Neutral Citation Number: [2024] EWCA Civ 1568

Case No: CA-2024-000354

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ Tayler, Ms E Lenehan, Mr C Lord
2024/EAT/2/21

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2024

Before :

LORD JUSTICE BEAN
LORD JUSTICE BAKER
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

DR NICHOLAS JONES	**Appellant**
- and -	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Respondent**

- -
- -

Jeffrey Jupp KC (instructed by **Advocate**) for the **Appellant**
Bayo Randle (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 02 December 2024

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Approved Judgment

This judgment was handed down remotely at 14:00 on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. This appeal concerns the application of the "just and equitable" test for extending the time in which to bring a discrimination claim.

The facts and the ET decision

2. The Claimant, Dr Nicholas Jones, describes himself in his ET1 claim form as being of African-Caribbean descent having being born in Bridgetown, Barbados. He applied for the role of Assistant Business Development Manager, Public Health England ("PHE") on 8 March 2019. There was an initial paper sift which he passed along with other candidates. Dr Jones was interviewed on 28 March 2019. The candidates were asked standard questions and scored against a matrix.

3. The Claimant was considered to be appointable and scored the second highest of the four candidates who had been interviewed. The candidate who received the highest score ("Candidate B") was offered and accepted the role on 2 April 2019. Candidate B is white, as are the candidates who came third and fourth.

4. The Claimant was not told that he had not been appointed 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. The primary three month limitation period had already expired two days earlier.

5. Mr Darren Clehane, a hiring manager at PHE, wrote on 3 July 2019:

> "Dear Nicholas
>
> Very many apologies – I believed I had sent feedback on your interview, previously. It did take us quite a while to complete things. It was a very strong bunch of applicants and we felt all of you were appointable (you were our "reserve"). We offered to someone who had broader and more directly relevant experience but I have asked that you are kept on our lists – and I would hope that you would apply for any similar posts in the future. My best guess is that at least one very similar position will arise in about six months' time. There is a possibility that one – with greater emphasis on marketing – may appear sooner. In terms of feedback, I'll keep it simple and stress there were no negatives – it was just on the day there was a stronger candidate. Again, many thanks for taking the time to apply. And, again, I am so sorry that this did not get to you, sooner. Do get in touch (use this direct email rather than go through the system) if you want further details. All the best, Darren."

6. On 24 July 2019, the Claimant sent an email asking a number of questions, including:

> "5. Can you confirm whether any other candidate(s) representing a minority group was/were considered for this role?"

> 6. Can you kindly describe the profile characteristics of the successful candidate to include age, gender and ethnic origin?
>
> I would ask that these queries be now considered as part of an official grievance which I am raising today with your office. I would also ask, with the utmost respect, that you provide me with a response ASAP, as I hope make a decision, on the basis of your response, whether or not I shall escalate this to the employment tribunal for consideration as to whether any specific violations occurred here. As a decision was made on May 9th, 2019, I believe I have until August 9th, 2019 to submit a claim.

7. It is not clear from where the Claimant got the date of 9 May. Be that as it may, the letter clearly put PHE on notice of a possible tribunal claim.

8. Correspondence ensued in which the Respondent contended that because of data protection issues they could not tell the Claimant the protected characteristics of the other candidates, but suggested that he could make an application under the Freedom of Information Act. The ET found that the reason the Claimant was not told the ethnic origin of the successful candidate was because he (Dr Jones) had not complied with the FOI policies of the respondent:

