



EMPLOYMENT TRIBUNALS

Claimant Mr M Ruffett

Respondent Learn to Live Federation

Heard at: Exeter
(remotely by video hearing)

On: 9 August 2022

Before:
Employment Judge Goraj

Representation

The claimant: in person

The respondent: Mr G Khan, solicitor

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS that: -

The Tribunal does not have jurisdiction to determine the claimant's complaint of age discrimination as it was not presented within the statutory time limit and it is not just and equitable to extend time pursuant to section 123 (1)(b) of the Equality Act 2010.

REASONS

1. The hearing was conducted as a remote hearing to which the parties consented. There was insufficient time for the Tribunal to complete its deliberations and deliver its Judgment in the allocated time. The Judgment was therefore reserved.
2. By a claim form which was presented to the Tribunals on 6 October 2021, the claimant alleged that he had been unlawfully discriminated

against because of his age by reason of an alleged comment (which prefaced one of the questions asked of him) during an interview for a post (Executive Headteacher) in the respondent that, "it won't have escaped your notice that you are the youngest candidate". The claimant further stated in his claim form that the comment "insinuated" that he was less suitable for the role because of his age and that he strongly believed that the comment was a determining factor in his not being appointed to the post. The claim form is at pages 2-18 of the bundle. The claimant stated in his claim form that his date of birth is 19 October 1982. The claimant further stated at paragraph 8.2 of his claim form that he recognised that his claim was "over time" but this was because he had completed the internal complaints processes which had just concluded.

3. The respondent's response and attached grounds of resistance are at pages 24 -38 of the bundle. The respondent stated in its grounds of resistance that the claimant attended interviews for the post of Executive Headteacher on 22 and 23 March 2021 and that the deliberations of the panel took place on 24 March 2021 at which time the panel decided that it was unable to make a recommendation to the governing body for the appointment of the claimant, or the other remaining candidate, to the post (and that no such appointment was accordingly made). The respondent further stated that the claimant and the other unsuccessful candidate were notified of the panel's decision on 24 March 2021. The respondent accepted at paragraph 2.9 of its grounds of resistance that during the interviews on 23 March 2021 a comment was made to the claimant (in the context of a question as to how the candidates saw themselves in 5 years' time) that he was the youngest candidate. The respondent however denied that the comment constituted age discrimination or that the comment/ the claimant's age played any part in the decision not to appoint the claimant to the post. The respondent further contended that the Tribunal did not have jurisdiction to hear the claimant's claim as it was out of time for the purposes of section 123 of the Equality Act 2010 ("the 2010 Act") and that it would not be just and equitable to allow the claim to proceed.
4. The claimant subsequently confirmed (in response to a request by the Tribunal) that the date of the alleged act of age discrimination was 23 March 2021 and that it occurred during his interview for the post of Executive Headteacher at the respondent (page 23 of the bundle).

The claimant's ACAS Certificate

5. The claimant's ACAS Early Conciliation Certificate (which is at page 1 of the bundle) states that the claimant's EC notification was received on 2 October 2021 and that the EC Certificate was issued by email on 4 October 2021.

Witness statements

6. On 17 January 2022 the Tribunal wrote to the parties informing them that it had been directed that the matter be listed for a Preliminary Hearing to determine whether the claim should be struck out as being out of time / whether it was just and equitable to extend time. The parties were directed to exchange witness statements 14 days before the Preliminary Hearing on the issue of whether it was just and equitable to extend time. Neither party prepared / exchanged witness statements as directed. The respondent indicated that it did not intend to rely on any witness evidence. The claimant applied to give oral evidence on oath without a witness statement on the grounds that he had not appreciated that he was required to provide a witness statement. The respondent did not oppose the application and the Tribunal agreed to proceed on that basis as it was satisfied that it was in accordance with the overriding objective to do so as the issue was not factually complex/ lengthy, and the respondent did not object. Following the conclusion of the witness evidence the Tribunal provided a summary of the relevant law and took a break for the claimant to consider the EAT Judgment of **Wells** referred to further below (with its helpful review of the relevant authorities) before proceeding with closing submissions.

