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# EMPLOYMENT TRIBUNALS

**Claimant:** "B"  
**Respondent:** Banco Bilbao Vizcaya Argentaria SA (BBVA)  
**Heard at:** East London Hearing Centre  
**On:** Wednesday 27 February 2019 & thereafter written submissions received on 6<sup>th</sup> & 29<sup>th</sup> March 2019  
**Before:** Employment Judge Brook

**Representation**  
Claimant: In Person  
Respondent: Ms C Darwin – Counsel

## JUDGMENT

**The Claimant's application for an extension of time in which to bring his claim in disability discrimination is refused and the Claim is dismissed as out of time**

## REASONS

1. This matter came before the Tribunal on the Claimant's (hereinafter "B") application to extend time for the presentation of his claim in disability discrimination against BBVA, B's employment with BBVA terminating in dismissal on 27 March 2014. The Respondent was represented by Ms Darwin of counsel, attended by her instructing solicitor Ms Sanchez, and the Claimant appeared in person. There was a suggestion in the Tribunal papers that the Claimant might seek an adjournment because of what B characterised as the Respondent having "*thrown an extra request to me (for a document) at the very last minute*". B had declined to provide the requested document and, in the event, Ms Darwin was content to proceed without the requested document and there was no application by either Party to adjourn.

### **Claimant's Application for Anonymity**

2. The Claimant did however make an application for anonymity that turned out to be directly linked to the document sought by the Respondent. The Respondent suspected the Claimant, prior to bringing this claim against BBVA, had already brought a separate employment tribunal claim, at a different hearing centre, in which he had alleged disability discrimination involving broadly similar psychiatric symptoms to those now relied upon against BBVA. That claim was dismissed in June 2018 (the 'June

Judgment') on the basis that the Claimant had not established that he was disabled under the Equality Act 2010. It was a copy of this Judgment, and an admission from the Claimant that he was also the Claimant in that June Judgment, that BBVA had sought from the Claimant and to which request the Claimant had objected. In the event in the hearing before me Ms Darwin obtained her admission.

3. It emerged that in the June Judgment case the Tribunal had acceded to the Claimant's request for anonymity, and that B applied for anonymity now in his Claim against BBVA so that there would be no link between these two matters. B was initially unwilling to confirm that he was the Claimant in that June Judgment though, as it was a necessary condition of his argument in support of his anonymity application before me that he was indeed one and the same person, after some prevarication on his part he accepted that he was the Claimant in that earlier June Judgment and that he sought anonymity now so that he would not be publicly linked to that earlier Case. That earlier Case (resulting in the June Judgment) had been brought against a subsequent employer to BBVA, he had been granted anonymity in that Case and B sought anonymity now to preserve this position. It was not clear to me that the avoidance of being identified as a person with a disability is a sufficient reason for anonymity in the Tribunal however the Respondent did not oppose the application and therefore I acceded to the Claimant's request.

#### The Claimant's Tribunal Claim against a Subsequent Employer

4. Neither Party produced a copy of that earlier June Judgment, the Claimant because he considered it irrelevant to his claims against BBVA and was why, he told me, he was initially reluctant to confirm his involvement. The Respondent because it had only very recently come to suspect that this Claimant might be one and the same person as that in the June Judgment. Indeed, B expressed some annoyance that the June Judgment had been published at all as he had understood that the Judgment would be completely unreported even (as it had been) in anonymised form. In that his understanding was mistaken.

#### Post Hearing Submissions

5. After the hearing solicitors for BBVA obtained a copy of that June Judgment and, on 6 March 2019, sent this to the Tribunal for my attention together with further written submissions drawing attention to what Ms Darwin submitted were relevant and material discrepancies between what that earlier June Judgment recorded as the Claimant's account of his psychiatric condition and what he had said about his condition before me in the BBVA matter. On 29 March 2019 B provided his own submissions expressing disquiet at the Respondent's actions. He described the Respondent as attempting a "*second bite of the cherry*" so as to "*disadvantage me in responding to matters not raised in the hearing*". B submitted that I should ignore this earlier Judgment and the Respondent's submissions re the contents of the same and that in sending these the Respondent it "*suggest(ed) that the Respondent is desperately trying to undermine my credibility by making reference to small points of factual detail ... arising from a Judgment in a different case*". I pause here to say that to some extent these subsequent submissions contributed to the delay in promulgating this reserved Judgment. In any event I extend my apologies to each Party for this delay.

### Relevance of Earlier Proceedings

6. I accept the Claimant's submissions in part and paid no regard to the Respondent's allegations of discrepancies. Had I thought that necessary then it would have been right for B to have had the opportunity to address me in person at a resumed hearing. However, the fact of that earlier Claim being issued at all, and certainly some time before 15 March 2018, I did find relevant. The fact of issue was raised in the hearing before me and 15<sup>th</sup> March was cited as the date on which, according to the Respondent and not disputed by the Claimant, an Employment Judge had granted anonymity to B. Whatever had been B's argument at that time in that Case is not material though it does explain the granting of anonymity, whether that decision was right or not. What is clear, and consistent with the Claimant's submissions before me, is that this earlier claim was in disability discrimination and involved B relying on a psychiatric disability with symptoms broadly similar to those now relied upon by B in the BBVA Case. As will become apparent I found this relevant to the issue of when B had sufficient knowledge and understanding of his psychiatric condition to have been able to bring a claim against BBVA.

7. I paid no regard to the Reasons for that June Judgment finding no disability, but the fact of that June Judgment is a matter of record and, to have been heard in June 2018, means that it must have been issued by at least January/February 2018, quite possibly earlier than that. Had it not been issued then there would have been no possibility of the then Respondent having served Grounds of Resistance or for the matter to be listed to hear the Claimant's application for anonymity in March 2018. Before me B emphasised that it was only as a result of that earlier case that, in about June 2018, he finally came to understand his condition and only thereafter to have a clear diagnosis of his condition as Asperger's syndrome, thus he at last had a 'label' for his condition. However, he must have already concluded by January/February 2018 that his symptoms, even without a diagnostic 'label', were sufficient to amount to be the basis of a claim in disability discrimination against that subsequent employer. Taking B's case at its highest it follows that he had sufficient knowledge to have then brought his case against BBVA, even if that involved simultaneous issue. Instead he did not issue against BBVA for some nine further months. In the hearing before me there was some suggestion from B that he did not want to be burdened by running two cases together though he did not expand upon this then or in later written submissions.

### **B's Submissions**

8. B was employed by BBVA between 11 November 2003 to 27 March 2014. At that time, he told me, he had no idea that he was labouring under a psychiatric disadvantage in comparison to his colleagues. His conduct, he says, was noticed as "odd" by his BBVA managers and colleagues and B placed some weight on an email dated 20 March 2014, written in Spanish and amounting to an aide memoire (he had sent it only to himself) of a manager who the Claimant said was instrumental in his dismissal. Ms Darwin agreed that the writer of this aide memoire had been involved. The agreed gist of that email was that its author considered B not to be a "team player", went "beyond the parameters of his role", and displayed "emotional instability" ("*inestabilidad emocional*"). B pointed to this as compelling evidence that his BBVA managers recognised that he had a psychiatric disability even though he himself only later came to realise that this was the case. He told me that it was only at the point of Judgment in the June 2008 hearing against a subsequent employer that he finally realised his psychiatric symptoms pointed towards a diagnosis of autism. He had not

brought that earlier case on the basis of diagnosed autism but did bring this case against BBVA on that basis. He asserts that BBVA would have realised, what he did not (and he submitted 'could not' by reason of his condition) himself realise at the time, that he had a psychiatric disability and that this, or rather his conduct as a result of his condition, was why he had been dismissed by BBVA.

9. The subsequent written diagnosis of B by Consultant Psychiatrist Dr Michael Craig, dated 29 September 2018, is of Autism Spectrum Condition, more specifically Asperger's Syndrome. The earlier written opinion of Dr Sandra Couto, Counselling Psychologist, dated 16 January 2018 refers to B having completed a course of ten counselling sessions, that B *"presented with moderate depression and severe anxiety" and that it was "clear he has suffered from this for some years"*. The written opinion of Consultant Psychiatrist Dr Stefanos Maltezos of 4 June 2018 refers to B reporting *"suffering with depression over the last ten years"* and had *"difficulty holding down jobs due to difficulties interacting in communicating with others"*. Dr Maltezos concluded that B presented with enough features for him *"to suspect a possible diagnosis of ASD which would explain his difficulties"*. An email dated 6 February 2019 from Oli Monks, Employment Consultant makes general remarks about Mr Monks' experience of working with autistic adults over a number of years and how such persons might typically present in the workplace. It does not, however, specifically refer to the B and does not take the matter very much further, save that the Claimant produces this in further support of his contention but whilst he has been suffering from autism for some years, including the period he worked for BBVA, those with this condition are often unaware they have this and explains why he had not made the BBVA connection earlier. It is this late realisation that B relies upon in bringing his claim against BBVA some five years after he was dismissed. For the purposes of this application I accepted this proposition, however it did not assist B for reasons I shall come to in due course.

### **The Respondent's Submissions**

10. On behalf of the Respondent Ms Darwin points first to the five-year period as being simply too long to countenance granting an extension of time. Whilst B's claims in disability against his subsequent employer might not have included direct reference to autism as the disability that did not matter as it was no more than a label put on B's symptoms and presentations which on B's own case had been present for many years. She found it lacking in credibility that the Claimant could not have realised that, whatever the label, he'd had this disability, if indeed it was a disability (Ms Darwin made no admissions) for some time and thus he had been well able to bring his claim against BBVA within the primary time limit. Even if he had not been able to do that then plainly he had brought a disability discrimination claim on precisely the same symptoms, albeit without a clear diagnostic label, at least a year ago against a subsequent employer and thus, label or no label, he had sufficient knowledge at that stage to bring a claim in disability discrimination against BBVA. He could not choose to first have a 'dummy run'.

11. Quite apart from that, even taking the Claimant's case at its highest, it entirely depended on BBVA knowing what the Claimant himself says he did not know, namely that he was psychiatrically disabled. Whilst it was possible that full disclosure might reveal unguarded comments going directly to such knowledge it was unlikely since the email of 20<sup>th</sup> March 2014 was in itself unguarded comments by a manager (sent only to himself as an aide memoire) and these comments chiefly referred to B failing to *'stay within the parameters of his role'*, the remark regarding B's emotional instability did not

amount to BBVA having actual or constructive knowledge of B's disability, whether that disability was labelled or not. The proper test was whether in the circumstances it was "just and equitable" to extend time. But in circumstances where even the Claimant was unaware of his disability, which disability was not in any event admitted by BBVA for the purposes of this hearing and nothing suggested that BBVA could have known, and with the passage of time dulling memories of each Party, it was not just and equitable. There was, submitted Ms Darwin, no reasonable prospect of success even if time was extended. In short, Ms Darwin submitted, this Claimant knew of his disability by at least January 2018 even if it had no precise label until June/September of that year and his delay in proceeding against BBVA was a significant factor. Even if that delay could be overcome the central flaw to the case was that even the Claimant was unaware of his disability at the time and there was no reason to suspect BBVA had any greater knowledge than that which could be gleaned from the Spanish aid memoire which could not be said to fix this Respondent with knowledge, actual or constructive.

### Conclusion

12. In reaching my judgment as to whether time should be extended so that B might bring his claim against BBVA I ignored the findings of fact in the earlier June Judgment, and in particular I gave no weight to that Tribunal's decision to dismiss the claims on the basis that, on the evidence before it, the Claimant was not disabled at the relevant time for that claim, which on any view was a time after B's employment with BBVA.

13. The application before me was whether it would be just and equitable to extend time so that B can bring his disability claim against BBVA. The question of when B came to believe he had a psychiatric disability and thus had the knowledge that he a potential claim against BBVA is a relevant factor to consider, as is whether there is obvious merit to the claim itself if time was granted. The latter consideration is rarely easy to determine at this early stage but I am persuaded that at this distance from the events, almost five years, and in the light of the unguarded 'note to self' that has so far been disclosed, there is little if any obvious merit in the Claim, nor is the passage of time likely to assist the Parties so far as recollecting these events is concerned. I am also satisfied that, label or no label, B had sufficient understanding of the position by at least January 2018. The suggestion, which B did not pursue with any vigour, that it would have been difficult to run two cases simultaneously from January 2018 undermines his claim not to have realised his condition until sometime between June and September of 2018. I accept that he did not have a diagnostic label for his condition until then but it is clear that he had all but that label in the previous January in order to bring the claim against the subsequent employer. Whilst none of these considerations are individually determinative taken together, the date of the Claimant's knowledge and the steps he took to progress his claim is a factor when he had that knowledge, the inherent difficulty to which the Respondent will be put in the recollection of events, and that the aide memoir points away from knowledge by the Respondent rather than towards it, persuade me that it is not in the interests of justice that time be extended. Accordingly, the Claim is dismissed.

Employment Judge Brook

17 June 2019