> "35. The material finding of fact which we made from all of that evidence is that the respondent did not refuse to provide the information in the way that the Claimant asserts. Rather, they were following their own procedures to ensure, as they saw it, compliance with the requirements of data protection law. Thus, where there was doubt about what was disclosable Mr Dwyer referred the matter to the Freedom of Information team and followed their guidance about what he could (or could not) disclose. He gave clear evidence that he would follow the guidance he was given. He would not refuse information that he was told by the team was disclosable. It is not relevant to the issues in this case (and the claimant's Equality Act claims) to decide whether or not the respondent did or did not understand the GDPR correctly. What matters is what caused them to act as they did: to exclude or disadvantage the claimant, or to follow the proper process as they understood it to be. Indeed, at one point the respondent said it would provide the documents if the claimant provided proof of identification. The claimant objected to doing this and so the parties were left at an impasse. At this stage, the factor which prevented the disclosure was not the respondent at all. Rather, it was the claimant's refusal to follow, what we consider to be a reasonable identification procedure. The respondent had a genuine concern that if they disclosed information about the profiles of the other candidates in such a small pool, it would render them identifiable. Whether this was right or not is certainly an arguable point and discloses the reason why they acted as they did. It shows that there was

> no conspiracy or desire to deliberately keep the claimant in the dark or cover up wrongdoing by the respondent."

9. It was not until 30 September 2019 that the Claimant commenced ACAS early conciliation; just under 3 months from the date on which he was notified that he had been unsuccessful in his application.

10. An ACAS early conciliation certificate was issued on 14 October 2019. This could not extend the period within which a claim could be submitted, unless an extension of time on just and equitable grounds was granted, because ACAS conciliation was only initiated after the primary limitation period had expired.

11. Dr Jones submitted a claim form that was received by the ET on 29 October 2019. The Department of Health and Social Care ("DHSC") was named as Respondent as being responsible in law for PHE. In the attached "statement" the Claimant wrote:

> "It is therefore based on the suspiciously and unexplained long period of time that it took to make a decision in this recruitment, and primarily comments made by Darren Clehane in his July 03rd response on this matter, that I submit this claim of direct and/or indirect discrimination by PHE in the violations of my civil and statutory rights and protections as a minority candidate on the basis of my race and/or age. I should make clear here that I have sought and requested pertinent information regarding my suspicions and the allegations being made here from the PHE which I intended to include as further evidence to support my allegations. They however have not been cooperative and instead have sought to withhold said information which has served to obstruct the fair pursuit of justice in this regard……."

12. On 4 December 2019 the DHSC submitted an ET3 response. The respondent contended that the claim was submitted out of time, denied discrimination and asserted that the claim was misconceived:

> "Further or in the alternative, the Respondent asserts that the claim is misconceived and has no reasonable prospects of success. The Claimant has advanced no prima facie case for the claims of race and/or age discrimination in his ET1 and simply says he is 'suspicious' that PHE are 'hiding something'. The claim is entirely without foundation. It is submitted that the claim should be struck out."

13. The ET3 stated that the other unsuccessful candidates were white but did not mention that the successful candidate was also white.

14. On 27 December 2019, the Claimant submitted a document responding to the ET3 in which he contended that the claim had been submitted within time. He also stated:

> "The Respondent has previously refused to release information pertaining to the profile characteristics of the shortlisted

> candidates which were requested by the Claimant as early as July 24th, 2019 and again as late as October 08th, 2019 by email communication. As noted in the ET1, the Claimant has even raised a complaint with the Information Commissioner concerning a Freedom of Information request to access this information which the Respondent continued to refuse to release despite direction from the IC to do so by a specified date. The Respondent eventually responded to a SAR out of time."
>
> Yet, the Respondent disingenuously claims that the Claimant has no evidential basis to make his claim because they are conscious of the fact that they have deliberately withheld this information from the Claimant. Notwithstanding, the Respondent has now confirmed for the first time at point 16 of the ET3 that the other two unsuccessful candidates were white British. Yet, there is nowhere in the ET3 where the Respondent has thought it appropriate, even at this stage of litigation, to acknowledge the ethnicity of the successful candidate, information which is directly pertinent to this case. At this point of escalation therefore, as the Respondent continues to withhold evidence even as they attempt to make their case, the Claimant will go ahead and assume that the successful candidate is also white British (based on a non-denial of this fact by the Respondent).
>
> If we are to conclude therefore that the successful candidate is white British, then this does substantiate the fact that the Claimant was treated differently, as the Respondent thought it appropriate to inform the white British applicant who allegedly scored the highest at the interview, but thought not to inform the Black Caribbean applicant who similar to the successful candidate, likewise made a genuine application to the PHE, scored second highest, but whose application, for no apparent reason, was processed differently. Inasmuch as it is significant that there was one minority candidate in a field of four who was highly qualified and experienced and assumed 'appointable' as the Respondent acknowledges, but he was not offered the position, the focus must therefore turn to the difference in treatment between the two top scoring candidates, one a minority candidate and the other a majority candidate, and how that impacted and affected the ultimate decision, in order to understand the violation and the discrimination. [emphasis added]

15. 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 the ethnicity of Candidate B. Mr Bayo Randle was acting for the Respondent then, as he did before us. The Employment Judge asked Mr Randle to take instructions, which he did, and stated that the successful candidate was white.

The employment tribunal hearing

16. The substantive claim was considered by the Reading Employment Tribunal chaired by EJ Eeley at a hearing held remotely on 14-17 December 2021. The Claimant appeared in person; the Respondent was represented by Ms Tutin of counsel. The judgment was sent to the parties on 22 January 2022. Written reasons were provided on 22 April 2022.

17. The ET dismissed the claim on the merits. It concluded that a hypothetical white candidate would have scored the same as the Claimant. The tribunal stated that there was "nothing in the evidence we have heard which leads us to draw an inference of discrimination", that there was "no evidence of any conscious or sub-conscious consideration of racial characteristics", that the respondent "genuinely chose those who they assessed as the best candidate for the role based on their performance at interview" and there was "no material breach of procedure from which the Employment Tribunal could draw an adverse inference of discrimination". The Employment Tribunal stated that they did not "feel the need to rely on the burden of proof provisions in this case" because it was able to "make actual findings on the evidence as to the reasons why the respondent acted as it did".

18. The Employment Tribunal went on to consider the time limit issue:

> "67. The question would therefore have been whether it is just and equitable to extend the time limit. We would have to look at the balance of prejudice between the parties. We find, based on the facts that we have cited above and the oral evidence the Claimant gave us, that the Claimant was aware in August that he had the raw material to make a claim. Looking at the documents, even on 24 July he mentions having until 9 August to present a claim. There was clearly an awareness on his part of time limits for presentation of a claim. If the Claimant had been thinking of expiry of a time limit in August it is not at all clear why he did not then present his claim until the end of the following October. We conclude, in fact, that he put this off because he was on an information gathering exercise. He was looking for the evidence to bolster his claim. However, there was no good reason why he had to await the outcome of this process before putting the claim to the Tribunal. He 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. He was already suspicious (even on his own account) by that point in time. We do not consider that the information gathering exercise was a good enough explanation for the delay in presenting the Tribunal claim.
>
> 68. Considering the balance of prejudice, it is also important to look at the cogency of the evidence. We think there was a disadvantage to the respondent in terms of the impact of the delay upon the cogency of the evidence. An earlier claim would have resulted in earlier disclosure and a greater preservation of documents. It would also, importantly, mean that the witnesses

> who were giving evidence about oral answers given at an interview would be doing so much closer in time to the events that they had to recall and with a better recollection of the detail of what was said by the Claimant and the other candidates.
>
> 69. As things are, the respondent has had to do its best to respond to these elements of the claim. Despite the Claimant's criticisms, the respondent did in fact provide him with information and an explanation of its actions quite early on in the chronology. It gave him enough information to know that there was a claim for him to make if he wanted to present it to the Tribunal. The respondent certainly did not hamper or prevent the presentation of the claim in a timely manner after 3 July. On balance we would have concluded that it was not just and equitable to exercise our discretion to hear the claim outside the primary time limit."

The appeal to the Employment Appeal Tribunal

19. The Claimant, acting in person, submitted a very lengthy notice of appeal, which was rejected on the sift. In the original grounds of appeal the Claimant did not specifically assert that he had delayed in submitting his claim because he did not know the race of the successful candidate.

