it being found that the successful candidate was not an actual comparator because of the material difference in circumstances. In respect of the time issue, the tribunal placed reliance on the fact that the claimant had an awareness of time limits, as he had specifically stated that he believed he had until 9 August to bring a claim, and yet he did not in fact bring a claim until October. It was found that he was putting off bringing a claim until he had concluded his fact gathering exercise, and they found that this was not a good enough explanation for the delay. Further, when considering the balance of prejudice, it was found that there was a disadvantage to the respondent in respect of the cogency of the evidence as an earlier claim would have resulted in earlier disclosure and

a greater preservation of documents. Further, the witnesses would be giving evidence much closer in time to the events in question.

The EAT decision

8. The claimant appealed the decision on the merits and the time point. Permission was given on the time point on the basis that the ET had failed to take into account that fact that the respondent had failed to tell the claimant the ethnicity of the successful candidate until the first preliminary hearing, which could potentially be a significant factor in considering a just and equitable extension. It was argued by the claimant that the failure to extend time was perverse, given that the claimant was only made aware of the outcome of the interview process on 3 July 2019, and only made aware of the date of that decision on 19 June 2020 [2 days prior to the preliminary hearing]. It was argued that it was entirely reasonable for the claimant to gather evidence before issuing his claim and it was the failure of the respondent to answer basic questions which led to the delay.

EAT decision

9. The matter came before HHJ Tayler. He commented that there was a tendency for those who sought to argue that time should not be extended to rely on the dicta of Auld LJ in Bexley Community Centre v Robertson [2003] EWCA Civ 576 as authority for the propositions that time limits in the Employment Tribunal were '*exercised strictly'* and that a decision to extend time '*was the exception rather than the rule'*. He noted that where these comments were taken out of context, the practice should cease. He pointed out that these comments needed to be read in the context of the rest of the judgment, which made it clear that tribunals had a '*wide ambit'* when deciding whether to exercise their discretion in respect of time limits, and that appellate courts should be slow to interfere. Reliance was placed on the Court of Appeal decision in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, in which Sedley J pointed out 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 wellknown 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.*

10. HHJ Tayler opined that Employment Tribunals should focus less on Roberston, and rather more on some of the other Court of Appeal authorities, such as Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, in which it was pointed out that, due to the language of section 123 EQA, '*Parliament has chosen to give the employment tribunal the widest possible discretion'.*

11. It was argued by the claimant that it was entirely reasonable for him to have ascertained the race of the successful candidate before deciding whether to bring a claim. Whilst on the face of it this does appear to be a sensible proposition, HHJ Tayler considered that there were two difficulties with such an argument. The first was that this was not how the claimant had put his case, as he had argued that the suspicious amount of time to make the decision, and the comments made by the respondent when they advised the claimant on 3 July 2019 that he had not been successful, formed the reasoning as to why he considered that he had been subject to discrimination. That provided the context as to why the tribunal had focussed on the date of 3 July. The second difficulty was that the claimant *still* did not know the race of the successful candidate at the point at which he brought his claim- this was not discovered until the first preliminary hearing. It was notable that the claimant submitted his claim more than three months after he found out he had not been successful. HHJ Tayler found that:

> *It would be unrealistic to conclude that the Employment Tribunal lost sight of the fact that the claimant did not know the race of the successful candidate until long after he submitted the claim as the Employment Tribunal considered the circumstances of the decision of the respondent not to provide details of the protected characteristics of the other candidates at paragraph 35, quoted above.*

12. It was noted that the grounds of appeal did not assert any error in the tribunal's direction as to the relevant law, and it was clear that the tribunal was aware of its wide discretion and did not consider the length of the delay and the reasons for the delay. It was concluded that the claimant could not establish that the decision was perverse.

Commentary

13. This case is a useful reminder of the very wide discretion given to employment tribunals when determining whether or not a claim had been brought within such time as was just and equitable, and appellate courts should be slow to interfere with the exercise of this discretion. Whilst it has become common practice for advocates to rely upon Robertson to argue that an extension of time is the '*exception not the rule'* and that time limits ought to be '*strictly applied'*, this is somewhat of a gloss on the actual test. The statutory language makes it clear that the discretion given is a wide one, with no prescribed list of mandatory factors to be taken into account [unlike under section 33 of the Limitation Act 1980]. Where a tribunal has considered the length of and reasons for delay and has not failed to take into account a relevant matter or vice versa, it will be extremely difficult for a party to persuade an appellate court to intervene.

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