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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Abubakar

**Respondent:** Waltham Forest College

**Heard at:** East London Hearing Centre

**On:** 3 April 2018

**Before:** Employment Judge Jones (sitting alone)

## Representation

**Claimant:** In person

**Respondent:** Mr L Harris (Counsel)

## JUDGMENT

The judgment of the Employment Tribunal is that:-

- 1** The claim was not presented within the relevant time limit set by the Equality Act 2010.
- 2** There is a continuing act in this case in relation to the Claimant's management by Dawn Bennett and the Respondent's handling of his grievance and grievance appeal. It is also just and equitable to extend time. The Tribunal has jurisdiction to hear the following complaints from the agreed list of issues: 2(a), 2(b), 2(c), 2(d), 2(h), 2(k), 2(i); 3(i), 3(ii), 3(iii) and 3(iv).
- 3** The Tribunal does not have jurisdiction to consider the complaints raised in paragraphs 2(e), 2(f), 2(g), 2(i) and 2(j) of the agreed amended list of issues.

## REASONS

1 The Claimant brought a complaint of race discrimination at the Employment Tribunal by way of an ET1 filed on 17 December 2017. The ACAS certificate noted that the Claimant contacted ACAS on 17 November 2017. The certificate was issued on 17 December 2017. The Claimant's complaint was therefore issued on the same day that he received the ACAS certificate.

2 In the grounds of resistance, the Respondent contended that the Tribunal did not have jurisdiction to hear any complaints of discrimination that relates to any act or omission that occurred on or before 17 August 2017. Three months before 17 November 2017 would be 17 August 2017.

3 The Respondent also denied that there was any conduct extending over a period, under section 123(3) Equality Act 2010 which would bring the Claimant's complaints within time.

4 This hearing was arranged by Employment Judge Foxwell who conducted a preliminary hearing in this matter on 12 March 2018 at which the issues were settled.

### **Law**

5 Section 123 of the Equality Act 2010 states that proceedings on a complaint of discrimination at work may not be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

6 Section 123(3) states that conduct extending over a period is to be treated as done at the end of the period. This is what is known as a 'continuing act'.

7 The leading case on this issue is the case of *Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96. In that case the Court of Appeal stated that the correct focus of the tribunal in assessing whether or not there was a continuing act should be whether the employer was responsible for an ongoing situation or continuing state of affairs in which the members of the defined group were treated less favourably. It was not necessary to place close attention to words such as 'policy', 'rule', 'practice', 'scheme', or 'regime' as these were but examples of when an act extends over a period. It was held that the Claimant was entitled to pursue her claim on the basis that the burden was on her to prove, either by direct evidence or by inference, that the numerous alleged incidents of discrimination in her case were linked to one another and were evidence of a continuing discriminatory state of affairs, by the concept of 'an act extending over a period'.

8 *Harvey* set out that in deciding whether a particular situation gives rise to an act extending over a time, it will also be appropriate to have regard to (a) the nature and conduct of the discriminatory conduct of which complaint is made, and (b) the status or position of the person allegedly responsible for it. A single person being responsible for discriminatory acts is a relevant but not conclusive factor in deciding whether an act has extended over a period. (*Aziz v FDA* [2010] EWCA Civ. 304).

9 The Tribunal also has the power to extend time, on a just and equitable basis, if the complaints are considered to be out of time and are not part of a continuing act.

The Claimant's case was that the Tribunal should exercise its discretion to extend time a just and equitable basis because the delay in issuing proceedings was due to him waiting for the Respondent to conclude the grievance process in which he had raised allegations of race discrimination. It is also the Claimant's case that the Respondent has still to date, not yet investigated his grievance fully.

10 The Tribunal is aware that time limits in the Employment Tribunal are strictly applied. The Claimant has to persuade the Tribunal that it is just and equitable to use its discretion to extend time in this particular case.

11 In the case of *Robinson v Post Office* [2000] IRLR 804 it was held that a delay caused by the Claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings may justify the grant of an extension of time but that is merely one factor that must be weighed in the balance along with others that may be present. There is no general principle that an extension should always be granted where delay is caused by the Claimant invoking an internal grievance or appeal procedure. Such a suggestion was rejected in the case of *Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116.