20. His Honour Judge Tayler permitted the appeal to proceed at a Rule 3(10) hearing on 23 March 2023, at which the Claimant had the benefit of representation under the ELAAS scheme by Mr Jupp. Mr Jupp drafted concise grounds of appeal that were substituted for the grounds originally submitted by the Claimant when acting in person. The amended ground in respect of the refusal of the extension of time was put expressly as an assertion that the ET was perverse in refusing to exercise the discretion to extend time.

21. Judge Tayler considered that there were arguable grounds of appeal on the merits. In respect of the time point, he considered it was arguable "that the employment tribunal failed to take into account the fact that the respondent failed to tell the Claimant the ethnicity of the successful candidate until the first preliminary hearing in the claim" as this "might have been a factor of considerable importance in considering a just and equitable extension if the employment tribunal had concluded that the race discrimination claim had merit".

22. At the full hearing on 4 January 2024 all the amended grounds of appeal were argued before a three-member EAT, chaired by Judge Tayler, by Mr Jupp for the Claimant and Ms Marianne Tutin for the Respondent. Both counsel accepted that if the appeal against the decision not to extend time on just and equitable grounds was unsuccessful the appeal as a whole must fail.

23. On 23 January 2024 the EAT handed down its judgment. It 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 accordingly dismissed.

The law

24. Section 123 of the Equality Act 2010 provides:

> "123 Time limits
>
> (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 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."

25. Section 140B permits an extension of time where ACAS early conciliation is undertaken in certain circumstances not relevant to this appeal.

26. As the EAT observed, strictly speaking section 123 does not set out a primary time limit that may be extended but a time limit of three months or "such other period as the employment tribunal thinks just and equitable". Where the Employment Tribunal decides that a period other than three months is just and equitable, that is the time limit. Nonetheless, the use of the term "primary time limit" for the three months period (with an extension for ACAS early conciliation where appropriate) is a useful shorthand.

27. The EAT referred to the well-known judgment of Auld LJ in *Bexley Community Centre v Robertson* [2003] EWCA Civ 576; [2003] IRLR 434:-

> "If the claim is out of the time there is no jurisdiction to consider it unless the tribunal considers that is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine. ... The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision."

28. In *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298; [2009] IRLR 327, Wall LJ at [24] said that the *Robertson* cases emphasises the wide discretion which the ET has. Sedley LJ said at [31]:-

> "There is no principle of law which dictates how generously or sparing 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."

29. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 64'; [2018] ICR 194 Leggatt LJ (as he then was), with whom I agreed, said:-

> "18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that

> Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para 75."
>
> 19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
>
> 20. The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 576; [2003] IRLR 434, para 24."

30. The Respondent relied before the EAT on *Barnes v Metropolitan Police Commissioner and another* UKEAT/0474/05 where the EAT, HHJ Richardson presiding, held:-

> "18. In Mr Barnes' case, there was no doubt that the acts complained of were more than three months before proceedings had commenced. His case was concerned with the second stage: s 68(6). Knowledge of the existence of a comparator at that stage may be relevant to the discretion to extend time. In *Clarke v Hampshire Electroplating* [1991] UKEAT 605/89/2409, the Appeal Tribunal said:

> "Under section 68(6) the approach of the tribunal should be to consider whether it was reasonable for the Applicant not to realise he had the cause of action or, although realising it, to think that it was unlikely that he would succeed in establishing a sufficient prima facie case without evidence of comparison."

19. It follows that a tribunal will be entitled to ask questions about a Claimant's prior knowledge: when did he first *know or suspect* that he had a valid claim for race discrimination? Was it reasonable for him not to know or suspect it earlier? If he did *know or suspect* that he had a valid claim for race discrimination prior to the time he presented his complaint, why did he not present his complaint earlier and was he acting reasonably in delaying? These, of course, are far from being the only questions which the tribunal may ask in order to decide whether it was just and equitable to consider the complaint. The tribunal has to consider all the circumstances. We single out these questions because this appeal turns on the tribunal's finding about Mr Barnes' state of mind." [emphasis added]

