

THE INDUSTRIAL TRIBUNALS

CASE REF: 23743/19

CLAIMANT: Geoffrey Wilson

RESPONDENT: The Partners for the time being of Worthingtons Solicitors

JUDGMENT

The judgment of the tribunal is as follows:-

- (i) The claimant has not presented his claim of age discrimination within three months of the act complained of.
- (ii) The tribunal finds that it is not just and equitable to extend time in all of the circumstances.
- (iii) The tribunal does not have jurisdiction to hear the claimant's claim of age discrimination and therefore the claimant's claim is dismissed for want of jurisdiction.
- (iv) In light of the dismissal of the claimant's claim, it was not necessary to determine whether a Deposit Order was appropriate in this case.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Sturgeon

APPEARANCES:

The claimant represented himself (in person).

The respondent was represented by Mr N Phillips, Barrister-at-Law, instructed by Ms L McAloon of Worthingtons Solicitors (in person).

Background

1. In April 2019, the claimant applied for a Legal Executive position within the respondent company.
2. The claimant was informed, by letter dated 1 May 2019, that he was not short-listed

for interview. The letter stated as follows:

“Dear Geoffrey,

Application for the position of Legal Executive

I refer to your recent application for the above post. I regret to advise you that, on this occasion, you have not been short-listed for interview.

...”

3. By email of 18 July 2019, the claimant wrote to the respondent enquiring why he was not shortlisted for interview:-

“Dear Kathryn,

As you know I applied for the above position with yourselves in April. I would be very much obliged if you could kindly provide the reasons why I was not shortlisted for interview for this position further to your letter of the 1st May last.

Yours sincerely

Geoffrey Wilson BA”

4. By email of 19 July 2019, the respondent company replied to the claimant stating:-

“Dear Geoffrey

I acknowledge safe receipt of your email. I can advise that your request has been forwarded to the shortlisting panel and I will be in touch with a response within five working days.

Kind Regards.

...”

5. The respondent further replied on 24 July 2019 stating:-

“Dear Geoffrey

Further to your email of 18 July 2019, I write to advise that the reason you were not shortlisted for interview is because, according to your application for the post, you did not possess a law degree.

I trust this is satisfactory.

...”

6. The claimant presented a claim form to the tribunal on 22 October 2019 for direct age discrimination.
7. The respondent presented its response on 13 December 2019 resisting the claimant's claim in its entirety. The respondent noted, within its response, that the decision not to short-list the claimant for interview was communicated to him on 1 May 2019 but that the claimant had not registered his claim with the tribunal until 22 October 2019. The respondent therefore contended that the claimant's claim was out of time and that the tribunal had no jurisdiction to hear the claimant's claim.

Issues

8. At a Case Management Preliminary Hearing (hereinafter "CMPH"), on 2 March 2020, the Vice-President (as he then was) directed a Preliminary Hearing to determine the following issues:-
 - (i) whether the claim of alleged discrimination on the grounds of age was made within the statutory time limit and, if not, whether time should be extended accordingly to allow the claim to be accepted as within the jurisdiction of the tribunal?
 - (ii) if the claim was made within the statutory time limit, or if time was extended accordingly, to enable the claim to be accepted as within the jurisdiction of the tribunal, does the claim of age discrimination have little reasonable prospect of success and, if so, whether a deposit up to £500.00 should be ordered before the claimant is allowed to proceed with that claim of alleged age discrimination?