12 The Tribunal has a wide discretion to grant an extension of time under the 'just and equitable' formula which is similar to that given to the civil courts by section 33 of the Limitation Act 1980. This is referred to in the case of *British Coal Corporation v Keeble* [1997] IRLR 336. Under section 33, the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular (a) the length and 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 parties sued had cooperated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. In the case of *London Borough of Southwark v Afolabi* [2003] EWCA Civ. 15 it was held that although these factors will serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion. There is no requirement for a tribunal to expressly rehearse these factors and 'balance them off'.

13 The Tribunal was aware that there were at least two types of prejudice which the Respondent may suffer if time is extended in this way. Firstly, the Respondent will have to meet claim which has been issued outside the time limit and secondly, it may suffer what *Harvey* refers to as 'forensic prejudice', especially if limitation is extended by many months or years; caused by fading memories, loss of documents and losing touch with witnesses who have moved on. Such forensic prejudice could be crucially relevant the exercise of the discretion. If there is no such forensic prejudice to the Respondent, that will not be decisive in favour of an extension and, depending on the Tribunal's assessment, may not be relevant at all.

14 The reasons put forward by the Claimant for failing to issue a claim in time is one of the factors to be considered when a tribunal is considering whether to use its discretion to extend time. The Tribunal is to take a multifactorial approach, with no

single factor been determinative of the issue. The Tribunal is also to consider the balance of prejudice as set out above and the potential merits of the claim.

***Decision***

15 The Claimant brings a complaint of race discrimination. The allegations that make up that complaint had been helpfully set out in the list of issues at 28J1 of the bundle before me today. The allegations date from November 2016 to November 2017.

16 The claim was issued on 17 December 2017 with the Claimant having first contact ACAS on 17 November.

17 Applying the law in section 123 of the Equality Act, the Claimant should have contacted ACAS within a period of three months after the date of the act complained of. Therefore, his complaints about matters that occurred prior to 17 August 2017 had been issued out of time. The only allegations that are in time are those numbered 2L and 3iv on page 28J3.

*Was there a continuing act?*

18 In my judgment, the Claimant raised what he considered to be racially discriminatory comments from a colleague, Mr Hamilton, to his line manager, Ms Dawn Bennett in November 2016 and February 2017. He considers that the allegations were never investigated or addressed. I was not told that she had investigated those complaints.

19 The Claimant raised these allegations again in an email to Peter Stone dated 7 February 2017 which the Respondent stated was addressed at the probation review meeting on 6 March 2017. The Claimant considers that they were not addressed at that meeting. Although it is the Respondent's case they were addressed at that meeting, in a subsequent report following his appeal against the grievance outcome; Miss Chesters agreed that there was a failure to address the first grievance in accordance with the Respondent's grievance procedure.

20 The Claimant also complains that the investigation report produced by Sandra Small failed to address his grievance. Ms Chesters' findings on his appeal also confirmed that Ms Small's investigation failed to make any enquiry or any finding as to why the Claimant's first grievance to Peter Stone was dismissed without any grievance hearing. It is also his case that Ms Small did not investigate the grievance properly, as there is no statement from Mr Stone or Mr Hamilton referred to in her report.

21 It would appear that internally, the Respondent did appreciate it had not investigated the Claimant's grievance as there are emails between Miss Thompson, the Respondent's head of HR and the principal, discussing how to proceed to investigate the grievance, in May 2017. A meeting to discuss the grievance with the Claimant took place in July 2017. This was part of Miss Small's investigation.

22 As already stated, the Claimant was unhappy about that investigation and appealed. The appeal hearing was conducted on 10 November 2017. The Claimant's

report as to what Ms Chesters said to him in the appeal hearing is different to what is stated in her outcome letter. Her decision was that the matter was closed and that even though there was there had been a failure to investigate his grievance in the beginning, Miss Small's investigation had addressed the matter and there will be no further investigation. That is not what her outcome letter says but it was Ms Thompson's evidence at this hearing, that this is what the outcome letter meant. It is the Claimant's belief that this is a continuing act of discrimination as the Respondent has never properly addressed the grievances in which he alleged race discrimination.

