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EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr R G Sinclair	AND	Faithful + Gould Ltd

PRELIMINARY HEARING

HELD AT: **London Central** **ON:** 31 January 2019

BEFORE: Employment Judge Wade (Sitting alone)

Representation:

For Claimant: Mr J Bryan, Counsel
For Respondent: Mr M Clayton, Solicitor

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The age discrimination claim is struck out because it has no reasonable prospect of success.

2. The disability discrimination claim is struck out because it was filed out of time.

REASONS

1. Mr Sinclair was told that his employment was to be terminated, purportedly because of redundancy, on 1 December 2017. His employment ended after a period of garden leave on 16 February 2018. He brings claims of unfair dismissal, age discrimination and disability discrimination. The Final Hearing is listed for **4-8 March 2019**.

2. The purpose of this Preliminary Hearing was to decide whether to strike out either of the discrimination claims because of jurisdiction or prospects of success, or to make a Deposit Order.

Age Discrimination

Time

3. Before the Hearing began the Respondent conceded that since the age discrimination claim included a claim that the dismissal was discriminatory, it was in time and so did not pursue a strike out on that basis.

Prospects of success

4. The claimant's age discrimination claim is divided in to three elements although they are part of one complaint. He asserts that because of his age he was not given enough work in order to be fully utilised. He complains in particular that he was not trained to do a type of work known as "BREEAM" work and that an offer to train him was rescinded. As a result of being under utilised he was dismissed by reason of redundancy. He has four named comparators who were younger than him and who he says were given the work he should have had.

5. The respondent argues that the claimant has no reasonable prospect of convincing the Tribunal, on the facts, that the burden of proof had passed given that a difference in treatment and a protected characteristic do not of themselves prove discrimination and he has nothing more.

6. I am of course aware of the guidance of the House of Lords in *Anyanwu* which emphasises the importance of not striking out discrimination claims "except in the most obvious and plainest cases". This is because discrimination claims are generally fact sensitive and there is disagreement about the facts. However, in this case the facts relevant to the age claim are not open to dispute except in a few details; they are documented and, indeed, agreed by the claimant, for example in relation to his under-utilisation. Thus, taking his case at its highest is much the same as taking it at its lowest as follows:

> 6.1 The respondent argues for strike-out with the support of contemporaneous documents in the bundle and there are no documents which give cause to think that there may be another side to this story. All the claimant could say was that there might be some unconscious discrimination yet to be identified but there is no concrete example of that.
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> 6.2 The documents show that under-utilisation had been an issue for the claimant since at least 2013. His contemporaneous performance reviews, which he participated in consistently record that the under-utilisation was due to the fact that he did not have the necessary relevant skills. For example, an email from his manager at the time, Dan Weiss, dated 7 December 2015 records a constructive meeting in which the claimant stated "that working …. on facilities management/maintenance, post–contract cost management is his

preference. All agree that [the team] does not now do this type of work and we should therefore consider other options". There is no suggestion, nor does the claimant now allege that he was being deprived of work because of his age.

6.3 The documents show an earnest attempt by his managers to find him work. For example, on 27 April 2016 Mr Weiss emailed the claimant saying:

> "as we have discussed on numerous occasions, your core skill set (post procurement, FM contract management) does not easily align with the [team's] consulting proposition but we remain determined to actively seek assignments for you".

6.4 All four managers across the years, including the manager who dismissed him, identified that his under-ultilisation was due to his not having skills and preferences which suited the needs of the available work. There would have to have been a conspiracy across five years and four managers to deprive him of work (and reduce the team's profitability) and to attribute a false reason for their acts for the age discrimination claim to work.

6.5 The claimant did not complain of age discrimination at the time. He first raised age discrimination when he filed his claim but this concern was not in his performance reviews, his grievance or even his solicitors' letter before action. The assertion has the hallmarks if an idea which arose not from the facts but from the litigation.

6.6 The claimant alleges that the utilisation problem arose because he had been passed over in favour of younger colleagues but when asked for further particulars of his pleading he did not give any specific projects where this had happened.