Procedure

9. This matter had originally been listed for a Preliminary Hearing on 7 April 2020. However, as a result of the national lockdown in the spring of 2020, the matter was unable to be heard on that occasion. At a further CMPH on 17 November 2020, the matter was relisted again on 16 March 2021. However, as a result of the closure of the tribunal building, from January to March of 2021, the matter was unable to be heard on that occasion also.
10. At a further CMPH on 3 November 2021, the matter was relisted for 13 December 2021. However, this date was not suitable for the claimant and therefore the matter was relisted again for 1 March 2022.
11. At the CMPH, on 17 November 2020, the claimant made the tribunal aware that, owing to a medical condition, the claimant would require breaks throughout the preliminary hearing. The claimant was directed to make any further requests for reasonable adjustments to the tribunal before the commencement of the preliminary hearing. The tribunal received no further requests from the claimant with regard to adjustments. At the preliminary hearing, the claimant was afforded regular breaks.
12. At the CMPH on 3 November 2021, detailed directions were given in relation to the preparation and exchange of written submissions and lodging of bundles for this preliminary hearing.

13. At the preliminary hearing, the tribunal heard evidence from the claimant in relation to the time point issue. The tribunal had regard to the claimant's claim form, the respondent's response form, written submissions and a bundle of authorities from the claimant and written submissions and a bundle of authorities from the respondent. The tribunal also had regard to the oral submissions made on behalf of both parties.

Format of this judgment

14. This judgment will set out the relevant law in respect of the first issue to be determined by this tribunal together with the relevant findings of facts:

ISSUE 1: *Whether the claim of alleged discrimination on the grounds of age was made within the statutory time limit and, if not, whether time should be extended accordingly to allow the claim to be accepted as within the jurisdiction of the tribunal?*

Time Limit for Age Discrimination Claims - Relevant Law

(i) Legislation

15. Schedule 48(1) of the Employment Equality (Age) Regulations (Northern Ireland) 2006 provides that:-

“(1) An Industrial Tribunal shall not consider a complaint under Regulation 41 (jurisdiction of industrial tribunals) unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done ...

(4) A court or tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.”

(ii) Case Law

16. The parties made reference to the following authorities and legal commentary in their submissions, in relation to the time point, and these authorities were considered by the tribunal:

Mr Wilson:

- i. **Clarke v Hampshire Electro-plating Co Ltd (1991) IRLR 490**

Mr Phillips BL:

- i. **Mensah v Royal College of Midwives [1995] UKEAT 124_94_1711 (17 November 1995)**
- ii. **Virdi v The Commissioner of Police of the Metropolis and Another [2007] IRLR 24**
- iii. **British Co Corporation v Keeble [1997] IRLR 336**

- iv. **Southwark London Borough v Afolabi [2003] IRLR 220**
- v. **Robertson v Bexley Community Centre [2003]**
- vi. **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327**
- vii. **Harvey on Industrial Relations and Employment Law (Division L Equal Opportunities 5E(2) paragraph 817).**

(a) **When Time Starts to Run for an Age Discrimination Claim**

17. Harvey on Industrial Relations and Employment Law (Division L Equal Opportunities 5E(2) paragraph [817] states:-

“(2) Date on which discrimination occurs.

[817]

The key date is the date of occurrence of the act, not the date when the complainant was aware of it.”

18. Mummery J in **Mensah v Royal College of Midwives [1995] UKEAT 124_94_1711** (17 November 1995) stated as follows:-

“An act occurs when it is done, not when you require knowledge of the means of proving that the act done was discriminatory. Knowledge is factor relevant to the discretion to extend time. It is not a pre-condition of the commission of an act which can be relied on as an act of discrimination.”

19. Elias J in **Virdi v The Commissioner of Police of the Metropolis and Another [2007] IRLR 24** (paragraph 25):

“I concede that there is much to be said for time not beginning to run until an employee is made aware of the decision which confers the cause of action. But that is not how the legislation has been drafted; the question is when the act is done, in the sense of completed and that cannot be equated with the date of communication.”

20. In the case of **Clarke v Hampshire Electro-Plating Co Ltd (1991) IRLR 490**, the EAT held that:-

“In determining when “the act complained of was done”, the question is whether the cause of action had crystallised on the relevant date, not whether the complainant felt that he had suffered discrimination on that date. The phrase “the act complained of was done” indicates that there was at that time an act of discrimination and that the cause of action could properly be said to be complete at that time, because otherwise there would be no point in bringing proceedings. Every case must depend upon its own facts as to the clarity of the crystallisation of any cause of action.”

