The merit of claims and time extensions

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***Kumari v Greater Manchester Mental Health NHS Trust* [2022] EAT 132**

In considering whether it would be 'just and equitable' to extend time, or to permit an amendment, the ET is entitled to take into account the fact that the merits of the proposed claims were weak.

Background facts

1. The claimant, a litigant in person, presented complaints of direct race discrimination and/or harassment to an employment tribunal, the last act relied upon having taken place on 8 October 2019, which was post-dated her resignation in May 2019. The claimant raised a grievance on 8 October 2019 (which did not refer to race), and an investigation took place. She entered into ACAS Early Conciliation on 16 January 2020, and thus all of her claims were out of time. At a case management hearing in April 2020, the claimant indicated that she wished to amend her claim to add a further discrimination complaint arising out of a letter which she had received on 9 December 2019, which was the outcome of the investigation. The claimant was ordered to provide further and better particulars and the matter was listed for a further hearing to consider if the claims were in time, and if not, whether time should be extended. The claimant duly provided a further particulars document on 1 May 2020. Whilst the letter of 9 December 2019 was referred to in this document, no link was made between the content of this letter and the claimant's race.

2. At the preliminary hearing to determine the time limit issue, the claimant gave evidence as to her complaints of bullying, which the tribunal summarised in their judgment, noting that it was not finding facts. It referred to the claimant's case that she had resigned when she could no longer tolerate this treatment. It noted that the letter of resignation was not before the tribunal but that the claimant had confirmed that it had made no reference therein to race. The tribunal went on to note that the claimant had said that she had not complained sooner (whether to the respondent or to the tribunal) because she was "burnt out" and in

poor mental health; but she did not seek medical advice and no medical evidence was before the tribunal.

3. The tribunal concluded that all of the acts were out of time and thus considered whether or not to extend time on a just and equitable basis. In the claimant's favour was the fact that the complaints were only a few days out of time. On the other hand, the tribunal considered that her claims were very weak. Their reasoning on this was as follows:

   Even on the claimant's case, it is difficult to discern anything which links the treatment received to the protected characteristic of race. There is nothing in the lengthy 1 May letter which even touches on such a link. In contrast, there are various points where Miss Kumari describes other staff at the respondent as being in the habit of acting in a particular way (e.g. sharing personal details) which would be detrimental to a range of staff and was not targeted at Miss Kumari (or others) on racial grounds.

4. In relation to the amendment application in respect of the letter received on 9 December, the tribunal concluded as follows:

   Applying the balance of hardship, I have determined that the amendment should not be allowed. If granted, Miss Kumari would win the right to bring a claim, but it would not be the claim with which she is primarily concerned. It would also appear to me that it is a weak claim. The respondent would face the cost and inconvenience of dealing with these proceedings in circumstances where, absent the amendment, all other matters have fallen away. In those circumstances, it appears to me that the balance of hardship is clearly against allowing the claim to proceed

5. The claimant applied for a reconsideration of the decision, but this was rejected.

6. The claimant appealed the decision, arguing that it was wrong for the tribunal to take into account the merits in a situation in which it was not said that the claims were so weak that they had no reasonable prospects of success. In particular, it was argued that this would circumvent the rules on strike out and the safeguards attendant upon it. The claimant also contended that she did not have fair warning that the merits might be considered at the preliminary hearing.

EAT judgment

7. The matter came before HHJ Auerbach who set out the relevant principles when considering an application to extend time. It was noted that section 123 of the Equality Act

does not elaborate on the factors to be taken into account and that the discretion conferred on a tribunal is a wide one. The assessment on each occasion as to which factors are relevant to the particular case, and what weight to attach to them, is one to be made by the employment tribunal on the particular facts and circumstances of the case. Similarly, in respect of an amendment application, there is no specific provision which sets out how the power may be exercised. The overriding principle is that the tribunal must balance the hardship, justice or injustice to each of the parties that would be occasioned by either granting or refusing the amendment.

8. It was argued by the claimant that the decisions of HHJ Clark in *Bahous v Pizza Express Restaurant Ltd, Rathakrishnan v Pizza Express Restaurants Ltd* and *Szmidt v AC Produce Imports Ltd* were not applicable. In those cases, it was held that where a discrimination complaint has been considered at a full merits hearing and has been found (or could have been, subject to the time point) to be meritorious, it was then a relevant consideration when determining whether to extend time. It was averred that the same principle was not applicable at a preliminary hearing as the tribunal did not have the benefit of hearing the full evidence and thus the merits could not be exhaustively determined. Reliance was placed on a point made in *Malik v Birmingham City Council* and referred to again in *Cox v Adecco Group*, namely that when considering at a preliminary hearing the potential merits of a claim, it may not be a reliable or fair approach to expect the litigant in that context to be able to articulate precisely the basis on which they would maintain that the treatment they seek to complain of was because of, or related to, the characteristic in question; and care must be taken fairly to examine whether this may be apparent from the pleadings or other documents before the tribunal, though the litigant has been unable to articulate it. It was also submitted that it was contrary to the principles of natural justice to consider the potential merits of a claim without a claimant having been given specific advance warning.

