EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr I Gakhal	**v**	Fleet Mortgages Limited

Heard at: Watford **On**: 10 February 2020

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: In person
For the Respondent: Miss H Bell, Counsel

JUDGMENT

1. The claim of disability discrimination is dismissed. It was not brought within the three month time limit set out in s123(1)(a) Equality Act 2010 or within such further period as was just and equitable.

2. The application for leave to amend was refused.

REASONS

1. This case came before me today to consider four matters:

   1.1 Whether the claimant was a disabled individual within the meaning of section 6 of the Equality Act 2010;

   1.2 Whether the claimant should be granted leave to amend his claim to add additional grounds of complaint set out at paragraphs 16.1.2-1.4 of the Case Management Order made by EJ Vowles;

   1.3 Whether the claimant's original claim was filed outside the statutory time limits set out in section 123(1) of the Equality Act 2010; and

   1.4 To consider whether it was necessary to make further case management orders.

Matters relating to the conduct of the hearing

2. By agreement with the parties, I decided to deal with the issues relating to amendment and time limits first, before then going on to consider the other matters.

3. A preliminary hearing bundle had been produced by the respondent and supplied to the claimant in accordance with the orders made by Employment Judge Vowles at an earlier case management hearing on 19 February 2019. The claimant asserted that he had not received the bundle although it appeared that it had been sent to him by e-mail and that repeated offers had been made to send it to him by post. Nonetheless, I adjourned the hearing for 40 minutes to give the claimant an opportunity to read the bundle

4. The claimant produced a witness statement addressing the question of whether or not he was a disabled individual together with some medical evidence. The claimant had produced no statements specifically addressing the reasons why there had been a delay in filing his ET1 or in connection with the application to amend to add new matters to the ET1. However, the claimant had an opportunity to give evidence on these points and was cross examined by the respondent's representative.

5. I considered the documents in the bundle, the evidence given by the claimant and submissions made by both the claimant and the respondent's representative before reaching my decision.

6. The original claim in this matter was filed on 16 April 2018 with ACAS conciliation having commenced on 27 February 2018 and terminated on 16 April 2018. The matters complained of in the ET1 essentially relate to the following events:

    6.1 The claimant alleges that a meeting took place on or around 2 August 2017 at which he disclosed that he was experiencing difficulties with stress and anxiety. He claims that, subsequently, the respondent subjected him to additional requirements, which went beyond those set out in its published policy, as conditions of his being granted a mandate for mortgage underwriting.

    6.2 That process continued until the mandate was eventually granted on 6 October 2017.

7. 6 October 2017 is therefore the last date which could be relevant when considering the question of time limits in relation to the claimant's original ET1. On that basis therefore, any proceedings should have been commenced by 5 January 2018. In fact, however, no action was taken by by the claimant until 27 February 2018, which was when he first contacted ACAS, and his claim was then filed on 16 April 2018. The time limit for bringing complaints of disability discrimination is set out in section 123 of the Equality Act 2010 which states that proceedings on a complaint must be brought within three months of the discriminatory or such other period as the tribunal thinks just and equitable. That time limit is extended by the

ACAS conciliation processes and by the provisions of s140B Equality Act 2010.

8. After the ET1 was submitted, the respondent filed a response in which it was explicitly stated that the claim contained insufficient particulars because it was not clear what the alleged disability was or what was being complained of as discriminatory treatment. The claimant was ordered to provide further and better particulars and to do so by 24 July 2018.

9. The claimant produced some further and better particulars during the course of July 2018. In doing so, he was assisted by somebody who he described as a "family friend" but who also appears to have been working in a legal capacity, Mr Dilraj Rai of Goodwin Legal. The claimant confirmed that Mr Rai first began to assist him in December 2017. As well as being assisted by Mr Rai the claimant also spoke to ACAS before bringing proceedings. Mr Rai provided further and better particulars of the claim during July 2018 in a series of emails. He identified that the alleged disability was anxiety and that the claim being brought was one of direct discrimination. However, the although the emails provided a very lengthy narrative they did not make clear what was mere background and what was said to be an act of discrimination.

10. As a result, the matter was listed for a case management hearing in February 2019. On 27 December 2018, the claimant wrote to advise the tribunal that he was now acting in person having parted company with Mr Rai. The claimant says he took this step because he had been unable to get in touch with Mr Rai for several months. On 19 February 2019, the claimant clarified the allegations that he was making and sought to add three additional matters which are recorded at Employment Judge Vowles' case management order at paragraph 16.1.2 to 16.1.4.

> "16.1.1 the process of achieving the qualification to sign off mandates was written down but changed after the meeting on 4 August 2017. The claimant was initially required to review two cases and then ten cases, and told for every error another case would be added. Then he was told he only needed to review four cases. He became qualified on 6 October 2017, this was a continuing act.
> 16.1.2 was a request for holiday on 22 December 2017 was refused by Ali Davidson.
> 16.1.3 the outcome of his grievance on 18 December 2018 omitted to mention the requirement to review 10 cases; and
> 16.1.4 complaints about him from mortgage brokers were fabricated by the respondent

11. The failure to deal appropriately with the claimant's grievance was a matter which was dealt with by a Mr Tyrell. Ms Davidson who the claimant complains failed to grant his holiday request, and was also involved in setting additional conditions prior to the grant of the claimant's mortgage underwriting mandate.

12. The claimant's evidence was that, although he was receiving some assistance from Mr Rai over December 2017, there was a delay in

submitting his ET1 because his wife had suffered a miscarriage in late December 2017 and he had begun a new job in January 2018. It was also clear from the medical records produced by the claimant that he had been signed off for two periods in December:between 4 and 8 December for a gastro complaint and between 13 December to 5 January 2018 for stress and anxiety. The claimant was not able to offer any explanation for the delay that occurred after this date.