(b) **Whether Just and Equitable to Extend Time**

21. In ***British Coal Corporation v Keeble [1997] IRLR 336***, the EAT confirmed that the discretion to grant an extension of time on “*just and equitable*” grounds is as wide as the discretion given to civil courts under the Limitation Acts. On that basis, the tribunal is required to consider the hardship and prejudice which each party would suffer as a result of either granting or refusing the extension and to have regard to all the other relevant circumstances, in particular:

- (a) the length of and the 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 parties sued had co-operated with any requests for information;
- (d) the promptness with which the claimant acted once he or she knew of the facts given rise to the cause of the action; and
- (e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.

22. Peter Gibson LJ in the Court of Appeal case of ***Southwark London Borough v Afolabi [2003] IRLR 220*** at paragraph 33, stated:-

“Whilst I do not doubt the utility of considering such a check list (or that in CPR 3.9(1)) in many cases, I do not think that it can be elevated into a requirement on the ET to go through such a list in every case, provided of course that no significant factor has been left out of account by the EAT in exercising its discretion.”

23. In addition, in the Court of Appeal case of ***Robertson v Bexley Community Centre [2003]*** Auld LJ stated (at 437 paragraph 25):-

*“It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out-of-time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. **A tribunal cannot hear a complaint unless the applicant convinces it that it just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.**” (Tribunal emphasis)*

24. Those comments have since been interpreted by Sedley LJ in the case of ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327***. Sedley LJ stated:-

“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 well-known 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: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them.*

32

Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment to be answered case by case by the tribunal of first instance which is empowered to answer it.”

25. In summary, therefore, the power to extend the time-limit on “*just and equitable*” grounds is a broad discretion to be exercised on the part of the tribunal. There is no presumption in favour of an extension of time. The onus remains on the claimant in each case to persuade the tribunal that it is just and equitable to extend time in all the circumstances of the case, given the overall context that time limits provided by statute are generally meant to be obeyed.

SUBMISSIONS OF THE PARTIES

(i) The claimant’s submissions

26. The claimant made the following points in relation to his contention that his claim has not been lodged out of time:-
- (i) the claimant’s cause of action crystallised in his mind on 24 July 2019 when he was informed of the reason why he was not short-listed by the respondent because he did not possess a law degree. The claimant submitted that time runs from the date of crystallisation of the cause of action, in his mind, as opposed to the date of the act of discrimination. On the basis that the event crystallised in his mind on 24 July 2019, the claimant submits that his claim was lodged within time on 22 October 2019. In support of this submission, the claimant relied on the **Clarke** case.
 - (ii) the claimant also submitted that the **Clarke** case was authority for the tribunal to extend time on a just and equitable basis as he alleged that, in line with the reasoning in **Clarke**, “*Every case must depend upon its own facts as to the clarity of the crystallisation of any cause of action.*”

(ii) The respondent’s submissions

27. The respondent argued that the claimant’s claim is out of time and that time should not be extended. The respondent made the following points in its defence:-
- (i) the respondent submitted that time in this case started running, at the very latest, on 1 May 2019 as that was the date the respondent communicated its decision to the claimant that he had not been short-listed. Given that the claimant’s claim was not presented until 22 October 2019, the respondent contended that the claimant’s claim is almost three months out-of-time;

- (ii) in relation to the just and equitable extension, the respondent submitted that the tribunal should not extend time. The respondent submitted that the claimant is an individual who has many years of experience representing claimants in Industrial Tribunals and that he has also appeared in the Court of Appeal. The respondent submitted that the claimant is someone who considers himself sufficiently experienced and knowledgeable in employment law and that he clearly felt he was qualified to occupy a position as an employment law Legal Executive. The respondent submitted that the claimant would therefore have had knowledge of time limits and knowledge of the consequences of not complying with time limits;
- (iii) the respondent submitted that there was nothing further provided within the email exchange on 24 July 2019 which could reasonably be interpreted as providing the claimant with some additional knowledge that would suggest or hint that direct age discrimination may have occurred.

