"Suspicion" unlikely to be a relevant factor in decision to extend time

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Jones v SoS for Health and Social Care [2024] EWCA Civ 1568

Summary

1. The Court of Appeal found that an employment tribunal acted perversely in deciding that it was not just and equitable to extend time for a race discrimination claim to be brought outside the primary limitation period and expressed doubts as to whether suspicion would ever be a relevant factor in the assessment of whether it was just and equitable to extend time.

Background

2. The Claimant (C) was of African-Caribbean descent. He applied for a role with R on 8 March 2019. There was an initial paper sift which he passed, along with other candidates. C was interviewed on 28 March 2019. The candidates were asked standard questions and scored against a matrix. C scored the second highest of the four candidates who had been interviewed and R considered C to be appointable. However, the candidate who received the highest score was offered and accepted the role on 2 April 2019. All candidates other than C were of white ethnic origin.

3. C was not told that he had been unsuccessful until 3 July 2019, and only then after he had chased on a number of occasions. The employment tribunal ("ET") found that this was as a result of a genuine error. He was informed that the reason for the decision not to employ him was "it was just on the day there was a stronger candidate". The primary three-month limitation period had already expired two days earlier.

4. On 24 July 2019, C wrote to R asking whether any of the other candidates considered for the role were from a minority background, and requested details of the successful candidate's age, gender and ethnic origin. He informed R that he required these details as he was raising

a grievance and raised the prospect of an ET claim. R responded that it could not divulge the requested details on data protection grounds.

5. C commenced ACAS early conciliation on 30 September 2019, outside of the primary limitation period, and submitted an ET claim on 29 October 2019.

Claim before the ET

6. In a statement attached to his ET1. C asserted that his claim was based upon the "suspiciously and unexplained long period of time" it took to make the decision, and the feedback provided to him on 3 July 2019. R responded that the claim was submitted out of time, denied discrimination and asserted that the claim was misconceived in that C had no prima facie case for his claims simply stating that he was "suspicious" that R was "hiding something".

7. The ET3 stated that the other unsuccessful candidates were white but did not mention that the successful candidate was also white. It was only at a preliminary hearing on 23 June 2020, at which the Respondent had applied for an order that the claim should be struck out, that the Respondent confirmed that the successful candidate was white. The claim was not struck out at the preliminary hearing and proceeded to a final hearing.

8. The ET dismissed the claim on the merits but went on to consider the time limit issue. It found that C was aware in August 2019 that he had "the raw material" to make a claim and had sufficient information and knowledge about the basis of the claim when he was informed on 3 July that he had not got the job as he was "already suspicious" by that point in time.

Appeal to EAT

9. C appealed on a number of grounds, including that the decision not to extend time on just and equitable grounds was perverse. Following the appeal hearing, the EAT held that the ET had made no error of law in refusing an extension of time, and that it was accordingly unnecessary to consider the other grounds. The appeal was consequently dismissed.

Court of Appeal

10. C appealed to the Court of Appeal on two grounds:
    a. that the EAT was wrong to determine that the ET did not act perversely in refusing to extend time for the Claimant to bring his claim; and

b. that the existing test (arising from *Barnes v Metropolitan Police Commissioner* UKEAT/0474/05) for prior knowledge was unfair.

Ground one

11. Bean LJ, giving the judgment of the Court, found that the ET (and by extension, the EAT) were wrong to find that C had "the raw material" on which to formulate a claim in July or August 2019. At that stage, C had been informed that he had been unsuccessful in his application, but the ethnicity of the successful candidate was an essential element of his claim. That information was not revealed until the preliminary hearing on 4 March 2020.

12. The Court of Appeal held that the ET ought to have set out its findings regarding the extent of the delay and the reasons for it and to have made findings as to whether the delay had prejudiced R. On the question of prejudice, the Court noted that there was no suggestion that actual (as opposed to theoretical) prejudice had been caused to R by the ET1 not having been issued until 19 October 2019, and R had been on notice since C's letter of 24 July that an employment tribunal claim was a possibility.

Ground two

13. The EAT referred to *Barnes v Metropolitan Police Commissioner* and the Court of Appeal concluded that the EAT attached considerable weight to the fact that C was "already suspicious" by August 2019 that he may have been the victim of discrimination.

14. Bean LJ was critical of *Barnes* generally, noting that it was an unreported case which was not "even referred to in the current version of *Harvey*". He doubted that it laid down any test for the assessment of suspicion in just an equitable extension assessment, but to the extent that it did he did not agree with it.

15. Bean LJ stated that in many cases involving the "just and equitable" discretion it will be highly relevant if the Claimant knew all the facts necessary to establish a discrimination claim but then failed without good reason to act promptly, but he was not of the view that suspicion, or a firmly held belief based on suspicion, was a relevant factor in such an assessment. He concluded that promptness in bringing ET claims remains important but that cases should not be brought on mere suspicion.

16. C's appeal was consequently successful, and the remaining grounds were remitted for the EAT to determine.

Comment

17. Whilst much of the Court of Appeal's analysis is fact-specific, Bean LJ is clear in his criticism of *Barnes* and the previous approach of the EAT regarding cases in which a claimant's suspicion of discrimination was treated as a relevant factor. It seems likely that *Barnes* was wrongly decided in so far as it appeared to lay down a test for prior knowledge or suspicion of discrimination and tribunals are likely to have little regard for it in the future.

18. This case also highlights the difficulties faced by prospective claimants in discovering sufficient information to bring a discrimination claim since 2014, after the repeal of the statutory questionnaire procedure. Perhaps unsatisfactorily, a claimant's only real option when faced with similar difficulties encountered by Mr Jones is to commence proceedings and make an application for disclosure under ET Rule 33.

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