The justice and equitability of time extensions

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Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23

1. On the 15th January 2021 Lord Justice Underhill handed down judgment in ***Adedeji v University Hospitals Birmingham NHS Trust,*** which confirms what employment lawyers had long suspected: it can be tricky to challenge an employment tribunal's determination as to whether it is just and equitable to extend time or not, under **s.123(1) Equality Act 2010**. ***Adedeji*** confirmed that a tribunal is not required to slavishly consider all the factors listed in **s.33 Limitation Act 1980** and is entitled to refuse to extend time, even when the delay is short.

Facts and procedural history

2. The claimant was a surgeon who resigned with effect from 25th August 2017 after a lengthy capability / conduct procedure. He claimed he had been constructively dismissed and discriminated against because of his race. He issued his claim 3 days after the latest primary time limit had expired. His evidence was that he believed he could benefit from an automatic extension of time under the early conciliation ("EC") rules, by contacting ACAS afresh following an attempt to withdraw his earlier notification and even though he was in possession of an EC certificate. His lawyers had apparently warned him twice that he should bring his claim within the primary time limits, but he had ignored that advice.

3. It appeared to have been accepted that the last act of discrimination was the expiry of his notice. It was not contested, by the time of the appeals, that the claimant was at least 3 days out of time (perhaps more than 3 day out of time for acts predating the expiry of his notice).

4. The claimant alleged that his lack of understanding of the ACAS EC rules was reasonable (notwithstanding the advice he had received from his lawyers). He also said the reason he

had left issuing so late was because he was awaiting the outcome of a GMC investigation which he thought would vindicate him and make settlement more likely.

5. The employment tribunal refused to grant an extension of time to enable him to proceed with his claims because it found (unsurprisingly) that it was reasonably practicable to issue the unfair dismissal claim in time, but also found that it was not just and equitable to extend time to allow the discrimination claim.

6. The EAT, in December 2019, upheld the tribunal's decision. Permission to appeal to the Court of Appeal was only granted in relation to whether it was just and equitable to extend time (not whether it was reasonably practicable to extend time).

The Court of Appeal's decision

7. Of course, the primary time limit for discrimination claims, set out in **s.123(1)(a) EqA 2010**, is three months from the date of the act complained of, modified by **s.140B EqA 2010** to have the broad effect of not including time spent conciliating in those three months, and ensuring that a claimant will have at least a month to issue after the date of the EC certificate.

8. The burden of proving that it is just and equitable to extend time to enable a claim to proceed is on the person seeking the extension. Underhill LJ expressed, as obiter, that there was no misdirection in the employment judge stating that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals.

9. The Court of Appeal approved the EAT decision in ***Commissioners of Revenue and Customs v Garau*** [2017] ICR 1121, (of which presumably Mr Adedeji's original lawyers were well aware) that once the ACAS EC process had been completed (with an EC certificate) no further attempt at conciliation through ACAS would have the effect of extending time under **s.140B**.

10. Underhill LJ found that the tribunal considered all the relevant factors and did not treat any one as determinative – that was the correct approach. He recognised that the main consideration appears to have been that the claimant did not have a good reason for the delay. He found that there was no error in the tribunal's judgment in finding that it was not just and equitable to extend time, notwithstanding the short delay.

11. Most importantly for practitioners, Lord Justice Underhill gave us some helpful guidance on what he termed the "*continuing influence in this field of the decision in Keeble".* He was

referring to the case of ***British Coal Corporation v Keeble*** [1997] IRLR 336, which is oft-cited before tribunals deciding whether or not to extend time in discrimination cases.

12. That decision introduced for employment tribunals the consideration of the factors mentioned in **Section 33** of the **Limitation Act 1980**. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to -

    (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 plaintiff acted once he or she knew of the facts giving rise to the cause of action.

    (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

13. In Lord Justice Underhill's view:

> *"Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy...*
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> *(R)igid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion…*
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> *The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking".*

14. This case serves as a useful reminder to practitioners that, whilst it is undoubtedly still considerably easier for litigants to obtain extensions of time where they only need to persuade a tribunal that it is just and equitable to allow it, as opposed to where questions of reasonable practicability arise, it is still for a claimant to give compelling reasons why a claim form was issued late. Although the *Keeble* factors should still be borne in mind by practitioners when approaching these arguments, they are by no means an obligatory checklist. It is a salutary tale about what happens when litigants ignore their lawyers…

28 January 2021

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