RELEVANT FINDINGS OF FACT

28. Having considered the evidence given by the claimant and the content of the relevant documents referred to by the parties, along with the submissions of both parties, the tribunal found the following relevant facts:-

- (i) The claimant applied for a position, as a legal executive, on 5 April 2019.
- (ii) It was common case between the parties that the advertised criteria for the post, as contained within the agreed bundle for hearing, stated that a law degree and/or experience of working in a legal environment would be an advantage.
- (iii) However, at the short-listing stage, the unchallenged evidence of the respondent was that the respondent enhanced its criteria and decided that, in order to be short-listed for interview, a candidate **must** have obtained a law degree prior to interview.
- (iv) The claimant's application stated that he studied law but did not complete his law degree. The claimant was therefore not short-listed for interview as a result of this enhanced criterion.
- (v) The claimant was informed, on 1 May 2019, that he was not shortlisted for interview.
- (vi) The tribunal accepts the evidence of the claimant that he had a suspicion of age discrimination from 1st May 2019.
- (vii) It was common case between the parties that two other applicants were not short-listed for the same reason as the claimant. Although age/dates of birth are not requested on the application forms, the two candidates, who were not short-listed, attended secondary/grammar school from 2009-2014 and 1992-1999 respectively.
- (viii) By way of email of 18 July 2019, the claimant sought confirmation of the reason why he was not short-listed for interview.

- (ix) By way of email of 24 July 2019, the respondent informed the claimant that the reason for his not being short-listed was that, according to his application, he did not possess a law degree.
- (x) The claimant submitted an ET1 to the Industrial Tribunal on 22 October 2019 complaining of direct age discrimination.
- (xi) Within paragraph 7.4 of the details of claim section of the claim form, the claimant outlined that his claim was for direct discrimination on the grounds of his age as he was not short-listed for interview for a Legal Executive position within the respondent.
- (xii) The claimant is an independent Legal Consultant of 18 years' experience specialising in employment tribunal litigation.
- (xiii) The claimant has represented a party in the Court of Appeal.
- (xiv) The tribunal accepted the claimant's evidence that he deliberated over whether to lodge an age discrimination claim as the claimant deems the respondent to be a most prestigious law firm with one of the best employment law practices in Belfast.

CONCLUSIONS

29. Having applied the relevant principles of law, to the relevant facts as found, the tribunal concludes as follows in relation to the first issue which this tribunal must deal with:-

(i) **When does time start to run for the claimant in this case?**

30. The first point which the tribunal must determine, in this case, is when time starts to run for the purposes of the claimant's age discrimination claim. The claimant accepted in evidence that he had been told on 1 May that he was not short-listed for the position of Legal Executive. The claimant also stated in evidence that he had a suspicion of age discrimination on 1 May.

31. There was a dispute between the parties as to when time starts to run in this case. The claimant's case is that time only started to run when the issue of discrimination crystallised in his mind - the claimant states this occurred on 24 July when he was told the reason for his non-selection i.e. not possessing a law degree.

32. However, the respondent states time starts to run on 1 May which is the date when the claimant was told he had not been short-listed for interview.