23 The Claimant also raised a grievance that Mr Stone had threatened him with dismissal if he did not resign and it does not appear that this has been investigated. In a meeting Ms Thompson advised the Claimant that this issue could not be ignored as he had raised it formally but there is no investigation of it.

24 In his claim the Claimant raises various issues in regard to his management by Dawn Bennett such as: that he has only had two probation reviews, that he was required to work as a counter assistant while other white lecturers were not required to do so, that he was given inadequate contact time with students in comparison with white staff and that his confidential information was shared with Mrs Scarfe by Peter Stone. Those were also of race discrimination.

25 In my judgement, the Claimant's complaints with regard to his management by Dawn Bennett are inextricably linked to the Respondent's response to his grievances. It was Dawn Bennett to whom the Claimant first raised the issue of Mr Hamilton's offensive remarks and it was Ms Bennett who was allegedly dismissive of those remarks and took no action on them. It was also Ms Bennett who reported on the Claimant's performance at the probation review and supported/recommended the decision to dismiss him. Ms Bennett made decisions about the amount of work that the Claimant should do and the number of hours he should work. It was also her decision to include his complaint about Mr Hamilton's comment in her probation report as an example of his difficult relationship with colleagues. It is the Claimant's case that the Respondent treated him less favourably on grounds of his race in relation to how they managed him and how they have responded to his grievances. Even though the decisions on his grievances in July and November and decisions on his management were taken by different people, it is open to the Claimant to prove that they are still part of a continuing act by the Respondent.

26 Even though Miss Chesters states in her outcome letter that the investigation report failed to make any enquiry or any finding as to why the Claimant's grievance raised with Peter Stone was dismissed at the probation meeting without any grievance hearing and apologises for this she also states that any further investigation into the first grievance is unnecessary. She did not explain why that was so. It is also open to the Claimant to prove that the grievance has still not been investigated.

27 It is therefore this Tribunal's judgement that the Claimant has alleged that the Respondent was responsible for an ongoing situation or continuing state of affairs in which black Africans were treated less favourably in the way in which they are managed at work, in respect of complaints of discrimination that they raise and in relation to their data. It is this Tribunal's judgment that there is a continuing act in

relation to the Respondent's response to the Claimant's grievances and his management by Ms Bennett.

*Is it just and equitable to extend time to consider the out of time complaints?*

28 The complaint at 2(h) on page 28J2 is a matter the Claimant only became aware of in October 2017.

29 I considered that the Claimant's reason for the delay in issuing his complaint was genuine. The Claimant knew about the three-month time limit, having brought an Employment Tribunal claim against a previous employer. However, the issue of time limits had not been an issue in that case. The Claimant had a mistaken belief that he had to wait until the internal grievance procedures were completed before he could bring a complaint to the Employment Tribunal. This is a factor that I took into account in deciding whether it is just and equitable to extend time.

30 The delay was not due to the Respondent misleading the Claimant or failing to provide information that he had requested. I note from the file before me today that his subject access requests were complied with and he was provided with that information in a timely manner. Also, in her evidence today, Ms Thompson confirmed that the Claimant had been in contact with the Respondent throughout the time that the grievance and grievance appeal were being addressed. The Respondent would have been aware that he was pursuing the matter. Ms Thompson confirmed that Miss Small was no longer employed by the Respondent and that the Respondent would have to arrange for her to attend the Tribunal and give evidence. It did not appear that any particular difficulty was envisaged in that regard. Ms Thompson also confirmed that as far as paperwork was concerned, there would be no difficulty in the Respondent retrieving the relevant documents for the final hearing. As I was not told otherwise, it is likely that Ms Thompson and Ms Bennett who are likely to be potential witnesses for the Respondent, are both still employed by the Respondent.