9. As regards an application to amend, reliance was placed on *Woodhouse v Hampshire Hospitals NHS Trust* in which the EAT considered that the merits could only be a relevant consideration if what was sought to be added was an utterly hopeless claim. Whilst it was acknowledged that the EAT in *Gillett v Bridge 86 Ltd* came to a different conclusion, the more recent decision in *Herry v Dudley Metropolitan Borough Council* followed the *Woodhouse* approach. The correct approach was that unless it could be said that a claim had no reasonable prospects of success, the merits should not be a relevant consideration.

10. The EAT did not accept these arguments. It was found that it was not wrong in principle to consider the merits, over and above a conclusion that there were no reasonable prospect

of success, on the footing that it subverts or undermines or circumvents the strike-out rule and the appropriate safeguards. It was held that it was wrong to import the no-reasonable-prospect-of-success test into the just-and-equitable-extension-of time test as such as it does not form part of s123, nor is there any rule of procedure to that effect.

11. Whilst it was recognised that there was a need to take real care when assessing the merits of a prospective claim when the tribunal does not have all of the evidence, it does not necessarily mean that it is impossible in every case to fairly assess the potential merits to some degree at a preliminary hearing and to identify whether it has particular weaknesses. It was pointed out that tribunals have to carry out an assessment of the merits at an early stage when considering whether to make a deposit order and as such, it is a matter that can properly be entrusted to tribunals.

12. It was held that [para 63]:

    It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

13. Similarly, in respect of amendment applications, it was held that if the merits can be properly and fairly assessed as falling below the no-reasonable-prospect threshold, then the application should plainly not be allowed as it would be pointless; and, even if the prospects are thought to be better than that, this may still in a given case be outweighed by other factors leading to a refusal of permission to amend.

14. HHJ Auerbach disagreed that *Herry* was authority for the proposition that the merits of a potential claim should not be a relevant factor in determining an application to amend. It was noted that Slade J had not at any point in the *Herry* judgment indicated her disagreement with the decision in *Gillett*, and it was considered relevant that *Herry* was a case in which it was found that the proposed claim had no reasonable prospects of success, and thus it was not strictly relevant for Slade to consider whether *Gillett* had been wrongly decided.

15. As to the issue as to what warning a tribunal is obliged to give, especially to a litigant in person, that some assessment of the merits might take place at a preliminary hearing, it was held that there was no obligation on a tribunal in every case to provide such a warning. What was required was that each party should be given a fair opportunity to advance their case and an opportunity to respond to their opponent's case. Where a party is seeking to amend their claim, or advance an argument that it would be just and equitable to extend time (or a party wishes to oppose such arguments), and they consider that there is a key piece of evidence which points strongly to a particular conclusion on the merits, there is nothing to stop that party from providing that evidence to the tribunal. A balance has to be struck between the fact that a tribunal should male fair allowance for the fact that a party is unrepresented and the fact that it is not the function of the tribunal to provide legal advice, nor assist them in presenting their case. On consideration of the statements of case, the tribunal may be in a position to identify a particular weakness or gap in a case and invite the claimant to comment upon this. If a real problem or weakness is identified, the tribunal may be entitled to have regard to it, so long as it does not then go on to give it excessive weight.

16. In this case it was found that the tribunal had adopted the correct approach.

Commentary

17. A helpful case for employers which makes it clear that the potential weak merits of an out of time claim, or a proposed claim which a claimant seeks to add by way of an amendment, *can* be taken into account at a preliminary hearing, even in circumstances in which it could not be said that there are no reasonable prospects of success. In some cases, this factor, when weighed into the balance, might operate to defeat a just and equitable extension argument. However, the EAT has made it clear that the ET must be cautious when considering the potential weak merits, and be especially cognisant of the fact that at a preliminary hearing, the ET does not have the benefit of the full evidence. The ET must ensure that where they are considering taking into account the merits, that this is adequately raised with a claimant and that they are given a proper opportunity to raise any arguments on this point. If an employer seeks to rely on the merits in order to oppose an application to amend or extend time, it would be wise to ensure that any documents which supports their argument are provided to a claimant and the tribunal well in advance of the hearing, and it would be beneficial for the legal representative who will be running the

argument to prepare written arguments in advance of the hearing, to avoid any suggestion that a claimant (especially a litigant in person) did not have sufficient warning.

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