33. The tribunal concludes that time starts to run, for the purposes of this case, on 1 May 2019. The tribunal makes this finding for the following reasons:-

- (i) the claimant was informed on 1 May 2019 that he was not being short-listed for interview;
- (ii) the claimant stated, in evidence, that he had a suspicion of age discrimination on 1 May 2019;

- (iii) as per the decisions in **Mensah** and **Virdi**, time starts to run when the act is done;
- (iv) given that the act of non-selection for interview was communicated on 1 May, this is the last possible date when time started running in this case;
- (v) the claimant argued that he only received strong enough evidence to submit his claim on 24 July 2019 when he was told that the reason for his non-selection was because he did not finish a law degree. However, the claimant has provided no reasonable explanation to demonstrate why being told possessing a law degree bolsters his case for direct age discrimination any further than being simply told he was not short-listed on 1 May 2019. The tribunal can discern no reason as to why the possession of a law degree would assist a direct age discrimination claim. The tribunal therefore finds that time starts to run from 1 May 2019.

(ii) **Just and Equitable Extension**

- 34. The claimant did not lodge his claim until 22 October 2019 meaning that the case has been lodged almost three months out of time given that the three months starts to run from 1 May 2019. The duration of the delay is considerable. This tribunal must then go on to assess whether it is just and equitable to consider a complaint which is out of time.
- 35. In considering the factors set out in the **Keeble** case (referred to above at paragraph 22), I considered factor (a) (the length of and the reasons for the delay), factor (d) (the promptness which the claimant acted once he knew of the facts giving rise to the cause of action) and factor (e) (the steps taken by the claimant to obtain appropriate professional advice once he knew the possibility of taking action). For the purposes of this case, I did not consider factors (b) and (c) relevant.
- 36. In looking at factor (a) (the length of and the reasons for the delay), the main reason advanced by the claimant for not bringing a claim promptly was that he was agonising over whether or not to sue the respondent. By the claimant's own admission, he viewed the respondent as having one of the best employment practices in Belfast. He told the tribunal that he knew that if he brought a claim against the respondent he would have a fight on his hands. The claimant also stated, under cross-examination, that if it had not been Worthingtons solicitors, but a smaller practice, he would have lodged the claim more promptly.
- 37. In relation to factor (d) of the **Keeble** factors, the tribunal has found that the claimant confirmed that he was suspicious, from 1 May 2019, that age may have been a factor in him not being short-listed. However, the claimant never elaborated on why he had this suspicion. Despite confirming that he had a suspicion of age discrimination, the only mitigating circumstance offered by the claimant for the delay in lodging his claim was that he was agonising over whether or not to sue a prestigious law firm like Worthingtons. The tribunal concludes that this is not a credible reason for not lodging a claim promptly.

38. The tribunal has also taken into account the fact that the claimant is, by his own admission, an experienced employment law practitioner who has attended the Court of Appeal. Having worked in employment law for 18 years, the claimant would have been well aware of the three month time-limit and there would not have been any need for him to seek legal advice on this matter.
39. As per the case of ***Southwark London Borough***, there is no legal requirement for the tribunal to go through the list of ***Keeble*** factors in every case but the tribunal has considered it helpful, in this case, to analyse the relevant factors set out in ***Keeble***.
40. The tribunal is also mindful that, as per ***Robertson***, it is for the applicant to convince the tribunal that it is just and equitable to extend time. The claimant has provided no compelling reason convincing the tribunal to extend the time-limit, in all of the circumstances of this case, on a just and equitable basis. Accordingly, the tribunal concludes that it has no jurisdiction to determine the claimant's age discrimination claim.
41. The claimant's claim for age discrimination is therefore dismissed for want of jurisdiction.

Issue 2: If the claim was made within the statutory time limit, or if time was extended accordingly, to enable the claim to be accepted as within the jurisdiction of the tribunal, does the claim of age discrimination have little reasonable prospect of success and, if so, whether a deposit up to £500.00 should be ordered before the claimant is allowed to proceed with that claim of alleged age discrimination?

42. In light of the conclusion above that the claimant's age discrimination claim is dismissed for want of jurisdiction, it was not necessary for the tribunal to determine whether a Deposit Order was appropriate in this case.

Employment Judge: EJ Sturgeon

Date and place of hearing: 1 March 2022, Belfast.

This judgment was entered in the register and issued to the parties on: