



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Scarth

**Respondent:** Santander UK Operations Ltd

**HELD AT:** Liverpool

**ON:** 23 April & 15  
August 2019

**BEFORE:** Employment Judge Shotter

## REPRESENTATION:

**Claimant:** In person

**Respondents:** Ms K Nowell, counsel

## JUDGMENT

The judgment of the Tribunal is that:

1. The Tribunal does not have the jurisdiction to consider the claimant's complaint of unlawful disability and age discrimination complaints which was presented after the end of the relevant time limit. It is not just and equitable to extend the time limit and the claimant's claims of unlawful disability and age discrimination claims are dismissed.
2. The respondent's application to strike out the claimant's claim of unfair dismissal is dismissed. The claimant's claim of unfair dismissal is adjourned to a liability hearing, the date of which the parties will be advised in due course.

## REASONS

1. This is a preliminary hearing to consider the respondent's application to strike out/deposit order out the claimant's complaint of unfair dismissal brought under Section 98 of the Employment Rights Act 1996, unlawful disability discrimination under Section 20-21 of the Equality Act 2010 and unlawful age

discrimination. The application for a deposit has been dealt with in a separate order.

2. By a claim form presented on 17 September 2018 following ACAS Early Conciliation between 20 July 2018 and 22 August 2018, the claimant brought complaints of unfair dismissal following his dismissal on 13 September 2018 and unlawful discrimination on the grounds of age and disability. At a preliminary hearing held on 16 January 2019 the claimant clarified his claims, which he then discussed further at the preliminary hearing held on 23 April 2019.
3. The claimant relies on a mental impairment of depression and anxiety as the basis of his discrimination complaint, maintaining he had mental health issues during the relevant period of his employment which culminated in a suicide attempt before he was disciplined and dismissed without notice on 13 September 2018. The respondent does not accept the claimant was disabled for the purpose of s.6 EqA during the relevant period from 2016 to 2018. The claimant has provided an impact statement together with supporting medical evidence in accordance with the case management order made at the 16 January 2019 hearing. The Tribunal has considered this evidence, to which it has referred to below.
4. Following the preliminary hearings that had taken place on 16 January and 23 April 2019, in addition to the respondent allegedly failing in its duty to make reasonable adjustments the claimant is claiming harassment brought under section 26 of the EqA by JG, a fellow employee, and his manager, JR who allegedly also took part and failed to do anything about the harassment of him by JG.
5. The Tribunal considered the documents provided by the parties in an agreed bundle, and the claimant who gave evidence under oath. The 23 April 2019 preliminary hearing was adjourned to this date in the interests of justice in order that the claimant could, as requested, seek legal advice concerning the respondent's application given the draconian nature of it and the position adopted by the claimant that there was a continuing act to the date of dismissal and yet the last day the claimant was physically at work was 23 March 2018. In compliance with case management orders made on 23 April 2019 the parties have exchanged and lodged written submissions, which the Tribunal has considered. The claimant's written submissions were received in three emails sent on 14 May 2019 at 17.23, 17.24 and 17.25. The respondent's submissions were sent via email received on 20 May 2019. The Tribunal does not intend to repeat all the submissions made; it has taken them into account and they are subsumed in the findings below.
6. The Tribunal has also considered, when considering the respondent's application for a deposit order, the claimant's means following evidence given by the claimant on oath, the claimant's impact statement, the medical records, and the bundle of documents.

7. To establish the relevant time, limit the Tribunal has considered each claim separately, and then if it was possible for the claimant to assert there was a continuing act between the alleged discriminatory acts. For the avoidance of doubt, the dismissal that took place on 13 September 2018 is not relied upon by the claimant as an act of discrimination and it cannot form a “state of affairs” or “ongoing situation” to enable there to be an overall continuing act. The Tribunal considered the section 123(3) of the Equality Act 2010 and the Court of Appeal judgement in Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, particularly paragraph of LJ Mummery’s judgement to which it was taken by counsel; “The question is whether there is ‘an act extending over a period’ as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.”

#### The claims

#### Failure to make reasonable adjustments

#### Work performance review

8. Turning to the claimant’s first complaint relating to the respondent’s breaching its alleged duty to make reasonable adjustments with reference to a work performance review, the claimant confirmed that the work performance review took place the last possible date being sometime April 2017 and there were no further complaints about his rate or quality of work. Ms Nowell submitted the claim was almost a year out of time, and the claimant had not viewed it as a detriment by the time it concluded. The Tribunal agreed. It is notable at the stage 3 appeal hearing held on 3 July 2018 following dismissal, the claimant referred to the work performance review as follows; “IRP I was concerned about it initially but Sean Kern helped a lot too we got there and it was fantastic...”
9. There was no satisfactory evidence that the work performance review was a continuing act; and as the claimant had successfully met his performance targets with no further reviews being held, the evidence points to there being no continuing act. No satisfactory explanation was given by the claimant why he could not have issued proceedings within the statutory time limit which would have expired at the latest on or around end of July/beginning of August 2017.

#### Failure to make reasonable adjustments relating to interviews

10. The claimant alleges he underwent a number of interviews, the last being in November 2017, and it is undisputed the claim in this regard is 5-months out of time. There was no satisfactory evidence failing interviews amounted to a continuing act beyond November 2017. No satisfactory explanation was given by the claimant why he could not have issued proceedings within the statutory time limit which would have expired at the latest on or around end of February/beginning of March 2018. There was no evidence before the

Tribunal that the claimant's mental health condition prevented him consulting with ACAS and issuing proceedings within the statutory time limits.

Failure to make reasonable adjustments relating to working conditions

11. The claimant maintains he struggled to work in an open plan office because of the effects on his disability of the noise generated by other people working. The alleged cause of action arose when he transferred to the respondent's finance department in October 2016 and he maintains it continued until the last day he physically worked in the office on 23 March 2018.
12. The claimant also alleged the two main protagonists who made the noise were JG and JR. Both left his department in October 2017.
13. In oral evidence the claimant confirmed JR "was not a disturbing influence after October 2017. Her remaining within the workplace after October 2017 did not present a problem." At the preliminary hearing the claimant confirmed there was no issue with JR after October 2017.
14. It follows accordingly that the last alleged act in relation to JR was on some date in October 2017 and the limitation period expired on some date in late January/early February 2018. No satisfactory explanation was given by the claimant why he could not have issued proceedings within the statutory time limit. As recorded above, there was no evidence before the Tribunal that the claimant's mental health condition prevented him consulting with ACAS and issuing proceedings throughout the period of his employment, when he had access to union assistance throughout and was supported by a union representative.
15. Turning to the claimant's allegation against JG, who he maintains created an intimidated environment by the noise he made and his treatment of the claimant, the claimant maintains there existed a continuous act because JG repeatedly returned to the department to see his friends, made a lot of noise and intimidated the claimant by staring at him. The alleged behaviour of JG continued up until the day the claimant went off ill on 23 March 2018 following which he did not return to work. The claimant was uncertain about the dates when JG returned to the department and acted as alleged. In respect of the harassment complaint the claimant confirmed he suffered harassment in 2017 on the 15 June, 22 June, 3 July, 2 August, 18 August, 31 August 2017 and on 23 March 2018. Even at its highest and the claimant could prove on the balance of probability that JG had harassed him as alleged on 23 March 2018 it would be difficult for him to discharge the burden of proof in respect of JG having created a noisy and intimidating environment after October 2017 when the claim for harassment relied upon allegedly took place on 31 August 2017 and then 23 March 2018, a gap of approximately 7 months or so.
16. Ms Nowell submitted that after October 2017 there cannot have been a continuing act and even if it was the case that JG returned to the claimant's department on occasions, it must have been infrequent such that reasonable adjustments would not have been required. On the claimant's best case, the

claim in relation to JG in respect of the respondent's alleged failure to make reasonable adjustments almost 2-months out of time if the claimant established a continuing act, and if he did not, 7 months out of time. In oral evidence before the Tribunal the claimant confirmed he had obtained legal advice concerning the alleged behaviour of JC to the effect that the claim was weak because JC and JG had left the department in October 2017.

17. No satisfactory explanation was given by the claimant why he could not have issued proceedings within the statutory time limit and there existed no evidence before the Tribunal that the claimant's mental health condition prevented him consulting with ACAS and issuing proceedings in time. He had obtained legal advice, was a fully paid up member of the union during the relevant period and in receipt of union support. The claimant also gave evidence that on 23 March 2018 he had been advised by ACAS that the incidents could be linked, and yet proceedings were not issued until 17 September 2018. It is notable the ET1 had been completed by the claimant's union representative who was on record as acting on his behalf. It follows that the claimant could and did access union support over a substantial period of time. The agreed bundle included documents which reflect this, for example, a note of a meeting held on 8 February 2018 when the claimant's health condition was discussed. The Tribunal was taken to this document by claimant during oral evidence during which he confirmed he had access to the union and emailed the union and HR in 2017.

#### Failure to make reasonable adjustments relating to the wearing of earplugs

18. The claimant maintains he was stopped from wearing earplugs (the reasonable adjustment sought) in February 2018. The respondent's position will be that earplugs were banned in April 2018, after the claimant no longer worked in the office but before his dismissal.
19. There is a dispute on the facts in this case. In a medical report referred to below it is recorded the claimant reporting his struggles with noise in the office, "although he has started to wear ear buds in his ears and this has helped..." There is no reference to the claimant wearing ear buds up to February 2018 as now alleged by the claimant, and the plain meaning of the text suggests the claimant was wearing earplugs at the time.
20. Ms Knowles submitted that if the respondent's case was accepted the claimant's case was bound to fail given no reasonable adjustments were needed as he had worn earplugs up to and including the last day he physically worked on 23 March 2018 before the banning of the earplugs.
21. In the alternative, on the claimant's case as he puts it, the act relied upon in respect of the wearing of earplugs took place in February 2018 and on the basis that the respondent's failure to make the reasonable adjustment of allowing the claimant to wear earbuds was a continuing act, the last day was 23 March 2018 and the claim is out of time by at least 2-months. The Tribunal repeats the observations made above concerning the claimant's lack of satisfactory explanation for his delay.

Section 26 EqA harassment

22. As touched upon above, the claimant alleges on 23 March 2018 JG came into the department, sat at a desk and “created havoc” by intimidating him. It is not disputed that the claimant was dismissed on 13 September 2018 for head-butting JG, although the claimant denies the dismissal was fair. The claimant alleges JG had engaged in unwanted behaviour related to the claimant’s protected characteristic of disability and his age. The claimant is 50 years of age, JG and colleagues who worked in the finance department were in their mid-twenties. In addition, he maintains there were incidents when JG intimidated the claimant during outbursts when he told the claimant to “shut up.” In oral evidence given under oath today the claimant clarified the dates further and confirmed the last date was 31 August 2017.
23. Ms Knowell submitted the claim was almost 2-months out of time if a continuing act was proven.
24. The claimant now relies on his disability status and admission to hospital on 24 March 2018 following an attempted overdose and in written submissions referred the Tribunal to his impact statement received on 13 March 2019 which the Tribunal considered. No explanation was given in the impact statement as to why the claimant was unable to issue proceedings within the statutory time limit. The claimant in his impact statement related the following, viewed by the Tribunal as relevant to this application: “After losing my job as Santander I tried to gain employment elsewhere” which suggests the claimant was well enough to take this step and thus could have issued proceedings.
25. The hearing bundle includes a number of communications sent by the claimant to the respondent, including an email sent on 10 May 2019 running to over 4-pages that set out the claimant’s version of events in relation to the “fracas” that took place on 23 March 2018 and the alleged actions of JC which culminated in the claimant believing he was about to be struck and “therefore reacted first before he did I lashed out head butting [JG]...this was the straw that broke the camel’s back as I had been persecuted as well you know by JG and his clique of friends for the past 1-months...” The claimant was in a position to write a comprehensive record of his recollection of events and the defence he relied upon. There was nothing to stop the claimant consult with ACAS and issue proceedings in the Employment Tribunal. The claimant’s work history and medical evidence before the Tribunal does not support his case that he was too unwell to issue proceedings in time.

The claimant’s work history and medical evidence

26. The claimant maintains he has suffered from anxiety and depression from 22 May 2009 and he had been prescribed Sertraline, an anti-depressant medication, for many years and had undertaken counselling.
27. The medical records reveal the following:

- 27.1 In a GP record dated 8 January 2016 a diagnosis of anxiety and depression duration 8/1/2016 to 5/2/2016 was made. The claimant's mood was referred to as "stable."
- 27.2 The claimant was reviewed in July 2017 with no issue referred to, and in 8 August 2017 the notes reflect asthma was not disturbing sleep.
- 27.3 By 22 August 2017 there was a reference to "recent stress at work...had counselling in the past." It did not say when the claimant had undergone counselling and there were no dates in any of the records before the Tribunal.
- 27.4 A fit note was issued for stress at work on 16 October 2017 to 30 October 2017 with reference to the claimant's partner having been suspended from work. The claimant's partner worked and continues to do so for the respondent. There is a reference to the claimant being on 100 mg of Sertraline "already" and to him receiving counselling from the respondent.
- 27.5 By 31 October 2017 the claimant continued to experience "ongoing problems with stress at work...having course of counselling started yesterday" and a further MED3 was issued to 14 November 2017.
- 27.6 By 23 November 2017 the claimant had undergone 4-5 sessions of counselling and a stress assessment. He was "keen to return to work" and "mood improving."
- 27.7 By 29 November 2017 the diagnosis remained "stress at work...[was] still undergoing counselling input...low grade stress/anxiety seems clearly work related..." Dr Gray provided a medical report dated 29 November 2017 in which he confirmed had been receiving some counselling and taking "his usual anti-depressant medication.... there is not likely to be an ongoing impact although given his previous history, stress in the workplace or at home may precipitate a worsening of depression or anxiety..."
- 27.8 By 27 December 2017 the claimant was found to have been "making good progress Re: phased return" and there is nothing further until the claimant's attempt to commit suicide on 23 March 2018 after the altercation with JG.
- 27.9 On 24 March 2018 Kirsten Brown, a mental health practitioner, provided a report confirming in her opinion the claimant's "long-standing history of anxiety and depression...meets the definition of disability as set out in the Equality Act 2010...given his main symptoms are anxiety, poor concentration and lack of confidence." She did not offer any information on how the condition had a substantial and long-term effect on the claimant's ability to do normal daily activities, and there was no such evidence before the Tribunal between 2016 and March 2018.

- 27.10 On the 8 February 2018 a meeting took place between the claimant and a manager concerning the claimant's "underlying medical condition of anxiety and depression." There is a reference to the work-related stress having a link to anxiety and depression and the outcome of a risk assessment that was outstanding.
- 27.11 The claimant applied for a permanent contract and on the 19 February 2018, was informed that his application was unsuccessful. In a subsequent meeting with a manager there was a discussion about this, and "despite not having any errors since returning to work...this had knocked his confidence." The claimant clarified at this preliminary hearing that he believed he was not given an interview due to his disability and being off sick in 2017 for 7-weeks and made this allegation in the meeting to be told that the business "cannot discriminate for sick absence." The claimant took no steps with a view to issuing proceedings.
- 27.12 A further "catch-up" meeting took place on 22 February 2018 during which the claimant was informed his contract had been extended until June 2018, and he indicated that he wanted a permanent contract and had "emailed the union...as he wants answers and support...and will speak to directors." The claimant emailed on 22 February 2018 indicating he was feeling "a little upset to say the least."
- 27.13 In the medical report completed by Clinical Pathways MerseyCare on 24 March 2018 the claimant confirmed he had headbutted a work colleague after drinking on a work's night out, he had been treated with Sertraline "for the last 2 years." The report set out how the claimant described his history, how he found it "difficult to relax...he feels exhausted at times...also has problems with concentrating. This has caused some problems in his workplace because one of his colleagues is somewhat loud and raucous...struggles with noise in the office, **although he has started to wear ear buds in his ears and this has helped...** he has previously accessed work counselling and has also seen Access Sefton." Reference was made to the claimant working hard, receiving no recognition and no permanent contract, all of which were matters that concerned the claimant during this period. The report concluded "advised to take further advice from an employment lawyer should things not improve..."
- 27.14 Statements for Fitness for Work were issued, and on 26 March the claimant was signed off work for stress/anxiety/depression with no adjustments suggested, and on 16 May 2018 the claimant was signed off work with no adjustments suggested, for depression.
- 27.15 In a medical report from a psychological wellbeing practitioner dated 28 June 2018 reference was made to the claimant having attended CBT and discharged from therapy "treatment is now complete."
28. Following his dismissal, the claimant was in communication with the respondent, he had access to the internet and could have checked time limits.



The claimant (who was accompanied by a CWU representative) attended the disciplinary hearing held on 8 and 13 June 2018 and the notes taken of the hearing run to 11 pages reflecting the claimant took an active part and described his mental health. Following dismissal, he submitted an appeal, the basis of which was that the full mitigation had not been considered, including well-being and disability. The claimant attended the appeal hearing on 3 July 2018 with a CWU representative, and fully took part in the process which included a discussion about his disability. The clear evidence was that the claimant was not debilitated and able to conduct his disciplinary defence and appeal, write fully and cogently to the respondent and there was nothing to stop him submitting his claims for discrimination within the statutory time limit.

### Unfair dismissal

29. The claimant confirmed it is not his case that he was discriminated against on the grounds of his disability or age when the respondent dismissed him for gross misconduct following the incident with JG on 23 March 2018 following which the claimant admitted in his written defence to head-butting JG and admitted to so doing on two occasions during the disciplinary process. The dismissal took place on 13 September 2018 and there cannot be an argument that the non-discriminatory dismissal formed part of a continuing act. The last date was far as time limits are concerned was 23 March 2018, and there is no issue that the unfair dismissal was received within the statutory 3-month time limit.

### The law and conclusion

#### Time-limit

30. For the reasons set out above, all the claimant's discrimination claims were lodged well-outside the limitation period.

31. The Tribunal has a wide discretion to consider whether it is just and equitable to extend time in discrimination cases. It can take a wide range of factors into account. Ms Knowell referred the Tribunal to the EAT decision in the well-known case of British Coal Corporation –v- Keeble and others (1997) IRLR 336 which is a case involving claimants bringing sex discrimination claims in respect of voluntary redundancy payments, a year over time. The EAT suggested that Tribunals would be assisted if they considered the factors listed in Section 33 of the Limitation Act 1980.

32. The Tribunal carried out this assessment concluding the claimant had and did access union advice during the period when he "thought" discrimination was taking place at the hands of his work colleagues and the issues concerning his work plan, reasonable adjustments within the workplace and harassment. He also took advice from union solicitors after the 23 March 2018 incident and could take part during this period in the disciplinary and appeal procedure, email a lengthy defence and put forward his case.

33. In Robertson v Bexley Community Centre: CA 11 Mar 2003 [2003] IRLR 434, [2003] EWCA Civ 576 it was held by the Court of Appeal (Auld LJ, Chadwick LJ and Newman J) a tribunal has a very wide discretion in the area of whether to extend time for a complaint of race or sex discrimination to be laid, and is entitled to consider anything that it considers relevant. Auld LJ set out the principles to be applied when considering the exercise of its discretion to extend time: 'The Tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision...**It is also of importance to note that the time limits are exercised strictly in employment and industrial cases.** When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. **A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule** [The Tribunal's emphasis].
34. In relation to Mr Scarf, for the reasons set out above, the Tribunal found he had not convinced it that it was just and equitable to extend time in the circumstances of this case. The claimant in written submissions referred the Tribunal to the Court of Appeal judgment in Chief Constable of Lincolnshire Police v. Caston [2009] EWCA Civ 1298 CA. The Court of Appeal stressed that whether it is 'just and equitable' to extend the time limit for lodging a claim is a question of fact and judgement for the tribunal. In the Court's view, when considering if a tribunal was entitled to find it just and equitable to extend time, the question to be asked is whether there was material on which the tribunal could properly exercise its discretion. In respect of Mr Scarth the Tribunal took the view that there was no material upon which it could properly exercise its discretion, no matter how much it had sympathy for the claimant.
35. The Court of appeal went on to note that in the Court of Appeal's decision reference was made to Robertson v Bexley Community Centre cited above, as 'an elegant repetition' of the principles relating to the exercise of judicial discretion. Although Lord Justice Auld there noted that time limits are enforced 'strictly' in employment cases, his judgment emphasises the wide discretion afforded to employment tribunals.
36. The Tribunal took into account the prejudice which each party would suffer as a result of the decision reached, and recognise that the claimant will feel himself to have been prejudiced by the decision as he is unable to take the discrimination complaints claim forward. However, given the passage of time and the claimant's own poor recollection of the dates and detail of his allegations, the Tribunal took the view the respondent would be caused greater prejudice than the claimant due to the delay and fading memories.
37. In conclusion and after taking these factors into account the Tribunal does not find that it just and equitable to allow the claimant's claims of disability and age discrimination to proceed out of time by extending the time limits to 17 September 2018 following ACAS early conciliation that commenced on 20 July 2018. The Tribunal does think that the cogency of the evidence is likely to

be affected by the delay and this is not in the claimant's favour. The Tribunal has also considered, when arriving at its decision, that the claimant's complaints are more likely than not to be weak and have little reasonable prospects of success. Its view is reinforced by the claimant's decision not to issue proceedings even after he had consulted the CUW lawyers and Clinical Pathways MerseyCare on 24 March 2018 concluded the claimant was "advised to take further advice from an employment lawyer should things not improve..."

38. In conclusion, having applied the law relating to time limits in unlawful discrimination complaint to the facts, the Tribunal is satisfied that it was not just and equitable to extend the time limit in respect of the complaints beyond the primary limitation period. The Tribunal does not have the jurisdiction to consider the complaints of unlawful disability and age discrimination which are dismissed.
39. Having dismissed all of the claimant's disability discrimination complaints there is no need for the Tribunal to proceed with assessing whether the claimant was disabled for the purpose of section 6 of the Equality Act 2010.
40. Case management orders have been issued in a separate order assisting the parties prepare the case for a final hearing dealing with the claim of unfair dismissal only:

15.8.19

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Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
13 September 2019

FOR THE SECRETARY OF THE TRIBUNALS