Grounds of appeal to this court

31. Mr Jupp's grounds of appeal to this court are as follows:-

> "Ground 1: Wrong not to determine that the ET acted perversely.
>
> 1. 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.
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> Ground 2: The existing test for prior knowledge is unfair.
>
> 2. The 'reasonable suspicion' test set out in *Barnes v Metropolitan Police Commissioner* UKEAT/0474/05 at [19] which the EAT applied in this case (at [38]) is unfair and had that test not been applied time would have been extended.
>
> The test in paragraph 19 of *Barnes* should be modified as follows:
>
> > "It follows that a tribunal will be entitled to ask questions about a Claimant's prior knowledge: when did he first ~~know or suspect~~ have sufficient knowledge of the facts required to establish ~~that he had~~ a valid claim for race discrimination? Was it reasonable for him not to know ~~or suspect it~~ of those facts earlier? If he did ~~know or suspect~~ have sufficient knowledge of such facts ~~that he had a valid~~

> ~~claim for race discrimination~~ prior to the time he presented his complaint, why did he not present his complaint earlier and was he acting reasonably in delaying?"
>
> Had the law provided for this approach then time would have been extended as the Claimant did not have sufficient knowledge of the facts necessary to bring a claim.
>
> *Note this point was not raised or argued before the EAT as the exceptional circumstances necessary for the EAT to depart from one of its own decisions were not present (see *Lock v British Gas Trading (No 2)* [2016] IRLR 316, EAT)."

32. On 17 May 2024 Elisabeth Laing LJ granted permission to appeal, writing:-

> "I conclude that, on these unusual facts, a high threshold for showing perversity is arguably met, and that if it considers it necessary or appropriate, the full court consider the correctness of the approach in *Barnes v Metropolitan Commissioner* and/or whether the EAT was entitled to adopt that approach in his case."

Appellant's submissions in this court

33. Mr Jupp accepted that perversity is difficult to establish and that the authorities (such as those cited above) emphasise the breadth of the discretion an ET has when determining whether an extension of time for bringing a claim would be just and equitable. He submits, however, that the high threshold is surmounted in the present case. The findings that the Claimant had the raw materials for bringing a claim in early July was simply wrong, as was the finding that the Respondent did provide the Claimant with the information he required. It is correct that Dr Jones was looking for information to "bolster" his claim, but that ought not to have been held against him.

34. As regards paragraph 19 of the EAT decision in *Barnes v MPC,* Mr Jupp repeated the suggestion in his grounds of appeal that the formulation was wrong and should be replaced by his proposed alternative set out above.

Respondent's submissions in this court

35. Mr Randle reminded us of the observations of Longmore LJ in the *Caston* case that in this area "appeals to the EAT should be rare; appeals to this court from a refusal to set aside the decision of the EJ should be rarer, and allowing such appeals should be rarer still."

36. He also reminded us that in *Yeboah v Crofton* [2002] EWCA Civ 794; [2002] IRLR 634, this court said that to meet the very high threshold for a perversity appeal the appellant must show an "overwhelming case" that the decision was one which "no reasonable tribunal, on a proper application of the evidence and the law, would have reached".

37. He accepted, however, that the judgment of Leggatt LJ in the *Abertawe Bro Morgannwg Health Board* case is an authoritative statement of the principles to be

applied on appeal in a case of this kind.

38. Mr Randle submitted that the finding of the ET at [67] of their decision that the Claimant "was aware in August that he had the raw material to make a claim" was properly open to it on the facts. Even on receipt of the email of 3 July from Mr Clehane the Claimant was aware that (a) he had been turned down for the job, (b) it had taken the employer three months to tell him with no very good explanation for the delay, (c) there had been "no negatives" found against him in the interview. The further communication of 24 July failed to reveal the ethnicity of the successful candidate but that too reinforced the Claimant's suspicions. Mr Randle submitted that a firm belief that one has been the victim of discrimination, even without knowledge, is highly significant; or, at any rate, the ET were entitled to hold that it was.

Discussion

Ground One

39. The word "perversity" is well entrenched in employment law, although for my part I regard it as excessively discourteous to hard working and conscientious ETs. I prefer the less florid description of the types of error which give rise to a successful appeal against a discretionary decision set out in paragraph 20 of the judgment of Leggatt LJ in the *Abertawe Bro Morgannwg Health Board* case. I accept Mr Jupp's submissions that the critical section of the ET's reasoning (paras 66-69) does indeed contain a number of such errors.

