# A short delay and the 'just and equitable' test

**ALICE SCOTT, Pump Court Chambers**

*The Court of Appeal has provided important guidance in Adedeji on the exercise of the tribunal's discretion to extend the period in which a claim for discrimination can be presented under s.123(1)(b) ERA. It also warned against treating the factors in s.33 Limitation Act as a checklist or rigid framework to reach a decision.*

***The facts of the case***

This case concerned an application by Mr Adedeji, a consultant colorectal surgeon, who resigned following a demotion and sought to bring claims for unfair dismissal and race discrimination. Just a few days before his resignation, he had contacted Acas; however, a couple of days after that, he withdrew the application and Acas issued an early conciliation certificate. He resigned with three months' notice on 25 May 2017, with his effective date of termination being 25 August. The expiry of the time limit to commence a claim was, therefore, 24 November. Mr Adedeji sought legal advice just before this deadline and was advised of this, but did not contact Acas again until 23 November and commenced his claims in the employment tribunal on 27 November.

Mr Adedeji's claim was presented three days outside the three-month limitation period if, as he was arguing, the conduct entitling him to resign included an act of discrimination. However, for the allegations of discrimination prior to that, the delay was even longer as they related to acts from two-years earlier.

***The tribunal's decision***

The employment judge found that both claims were out of time and refused to grant extensions on the basis that, first, there was no good reason for the delay and, secondly, because of the impact on the cogency of the evidence and prejudice suffered by the respondent. The judge's reasoning included an analysis of the factors in s.33 Limitation Act, identified as relevant to the tribunal's overall discretion by Holland J in *Keeble*. Mr Adedeji was granted permission to appeal on one aspect of the claim of race discrimination.

***The Court of Appeal's decision***

The court was concerned with s.123(1)(b): was it just and equitable to grant an extension of the period in which Mr Adedeji could bring his claim for race discrimination when it had been presented three days late?

Underhill J, who gave the leading judgment, with which the other lords agreed, held that when exercising its overall discretion in considering s.123(1)(b), the tribunal can 'properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago'. He held that the employment judge was entitled to take this into account and, in any event, she had not treated this factor as decisive, but placed more weight on the absence of any good reason for the delay.

Underhill J added that 'the fact that the grant of an extension will have the effect of requiring investigation of events which took place a long time previously, may be relevant to the tribunal's assessment, even if there is no reason to suppose that the evidence may be less cogent than if the claim had been brought in time'. Thus, although evidence going towards the alleged historic discriminatory acts were recorded in emails in this case, there was still likely to be a need for oral evidence, with memories being tested; therefore, the cogency of the evidence was a relevant consideration for the tribunal in deciding whether to exercise their discretion.

Furthermore, the Court of Appeal held that the employment judge was entitled to take into account, indeed for it to weigh heavily against the grant of an extension,

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that Mr Adedeji had asserted that he misunderstood, initially, the effect of the Acas certificate. It found that this case was distinguishable from a typical case, where a claimant misses a deadline because of a misunderstanding or ignorance or they are unaware, as Mr Adedeji had been explicitly advised of the date of the expiry of the limitation period on two occasions but had chosen not to act on it. The appeal was accordingly dismissed.

***Obiter***

Underhill J commented, *obiter*, on the continuing influence of the decision in *Keeble* on the tribunal's discretion under s.123(1)(b). In doing so, he echoed a line of authorities in which the same sentiments, as to the weighty status that *Keeble* had habitually been given by the employment tribunal, had been commented upon (*Afolabi, Jones, Miller* and *Morgan*).

The judgment of Holland J in *Keeble* was quoted by Underhill J: 'The task of the tribunal may be *illuminated* by perusal of s.33 Limitation Act wherein a check list is provided' (emphasis added). He went on to say that it has become too regularly relied upon as the 'starting point for tribunals' when approaching decisions under s.123(1)(b), which he regarded as unhealthy. Underhill J did accept that the factors in s.33 may be relevant, but warned against 'rigid adherence to a checklist that can lead to a mechanistic approach to what is meant to be a very broad discretion'.

Underhill J set out what he considered as the 'best approach' for tribunals when approaching decisions under s.123(1)(b) as follows: tribunals should assess all the factors in the particular case that are relevant to whether it is just and equitable to extend time, with particular regard to 'the length of, and the reasons for, the delay'. Therefore, if the tribunal does check the factors against the list in *Keeble*, then that was 'well and good', but it should not provide a framework for the tribunal's thinking.

Also, of note, particularly for respondents, is Underhill J's *obiter* agreement with Auld LJ in *Robertson*, that strict adherence to time limits in the tribunal is in the public interest.

***Comment***

This is important guidance for tribunals when approaching decisions under s.123(1)(b); it serves as a further reminder that over-reliance and strict adherence to the factors in s.33 Limitation Act, accentuated in *Keeble*, should not be rigidly adhered to, or read as a checklist, but the tribunal should take all relevant factors into account.

Furthermore, it should serve as a warning for claimants who present their claims with only a very short delay, which may not appear substantial, but where the cogency of evidence pertaining to historic complaints as part of a continuing series of acts is going to be tested in oral examination; or where there is evidence of them being explicitly advised of the date of the expiry of the limitation period and not acting upon it.

***KEY:***

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| *Adedeji* | *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 21 |
| ERA | Employment Rights Act 1996 |
| Limitation Act | Limitation Act 1980 |
| *Keeble* | *British Coal Corp v Keeble* [1997] IRLR 336 |
| *Afolabi* | *Southwark LBC v Afolabi* [2003] ICR 800 |
| *Jones* | *Department of Constitutional Affairs v Jones* [2008] IRLR 128 |
| *Miller* | *Miller v Ministry of Justice* [2016] UKEAT 0004/15 |
| *Morgan* | *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 |
| *Robertson* | *Robertson v Bexley Community Centre* [2003] IRLR 434 |