13. Dealing first with the question of whether or not the claim as originally filed was submitted within the statutory time limit or within such further period as I consider just and equitable. In considering this issue I had regard to the following matters.

    13.1 It is not disputed that any continuing act in relation to the failure to grant the claimant a mandate had concluded by 6 October 2017. The primary time limit for submission of an Et1 in relation to that matter was 5 January 2018. The claimant failed to submit his Et1 within the time limit.

    13.2 It is therefore necessary to consider whether it is just and equitable to extend time. The claimant's initial response to these matters was to pursue a grievance and he only received the decision in relation to his grievance on 18 December 2017. The claimant was by then signed off work due to work related stress and remained signed off until 5 January 2018. Over this period he also had to contend with the sad news in relation to his wife's miscarriage. However, the claimant began a new job on 11 January 2018. He had by then had obtained some advice from Mr Rai and the claimant had also spoken to ACAS over that period. However, it was not until 27 February 2018 that he finally contacted ACAS to begin pre-claim conciliation and not until 16 April 2018 that he filed his ET1. In deciding whether or not it is just and equitable to extend time, I have a broad discretion. I need to consider matters such as the length of delay, the reasons for the delay, the promptness with which and individual has acted once made aware of his legal rights, the steps which he took to obtain appropriate advice and I must also consider whether or not any prejudice will be caused to the respondent.

    13.3 The respondent says that prejudice will result. The cogency of evidence will be affected by delay. However, it seems to me that the prejudice to the respondent is not likely to be extensive. Ms Davidson is still available to give evidence, as she remains employed by the respondent and although the cogency of her evidence is likely to be affected by the passage of time, that is largely likely to have been due to the delay in the tribunal's processes, rather than the delay until April in bringing proceedings on the claimant's part.

14. Nonetheless I have concluded that it would not be just and equitable to extend time. The time limits are set out in statute and are strict. The burden is on the claimant to persuade me that I should exercise discretion and the exercise of discretion is intended to be the exception rather than the rule. Whilst I accept

that there are good explanations for the claimant's failure to bring proceedings in the period up to mid January 2018 (his pursuit of an internal grievance, his own health issues, and his wife's health) such matters were certainly resolved by 11 January when he began his new employment. By that point, the claimant was fit to work, had taken some legal advice, had discussed matters with ACAS. I do not consider that he has shown any good reason why he then delayed until the end of February to contact ACAS or until April to file his ET1. Ultimately, the burden is on the claimant to persuade me that it would be just and equitable to extend time and I am not persuaded.

15. I also considered the application to amend. The application to amend was not formally made until the February 2019 preliminary hearing. Whilst the claimant made reference to some of these matters in the e-mails sent in July 2018 it was only at the preliminary hearing in February 2019 that the additional allegations of direct disability discrimination were clearly stated. The claimant was aware of all of these matters before his employment terminated and was aware of them at the time that he filed the original ET1. There is no reason why these matters could not have been included in the ET1 or why an application to amend could not have been made at an earlier date. I have considered the guidance in the Selkent case which makes clear that I have a broad discretion in relation to the grant or refusal of an application to amend and that it will be relevant for me to consider matters such as: the nature of the amendment (whether it is minor or substantial), the timing and manner of the application to amend, the question of prejudice on each side, and the applicability of the statutory time limits as at the date of the application to amend, ie February 2019.

16. The respondent contends that a number of the witnesses whose evidence would be necessary to rebut the new allegations are no longer employed by it. In particular Mr Tyrell, the decision maker in relation to the grievance, left in July 2018.Two other employees concerned have also left, Ms French left in April 2018 and Mr Pigeon departed its employment in April 2019.

17. Having considered the balance of hardship, and having had regard to the Selkent factors, I have concluded that it would not be appropriate to grant the application to amend. I have had regard to the nature of the amendments, it seems to me that these are fairly substantial. They are not simply a relabelling exercise and they involve the addition of substantial new factual allegations which will broaden the nature of the enquiry that the tribunal would need to engage in from that contemplated in the original claim and would require the calling of additional witnesses. I have considered the question of the applicability of time limits, bearing in mind that time limits are not necessarily determinative, but that they are none the less, an important factor. The application to amend was made in February 2019 over a year outside the time limit in relation to the latest of the matters complained of and I do not consider that it would be just and equitable to extend time so far, particularly given that there appears to be no good explanation for the failure to either include such matters in the ET1 or to make an application to amend earlier in the process. I have also considered the timing and manner of the application. The claimant was on notice from the date of submission of the ET3 of the

need to clarify his claim and had to be repeatedly pressed by the respondent to do so during exchanges of e-mails in July 2018. However, the application to amend was not made made until the preliminary hearing in February 2019. Finally, I have considered the question of prejudice on both sides. As I have recorded, a number of relevant witnesses have left the respondent. Had the application been made promptly, then it would have been possible for the respondent to interview and obtain co-operation from these witnesses in dealing with the claim. Now they will be faced with the prospect of trying to secure co-operation from ex-employees. I am also conscious that the passage of time will affect witness memories and in this instance, witnesses will be being asked to deal with matters which occurred at least a year earlier if one takes the date of the application to amend and over two years if one were to look at matters from today's date. In, this instance, the fault is attributable to the claimant and his failure to either include these matters when filing his claim or to make an application to amend at an earlier stage, a failure which remains without good explanation.

18. Accordingly, having considered the interests of justice and the balance of prejudice, I do not consider it appropriate to grant the application to amend.

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Employment Judge Milner-Moore

Date: 14 March 2020……..

Sent to the parties on: .31 March 2020..

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For the Tribunal Office