40. Firstly, the finding that Dr Jones had the raw materials on which to formulate a claim in early July, or even in August 2019, was simply wrong. He was told on 3 July that he had not got the job, but that was plainly not enough in itself to justify the issue of proceedings. Nor was the delay in notifying him of the outcome, however suspicious he might have been about it.

41. Secondly, it was correct that the Claimant was looking for information to bolster his claim; but I agree with Mr Jupp that this ought not to have been held against him. The information he was seeking about the ethnicity of the successful candidate was an essential part of his claim.

42. What the ET should have done, following paragraph [19] of the judgment of Leggatt LJ, was to set out the extent of the delay and the reasons for it, and to make findings about whether the delay has prejudiced the Respondent, for example by preventing or inhibiting it from investigating the claim when matters were fresh. A paragraph dealing with this issue might have gone something like this. The decision was taken on 2 April. The reason why the Claimant did not bring a claim in the three month period beginning with that date is because the Respondent had not told him the result of his application (despite being "chased") until 3 July. The reason why he did not bring a claim in the period from 3 July until 19 October is that the Respondent repeatedly failed or refused to answer the simple question of whether the successful candidate was white.

43. The ET should have taken into account, as a highly relevant factor, that the employers had gone to great lengths not to disclose the ethnicity of the successful candidate. The ET3 filed on 4 December 2019 stated at paragraph 18 that "in not being informed of

the outcome of the interviews he was treated in the same manner as the other 2 unsuccessful candidates, who were both of white British ethnicity". Yet the information that the successful candidate was also white was withheld until it was revealed at the preliminary hearing on 4 March 2020.

44. As to prejudice caused by the delay, there was in the course of the employment tribunal's findings on the merits no suggestion that actual (as opposed to theoretical) prejudice had been caused to the Respondents by the ET1 not having been issued until 19 October. Indeed, PHE had been on notice since the Claimant's letter of 24 July that an employment tribunal claim was a possibility. If indeed any evidence disappeared during the period from 24 July to 19 October 2019 they only had themselves to blame.

Ground 2

45. Although the ET did not refer to the *Barnes* case in their decision, the EAT did so, and the ET obviously attached considerable importance to the fact that the Claimant "was already suspicious" by August that he might have been the victim of discrimination. Ground 2 is therefore of some general importance.

46. *Barnes v Metropolitan Police Commissioner* is a 2005 decision of the EAT which remains unreported to this day and is not even referred to in the current version of *Harvey*. This suggests that [19] of the judgment does not lay down a formula. But to the extent that it does I cannot agree with it. 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. I am much less persuaded that suspicion, or a firmly held belief based on suspicion, is a relevant factor. Until 2014 the statutory questionnaire procedure enabled prospective Claimants for discrimination to ask questions, with failure to answer them giving rise to the possibility of adverse inferences. That procedure is no longer available. Promptness in bringing ET claims remain important but this court, the EAT and ETs should not encourage cases to be brought on mere suspicion.

47. In those circumstances I consider that the ET's reasoning on the "just and equitable" issue was erroneous, and that their conclusion lay outside the very wide ambit within which different views may reasonably be taken about what is just and equitable. I am therefore satisfied that the Claimant has surmounted the high threshold for establishing that the ET's decision that it would *not* have been just and equitable to extend time was perverse, and the order of the EAT upholding that decision, should be set aside.

48. We were told that the grounds of appeal to the EAT on the merits were fully argued at the EAT hearing. It is not suggested that we can or should deal with the merits grounds ourselves. I would allow the appeal and remit all the other pleaded grounds of appeal to the EAT relating to the merits to Judge Tayler and his colleagues (if they are available) to determine. Whether they are content to do so on the basis of existing submissions is a matter for them.

Lord Justice Baker:

49. I agree.

Lady Justice Nicola Davies:

50. I also agree.