6.7 The only specific example given in the pleadings is that he was assigned to BREEAM training and then this was rescinded and the list of issues said that the work was then "offered to a new consultant in their 20s". In fact, as the evidence shows, and as agreed on the claimant's behalf by his representative, the consultant was new because she was an entry-level graduate several grades below the claimant and the others taken on to do BREEAM work were only interns. Thus, the work was offered to staff of a lower grade than the claimant and if they happened to be younger this was because experience was not required.

6.8 These lower-grade staff were the only four comparators named in the claimant's further particulars of claim which was compiled by his solicitors and he did not assert a hypothetical comparator. The claimant agrees that he was a senior consultant and they were at a more junior level. Therefore, applying Equality Act s.23, there was a material difference between their circumstances and the claimant's and so they were not comparators for the purposes of his claim.

6.9 There is contemporaneous correspondence from the claimant acknowledging that whilst he could do the work that they were doing, it was at a junior-level work. His proposal in his redundancy consultation meeting on 24 November and in a follow-up letter of 30th was that he should be utilized doing

this junior work which should be charged out at the junior/lower rate whilst he remained on his normal terms and conditions. Ms Davis, who made the decision to dismiss him, responded:

> "I would like to highlight that the work within the area of post-contract maintenance/ quantity surveying has been lacking over a long period of time. We do not have a demand for this work at present and we do not foresee demand for work in this area increasing. Your proposal, therefore, to charge you to a client at a lower rate to maintain your utilisation, whilst also maintaining your existing terms and conditions is not one which is sustainable for the business in either the short or long term".

This was a cogent reason for rejecting the proposal which was not connected to the claimant's age.

7. In conclusion, there is no reasonable prospect of the claimant:

a. Establishing that there were facts from which the Tribunal could concluded that he had been discriminated against because of his age or
b. of showing that the reason why he was dismissed was not cogent and unrelated to age.

The problem of his skill/ preference- and not age-related under-utilisation was thoroughly documented from 2013 and he himself agreed that the problem was true. It is very important, of course, to remember that discrimination is committed not by an organisation in general but by individuals who have to have a discriminatory intent and only one of the four managers who grappled with the under-utilisation is accused of discrimination. Whilst there will be a few small factual disputes, overall the documents speak for themselves; the claimant is represented and there is little prospect of important undisclosed factual disputes arising before the hearing which is only a few weeks away. None of the claimant's comparators, put forward with legal advice, appear to be true comparators.

8. Indeed, having initially taken the view that this age discrimination claim was obviously in time, I now have my doubts in that the dismissal claim is not a free-standing claim. Instead, the claimant says that because of his under utilisation he was made redundant and seeks a remedy for lost earnings. I have not heard argument on that point and will say no more.

Disability Discrimination

9. The list of issues records that the disability discrimination claim is a failure to make reasonable adjustments. These relate to the period of the redundancy exercise which ran from 11 September 2017 through to notification that the Claimant was redundant on 1 December 2017. However, the actual consultation period ran from 17 November because the Respondent delayed the process by two months because of the Claimant's ill health, he had been signed off sick with work related stress from 18 September. After 1 December the Claimant was on garden leave until his employment terminated.

10. This means that the period during which the Respondent allegedly failed to make reasonable adjustments ran from 17 November to 1 December. The claim was not filed until 28 June 2018 and if it is correct that time ran from 1 December the claim should have been submitted by 28 February which means that the claim is four months out of time. The ACAS "stop the clock" provisions do not assist because the Claimant did not start early conciliation until 1 May. I said during the Hearing that I thought the claim was two months out of time but that was wrong, and I was distracted by the fact that events from 1 February would have been in time because of the complex inter-relationship between the primary limitation period and ACAS early conciliation.

Continuing act

8. The Claimant argues first that the reasonable adjustment claims were part of a continuing act. I am afraid that this argument fails. There was no "in time" act of disability discrimination for the continuing act concept to work. Whilst a failure to make reasonable adjustments may result in a dismissal and so attract as remedy for loss of earnings, a failure to make adjustments cannot of itself be a dismissal. The only act that was in time was the termination of employment on 16 February and that cannot be part of the continuing act with the failure to make reasonable adjustments.

9. Further, whilst the period of garden leave from the notification of dismissal on 1 December to the termination of employment on 16 February acted to bring the dismissal in time, the failure to make reasonable adjustments clearly ended with the Claimant's departure from the workplace on 1 December. This was the date of the decision to dismiss and all the adjustments argued for were either made or not made before that date. The notice period does not act to extend the failure to make reasonable adjustments.

Just and equitable extension?

10. This brings us to the question of justice and equity as the Tribunal has the power to extend time if it is just and equitable to do so under Equality Act section 123.

11. Justice and equity is always a difficult issue when claims remain to be argued in the Tribunal. In this case the unfair dismissal claim proceeds and the process leading up to the dismissal will be examined so it could be said why not just let this claim in as the Respondent has to come to defend itself anyway so there is no prejudice. The starting point, however, is that it is clear from case-law that an extension of time for reasons of justice and equity is the exception not the rule, otherwise there would be no point in having a time limit at all.

12. I have decided that although at first blush there is little prejudice to the Respondent in allowing this claim to go ahead I should none the less strike it out. My reasons are as follows: -

(1) Four months (or even two months) is a long period of time to delay in bringing the claim. This is not least because the Claimant had a redundancy payment which

enabled him to seek legal advice and access to legal help because his solicitors wrote a letter before action for him on 23 March 2018. Once his employment had ended he had a long period of gardening leave where he could have researched his rights but still he took no action on his disability claim until 28 June.

(2) Neither the letter before action nor the Claimant's appeal against redundancy made any mention at all of a discrimination claim and therefore in terms of what was important to the Claimant at the time, and what he really felt had happened to him, it is not just and equitable to allow this after-thought to go ahead. It seems that discrimination was not in his mind until the ET1 was written which is why the claim complied with the unfair dismissal deadline but not a discrimination one.

(3) Contrast this with the Respondent's position, they are facing claims that a number of their employees discriminated against the Claimant and they should not be put under that pressure if even he did not have that belief until sitting down to write his ET1. Further, I do not consider that the prejudice to the Claimant is as great as first appears in that the rather complex claim boils down to an allegation that disadvantage suffered from lack of reasonable adjustments was a loss of confidence and exacerbated stress. The Claimant says that another detriment was that he might have become absence because of sick leave, but he did not and therefore the loss to him in not being able to argue these claims is a small amount of injury to feelings.

(4) The merits in general are poor and I was seriously considering at least making a Deposit Order until I decided that it was not just and equitable to extend time. The claim is complex and based upon a number of assertions which are hard to substantiate and again lead me to the concern that the Claimant shoe-horned a claim about a flawed unfair dismissal process into a disability discrimination claim.

(5) Finally, however, my most serious reason for considering that it is not just and equitable to extend time is the Claimant's reliance upon his poor health as a reason for why he did not pursue the claim within time. This is simply unsustainable and I am sorry that he chose to make such an assertion. First, he was able to write a long and cogent appeal during this period (but not an ET1). Second, he was able to start looking for work immediately. Third, he actually started a new job in February 2018, note that this was within the time limit for bringing a reasonable adjustments claim. Next, he had recovered from his ill health once the pressures of work had receded as recorded by his doctor. There is no evidence which would suggest that the "exception" allowing the claim to proceed should be exercised because of the Claimant's poor mental health.

13. I have therefore decided that the disability discrimination claim should be struck out as out of time and I have not gone on to make a decision on the Respondent's applications to strike out on the basis of prospects of success or make a Deposit Order.

14. This matter is listed for a five-day Hearing. I do not expect that, if decision-making time is taken in to account, the parties will now think that the case should be allocated less than five days but should they wish to make an application they may of course do so.

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Employment Judge Wade

Dated: 5 February 2019

Judgment and Reasons sent to the parties on:

5 February 2019

For the Tribunal Office