EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr J B Mandicourt **v** **Lucozade Ribena Suntory Limited**

Heard at: Watford by CVP **On**: 14 August 2020

Before: Employment Judge Alliott

Appearances
For the Claimant: In person
For the Respondent: Mr Chris Milsom (Counsel)

JUDGMENT

The judgement of the tribunal is that:

1. The claimant's claims for race discrimination are dismissed as they were presented out of time and it is not just and equitable to extend time.

REASONS

Introduction

1. The claimant was employed by the respondent from 16 April 2018 as a Finance Business Partner. He was engaged on a temporary basis and his employment ceased on 14 September 2018.

2. By a claim form presented on 22 April 2019, following a period of early conciliation between 7 and 22 March 2019, the claimant brings complaints of race discrimination.

3. This preliminary hearing was ordered by Employment Judge Manley on 31 August 2019 to determine the following issue:

> "Whether it is just and equitable to extend time to allow the claimant's complaint of race discrimination to proceed".

The primary limitation period

4. The claimant's complaints relate to being denied the opportunity to obtain a permanent employment position with the respondent. He alleges that he

was not afforded the opportunity to be fairly assessed for one position and was not interviewed for another position. It is understood that the two positions that the claimant thinks he should have been considered for were offered to other individuals on 1 May and 22 May 2018.

5. In his claim form the claimant states that he "claims victimisation and race discrimination based on nationality. The claimant is a French national."

6. The claimant goes on to state that he:

> "raised these concerns in an email to Hannah Norbury on 13 July 2018, however he received no reply."

And

> "the claimant experienced isolation and unwelcoming working environment. He felt repeatedly ostracised and intimidated. The claimant raised this in an email to Hannah Norbury on 13 July 2018."

7. Hence, on the claimant's case, the less favourable treatment he is complaining about, namely the appointment of others to positions that he should have had an opportunity to apply for, took place in May 2018 and he was complaining about it on 13 July 2018. The three-month primary limitation period beginning with 13 July 2018, would have expired on 12 October 2018. At the very latest, time would have begun to run from the cessation of the claimant's employment on 14 September 2018. The three-month time period would therefore have expired on 13 December 2018.

8. The claimant's claim was issued on 22 April 2019. The claimant's claim was therefore 6 months 11 days after 12 October 2018 and 3 months 9 days after 13 December 2018.

9. The claimant's claims were presented out of time.

The discretion to extend time

10. Where a claim is not brought within the primary three-month limitation period set out in section 123(1)(a) of the Equality Act, it may be brought in "such other period as the Employment Tribunal thinks just and equitable": section 123(1)(b). From the Employment Tribunal Practice and Procedure IDS Employment Law Handbook at 5.103:

> "While Employment Tribunals have a wide discretion to allow an extension of time under the "just and equitable" test in section 123, it does not necessarily follow that exercise of the discretion is a forgone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR434, CA, that when Employment Tribunals consider exercising the discretion under what is now section 123(1)(b) Equality Act, "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 the discretion is the exception rather than the rule."

11. The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.

12. In addition, the respondent has drawn my attention to the case of British Coal Corporation v Keeble and others [1997] IRLR336 where the Employment Appeal Tribunal gave guidance that tribunals, in considering whether to extend time in discrimination cases, should consider the prejudice which each party would suffer as a result of the decision to be made and have regard to all the circumstances of the case, in particular:

    (a) The length of and reasons for the delay.
    (b) The extent to which the cogency of the evidence is likely to be affected by the delay;
    (c) The extent to which the party sued had cooperated with any request for information;
    (d) The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
    (e) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

The claimant's evidence

13. Following the direction for this open preliminary hearing, Employment Judge Manley made case management orders which were sent to the parties on 19 September 2019. The case management orders required exchange of list of documents and the creation of an agreed joint bundle of documents. It also stipulated:

> "The claimant and respondent shall prepare witness statements containing facts relevant to the preliminary issue and send them to each other by 21 December 2019".