31 I weighed up the prejudice to both sides. If these complaints were not allowed to proceed, the Claimant will only have his complaint about the grievance appeal conducted by Ms Chesters, before the Tribunal. He would not be able to make complaints about the way in which he was managed, the way in which the first grievance was handled by the Respondent, including the way in which it was addressed by Miss Small in July. The Claimant considers that these allegations show a continuous act of race discrimination towards him. There would no assessment of that complaint if time was not extended. If these complaints were allowed to proceed, the Respondent would be faced with the difficulty of having to arrange for Ms Small to attend the Tribunal hearing as she is no longer employed by it. Ms Thompson and Ms Bennett will have to recall events that took place about a year ago.

32 The Respondent took an inordinately long time to consider the Claimant's grievance. Ms Thompson confirmed in her evidence today that she got the Claimant's email raising his grievance on 7 February. She considered it was appropriate to address it through the probation meeting but did not inform the Claimant of that decision. An investigator was not appointed until 20 May even though from her evidence, the Respondent's policy suggests that the whole process should be completed within 20 to 28 days. The appeal against the grievance decision was not

heard until 10 November. It was not submitted to the Tribunal that those delays were due to the Claimant's actions. The delay in addressing the Claimant's grievance is a matter that could have caused him some distress and prejudice, since, if the grievance process had been started sooner, it is likely that the decision and any resultant appeal will also have occurred sooner.

33 I considered whether it was reasonable for the Claimant to wait until the end of his grievance process before issuing proceedings. The Respondent submitted that it was not reasonable for him to do so as the Claimant had previous experience of the Employment Tribunal process as stated above and was aware of the three-month time limit. However, in my judgment, it is also a consideration that although he had raised a grievance in a previous case, time limit had not been an issue and it was reasonable to try to resolve the matter internally before rushing to the Employment Tribunal.

34 It is my judgement that the Claimant always firmly believed that he was being treated less favourably because of his race by the Respondent from early in his employment until November 2017. That is evident from this correspondence and from his persistence with the grievance and his decision to issue these proceedings.

35 It is also true that the Claimant failed to do any research on time limits because he believed he already knew the answer. He believed that he had to wait until he had exhausted the internal procedures before you bring a claim. In these particular circumstances, it is my judgement this was not unreasonable conduct by the Claimant. Even though he had been dismissed in March, the matter had not been completed as far as he was concerned. This did not happen until he received the outcome of the grievance appeal. Once he received Ms Chesters' decision on his grievance appeal dated 17<sup>th</sup> November, he immediately contacted ACAS on the same day to start the early conciliation process.

36 Taking into account all these matters and weighing up the prejudice to both sides, it is this Tribunal's judgement that the Claimant would be severely prejudiced, if time was not extended. The prejudice against him outweighs that to the Respondent in allowing his complaints about his line management and the handling of his grievance to proceed.

37 In this Tribunal's judgement it is just and equitable to extend time for the matter complained of in 2(h) to be considered as the Claimant only discovered that Mr Stone had shared his confidential information with Ms Scarfe, in October 2017.

38 It is this Tribunal's judgement that the allegations regarding the Claimant's line management are inextricably linked to those concerning the handling of the grievance so that they could be considered to be part of a continuing act extending to 17 November 2027. It is also this Tribunal's decision that it is just and equitable for time to be extended to enable the Tribunal to consider those complaints.

39 In this Tribunal's judgment, the Tribunal can consider the complaints listed as 2(a), 2(b), 2(c), 2(d), 2(h), 2(k), 2(i); 3(i), 3(ii), 3(iii) and 3(iv).

40 The Tribunal does not have jurisdiction to consider the complaints raised in paragraphs 2(e), 2(f), 2(g), 2(i) and 2(j) of the agreed amended list of issues on page

28J2 of the preliminary hearing bundle; as they were issued outside of the time limit set in section 123 Equality Act 2010. They are not part of any continuing act and it is not just and equitable to extend time to enable them to be considered.

41 The parties will now comply with the Orders and Directions given by Employment Judge Foxwell on 12 March for the preparation of this case for the Hearing listed on 13, 14, 15, 19 and 20 June 2018 at these Employment Tribunals.

Employment Judge Jones

12 April 2018