Documents

7. The Tribunal was provided with an agreed bundle of documents (“the bundle”).

THE FACTS

8. The following findings of fact are made strictly for the purposes of this Preliminary Hearing.
9. The claimant was at all material times an Executive Headteacher with experience of dealing with staff related issues. The claimant attended interviews for the post of Executive Headteacher of the respondent on 22 and 23 March 2021. During the final interviews on 23 March 2021, a member of the interview panel made the comment that the claimant was the youngest candidate as further referred to at paragraphs 2 and 3 above. On 24 March 2021 the panel decided not to recommend the claimant, or the other remaining applicant, to the post and the claimant was advised accordingly on 24 March 2021.
10. On 1 April 2021 the claimant made a written complaint to the respondent regarding the recruitment process (pages 45 – 47 of the bundle. The claimant raised a number of wide-ranging concerns about the recruitment process. One of the concerns raised by the claimant (in the 3rd paragraph of his letter at page 46 of the bundle) related to the comment about his age as referred to above and in respect of

which the claimant stated that age is a protected characteristic for the purposes of the “Discrimination Act 2010” and that it was totally unacceptable to make reference to it in such a way. The claimant further stated that the comment insinuated that the claimant was less suitable for the job because of his age, that it was illegal to discriminate against someone because of their age and that it had placed him in a difficult position as he did not know the ages of the remaining candidates and was therefore unable to answer the question fully.

11. The claimant's complaint was acknowledged by the respondent on 1 April 2021 and the claimant was provided with a copy of the respondent's complaints procedure. The claimant was advised that response might be delayed because the respondent had just started the Easter break.
12. The claimant was further advised on 20 April 2021 that in the light of the wide-ranging nature of the claimant's complaint the respondent had decided to appoint an external investigator which meant that the time scales in the complaints procedure would need to be varied to accommodate this.

The Investigation Report dated 10 July 2021

13. On 10 July 2021 the investigator Dr Grey sent the claimant and the respondent his investigation report which is at pages 65 – 68 of the bundle. The report identified three areas of complaint by the claimant including in respect of the comment relating to the claimant's age. The claimant was advised that it was accepted that the comment had been made and that that aspect of the complaint had therefore been upheld. The claimant was further advised however that no evidence had been found of any age bias, that the comment was considered to be an unfortunate turn of phrase rather than evidence of discrimination and in respect of which the Governor concerned had been advised accordingly. The claimant was advised that he had the right to appeal within 20 working days.

The claimant's letter dated 15 July 2021

14. The claimant wrote to the respondent by a letter (which according to the Index) was dated 15 July 2021 which is at page 69 of the bundle. The claimant stated in the letter that he was writing to seek clarification of certain issues and that the letter could be taken as an appeal, if necessary, in order “to continue the conversation”. The claimant raised two principal issues namely relating to a breach of confidentiality relating to his psychometric test and in respect of the age-related comment made during the interview. The claimant took issue with the respondent's description of the comment as an unfortunate turn of

phrase and contended that it gave a window into the thought processes of a member of the selection panel. The claimant further stated that "Following legal counsel" he was satisfied that a discriminatory question had been posed and that the respondent could not prove that discrimination did not take place. The claimant pointed out that age was one of a number of legally protected characteristics and drew analogies with the question being asked in the context of other protected characteristics. The claimant concluded his letter by advising the respondent that its letter had not provided a sufficient answer to his complaint and asked the respondent how it proposed to compensate him for the age discriminatory and data protection issues referred to above.

The respondent's letter dated 29 July 2021

15. The respondent replied by a letter dated 29 July 2021 which was sent to the claimant by e-mail the following day. The letter from the Chair of Governors, Mr S Cleverly responding to the issues raised by the claimant is at pages 71 - 72 of the bundle. The respondent denied that any age discrimination had occurred including as the claimant's age was never considered during the selection process as evidenced by the fact that the claimant was taken through all stages of the interview process. The letter concluded by advising the claimant that if notwithstanding the additional reassurances, the claimant still wished to appeal he should do so in writing by 27 August 2021 setting out what remedy he was seeking.

The claimant's without prejudice email dated 27 August 2021

16. On 27 August 2021, the claimant sent a reply to the respondent which is at page 73 of the bundle the subject of which is stated to be "Without Prejudice". The claimant stated that following communications from the respondent he had taken further professional advice and was writing to outline the remedy he was seeking and why. The claimant requested a without prejudice conversation regarding financial recompense for the inconvenience, emotional distress and potential negative impact on his future career. The claimant gave two reasons for his request namely, the dissemination of his personal sensitive data which he believed had had an adverse effect on his ability to secure other roles in Devon and also because he did not accept that no age discrimination had occurred. The claimant further stated that prefacing a question in the manner complained of demonstrated that there was an underlying prejudice in at least one of the panel members.

The respondent's responses

17. The respondent responded on 16 September 2021 advising the claimant that it had noted his request and would get back to him shortly. The respondent emailed the claimant again on 1 October 2021

advising him that having sought advice from the county solicitor the respondent had decided that it should not engage in without prejudice discussions. The claimant responded by initiating the ACAS and Tribunal proceedings referred to above.

The reasons for the delay in presenting the proceedings

18. The claimant has given two reasons for the delay in presenting the proceedings. The primary reason was that he had exhausted the complaints procedure before seeking to initiate proceedings. The further explanation, which emerged during the proceedings, was that he was unaware of any relevant time limits until he investigated the process involved in bringing a Tribunal claim.
19. The claimant contended in respect of the latter that: - (a) he had taken informal advice before writing his letter dated 15 July 2021 from a friend who was a HR lawyer however there was no discussion about any time limits for bringing a claim (b) he had taken further advice from a Headteacher colleague before writing his letter dated 27 August 2021 however, again, there was no discussion about time limits and (c) he had started to investigate the possibility of bringing a Tribunal complaint in the middle of September 2021 at which time he discovered the position with regard to statutory time limits. The claimant has not produced any documentary evidence regarding such matters however the Tribunal accepts, on the balance of probabilities, the claimant's evidence regarding such matters.

The question of prejudice

20. Both parties were asked to address the question of prejudice. Neither party identified any prejudice other than (the claimant) the prejudice of not be able to pursue the claim and (the respondent) the cost and inconvenience of being required to defend a claim that had not been presented within the primary statutory time limit.

Closing submissions

21. The Tribunal has had regard to the oral closing submissions/ legal authorities relied upon by the parties which are referred to further below:-
 - 21.1 In brief summary, the respondent contended as follows:- (a) section 123 of the 2010 Act requires a complaint of discrimination to be presented within the relevant 3 month time limit or within such other period as the Tribunal considers just and equitable (b) the Tribunal has a discretion to extend time but there is no presumption that an extension should be granted and the burden is on the claimant to satisfy the Tribunal that it is just and equitable to do so (c) the authority of **Robertson v Bexley** (referred to below) makes it clear that time limits are not just targets but should be strictly enforced (d) as stated in **Adedeji** (also referred to below) the Tribunal should have regard to the relevant circumstances of the

case including in particular the length and reasons for any delay (d) the legal authorities make it clear that the pursuit of an internal procedure does not of itself justify an extension of time and that something more is required (e) the claimant has not provided sufficient reason for the Tribunal to exercise its discretion to extend time on just and equitable grounds. By 29 July 2021 the claimant had been given clarification of the respondent's position regarding his complaint of age discrimination and given an opportunity to appeal however the claimant elected to initiate/ engage in without prejudice discussions with a view to reaching a financial settlement (f) the primary time limit expired on the 23 June 2021 accordingly the claimant's complaint was approximately 3 1/2 months out of time and in respect of which he has not provided a credible explanation for the delay (g) the claimant did not submit his claim until the beginning of October 2021 notwithstanding that he is an Executive Headteacher with experience of staff related matters who was aware of the statutory time limits by, at the latest, September 2021.

21.2 The respondent relied in particular on the legal authorities of **Robertson v Bexley Community Centre 2003 IRLR 434 CA** and **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** together with the EAT judgment of **Wells Cathedral School Limited (1) and Mr Stringer (2) v Mr M Souter(1) and Ms K Leishman (2) EA -2020 -000801- JOJ (previously UKEATPA/0836/20/JOJ)** and the further authorities referred to therein.

21.3 In brief summary, the claimant relied in particular on :- (a) the guidance contained in the **Wells** case regarding the balancing exercise to be undertaken by the Tribunal including with regard to the length and reasons for delay together with the question of prejudice and in which case the Tribunal had found in favour of the claimants (b) the claimant believed that his complaint was being swept under the carpet and that the respondent had failed to demonstrate that the discriminatory comment had no effect on the decision making process (c) the claimant was unaware of any statutory time limits until September 2021 and (d) the claimant believed that in all the circumstances, it was, in any event, a reasonable decision to await the outcome of the internal procedure, pursuant to which the respondent had invited the claimant to identify the remedy sought, before pursuing his claim to the Tribunal.

The Law

22. The Tribunal has regard in particular to section 123 (1) of the 2010 Act together with the helpful comprehensive recent review of the relevant authorities undertaken by His Honour Judge Auerbach in the EAT Judgment of **Wells** referred to above.

23. The Tribunal has reminded itself in particular of the following:-

- 23.1 Pursuant to section 123 (1) of the 2010 Act, a complaint of discrimination may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint related or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period 123 (3) (a) of the 2010 Act.
- 23.2 There is no presumption in favour of an extension of time. A good reason for an extension generally had to be demonstrated albeit that the absence of a reason would not necessarily be determinative.
- 23.3 As stated in the Judgment of Adedeji Tribunals are cautioned against adopting a mechanistic use of the checklist contained in the Judgment of British Coal Corporation v Keeble [1997] IRLR 336 EAT as the factors which are relevant in a given case are case sensitive and must be identified by the Tribunal on a case by case basis.
- 23.4 The pursuit of an internal grievance does not automatically enable a claimant to say that it was not just and equitable to have issued in time if the grievance process had exhausted the statutory limitation period however, it may be a relevant factor.
- 23.5 The fact that there has been no forensic prejudice caused to the respondent by the delay is not, in and of itself, necessarily decisive.
- 23.6 Whether it is just and equitable to extend time will depend on the Tribunal's weighing in the balance all the factors that it regards as relevant in the case. In some cases, the features may not be enough in all the circumstances to persuade the Tribunal to extend time but in others they may.
- 23.7 This is a different, less stringent, test to that applied in unfair dismissal claims where the principal consideration is one of reasonable practicability.

THE CONCLUSIONS OF THE TRIBUNAL

24. Having given the matter careful consideration, the Tribunal considers the following matters to be of particular significance in the balancing exercise to determine whether it is just and equitable to allow the claimant's complaint to proceed: -

The delay in commencing the proceedings

24.1 The delay in commencing the proceedings – the last act of age discrimination complained of occurred on 24 March 2021 (the decision not to appoint the claimant (or the remaining candidate) to the post). The claimant's complaint of age discrimination was presented on 6 October 2021 and therefore (disregarding any period of ACAS Conciliation which does not assist the claimant in

this case as the primary statutory time limit had expired before he contacted ACAS) the complaint was presented over 3 months after the expiry of the primary time limit (which expired on 23 June 2021). The claimant recognised in his claim form that “this claim is over time” (page 8 of the bundle).

The reason for the delay

24.2 The reason for the delay – the primary reason advanced by the claimant for the delay (and the only reason advanced in his claim form) was that he had just exhausted the internal complaints procedure. On the facts, the claimant received on 1 October 2021 the letter from the respondent advising him that it was not prepared to agree to his request to engage in without prejudice discussions, completed the ACAS procedure on 2- 4 October 2021 and presented his claim form on 6 October 2021.

24.3 The Tribunal has also taken into account that: -

24.3.1 the claimant sought, and obtained, clarification of the respondent’s position regarding the allegations of age discrimination by 29 July 2021 and did not request any further information from the respondent thereafter.

24.3.2 Following the receipt of the above, the claimant took no further action until 27 August 2021 at which time he initiated (in response to the respondent’s invitation to identify the remedy which he was seeking) a request for without prejudice discussions to secure a financial settlement of the age discrimination and data breach claims. The claimant did not otherwise seek any further resolution of his complaint of age discrimination through the complaints procedure.

24.3.3 This is not a case in which the claimant contends that he received negligent advice regarding the operation of the statutory time limits. The claimant’s case is that he was not made aware during the brief discussions with an HR lawyer/ colleague of any relevant time limits. Further, notwithstanding that he is an Executive Headteacher with experience of staff related matters, the claimant did not make any enquiries of his own until September 2021. The claimant, in any event, accepts that he became aware of the statutory time limits for presenting a complaint of age discrimination by the middle of September 2021 but that he did not initiate ACAS Early Conciliation or present his claim to the Tribunals until the conclusion of the grievance procedure at the beginning of October 2021.

The question of prejudice

24.4 As stated previously above neither party identified any prejudice over and above the prejudice of being unable to pursue or the cost and inconvenience of being required to defend the proceedings. There is no suggestion in this case that the delay has adversely affected the cogency of the evidence. Further, the respondent has admitted the relevant age-related comment.

The balancing exercise

25. When exercising its discretion, the Tribunal has considered the matter in the light of the relevant legal provisions / authorities referred to previously above including in particular that :- (a) section 123 (1) of the 2010 Act provides that a complaint of discrimination may not be brought after the end of the relevant 3 month period or such other period as the Tribunal thinks just and equitable (b) there is no presumption in favour of granting an extension of time with a claimant generally being required to demonstrate a good reason for such an extension (c) the pursuit of an internal grievance and/or the absence of any forensic prejudice caused to the respondent by the delay are likely to be relevant factors but are not of themselves decisive.
26. Having given the matter careful consideration, the Tribunal is not satisfied, in all the circumstances of this case, that it is just and equitable to extend the time limit to enable the claimant to proceed with his complaint of age discrimination, including that the claimant has provided sufficient reason for such delay.
27. When exercising its discretion, the Tribunal has taken into account the absence of any contended forensic prejudice caused to the respondent by the delay and the claimant's pursuit of the internal grievance procedure. The Tribunal has however, balanced against such factors that the claimant's claim form was not presented to the Tribunals until 6 October 2021 notwithstanding that the primary time limit expired on 23 June 2021 together with the further matters identified at paragraph 24.3 above which the Tribunal considers to be the decisive factors in this case.
28. When reaching its conclusions, the Tribunal has taken into account the EAT Judgment in **Wells** (together with the further authorities referred to therein) which is relied upon by the claimant in support of his case. In the **Wells** case The Tribunal (as upheld on appeal) exercised its discretion to allow the discrimination claims to proceed where the claimants had pursued an internal grievance procedure before pursuing Tribunal proceedings in circumstances in which many of the claims were, on the face it, presented significantly after the expiry of the initial 3-month time limit. The Tribunal is however satisfied that the

Judgment in **Wells** does not change the outcome in this case as the authorities (including **Wells**) make it clear that the exercise of the Tribunal's discretion will turn on the individual circumstances of the relevant case. Moreover, the Tribunal is, in any event, satisfied that there are significant differences between the circumstances of this and the **Wells** case including, by way of example, that in the latter case, many of the factual allegations formed the basis of both the discrimination and other statutory claims which would still have required determination by the Tribunal if the discrimination claims had not been allowed to proceed which is not the case here.

29. In all the circumstances the Tribunal is not satisfied that the claimant has provided sufficient reason for the Tribunal to exercise its discretion to extend the statutory time limit to allow the complaint of age discrimination to proceed on just and equitable grounds. The Tribunal does not therefore have jurisdiction to entertain the complaint.

Employment Judge Goraj
Date: 25 August 2022

JUDGMENT SENT TO THE PARTIES ON
8 September 2022 by Miss J Hopes

FOR THE OFFICE OF THE TRIBUNALS