14. On 20 December 2019, solicitors acting for the respondent were making enquiries of the claimant as to when exchange of witness statements could take place. On 20 December 2019 the claimant emailed the respondent's solicitors stating:

> "Now as far as I am concerned I will not include any other statements for it would be counter-productive on that case."

15. On 21 December, the respondent's solicitors replied to the claimant:

> "Are you not producing and serving your own witness statement for the preliminary hearing as per paragraph 3 of the Tribunal's order?"

16. On 21 December, the claimant replied to the respondent's instructing solicitors:

> "In terms of statements, provided that all necessary documentation will be included in relation to the delay in submitting the claim (I provided you with the list), and considering that no witness statement related to my period of contract

> has been requested to the employees interacting with me during my contract I do not see the interest of providing at this stage any witness statement for the preliminary hearing that would serve the purpose of justice".

17. The respondent served its witness evidence in accordance with the directions.

18. In an email dated 10 January 2020 to the claimant and the employment tribunal, the respondent complained that the claimant had not provided a witness statement and had failed to comply with the case management order. The application states:

> "In light of the above, the respondent respectfully submits that the claimant should be ordered to provide a witness statement which sets out his evidence as to why he believes it is just and equitable to extend time to allow his claim of race discrimination to proceed. If the claimant does not provide a witness statement in advance of the preliminary hearing, and is subsequently allowed to give oral evidence, the respondent will be unfairly prejudiced."

19. On 10 January 2020, the claimant responded to this application as follows:

> "Please find attached a clear communication exchanged between the parties on December 21st 2019 demonstrating that the desire not to provide any statement from the claimant's side was clearly communicated to the respondent."

20. The respondent's application and the claimant's response were referred to Employment Judge Lewis and on 18 January 2020 a letter was sent to the parties stating:

> "Employment Judge R Lewis declines to make any further case management order before the hearing on 10 February 2020. A party who fails to serve a witness statement will be unable to call or give evidence."

21. The open preliminary hearing listed for 10 February was adjourned due to a lack of judicial resource and relisted for hearing today. Thus, it is that the claimant appears today with no witness statement.

22. I asked for an explanation from the claimant as to why he had not filed a witness statement in accordance with the tribunal orders. He told me that he did not think it was relevant for him to provide a witness statement and that he thought it was optional. At one point he appeared to suggest that he was confused by the reference to a witness statement in that he was not a witness.

23. During the course of his submissions the claimant later informed me that in November 2018 he had been prioritising with a solicitor two other claims he was presenting to the employment tribunal, one of which involved Snacks International Development.

24. During the course of this hearing the respondent's solicitor obtained a copy of a judgment and reasons in that case. An open preliminary hearing was heard on 19 November 2019 in order to consider whether the claimant's

claims were out of time and whether time should be extended. It is notable that at paragraph 13 of the reasons the following is recited:

> "The claimant did not prepare a witness statement on his own behalf for this preliminary hearing in accordance with directions from the tribunal…. The tribunal nevertheless permitted the claimant to give oral evidence and he was cross examined."

25. I do not accept that the claimant was confused about whether he should prepare a witness statement. In my judgment he was perfectly well aware of the requirement for a witness statement as, on 19 November 2019, he had attended at the employment tribunal at Watford, represented himself and, as no doubt an indulgence, had nevertheless been allowed to give oral evidence.

26. Notwithstanding the absence of a witness statement from the claimant I heard submissions from him as to why time for presenting his claim should be extended on a just and equitable basis.

The relevant facts

27. It is quite clear to me that the claimant was well aware of the three-month time limit for presenting claims to the employment tribunal. In the Snacks International Development UK Limited reasons, at paragraph 6, the following is recited:

> "In January 2018, the claimant sought advice from employment law solicitors but was not successful in finding a solicitor who could give him the advice that he sought. The claimant was already by that time aware of the three-month limitation period for bringing unfair dismissal and discrimination claims because he had spoken to Acas about claims, or potential claims, against a previous employer in about August 2017."

28. In addition, the claimant has disclosed an email from his solicitors, Messrs Robinson Wilson, dated 20 December 2018, in which it is stated:

> "The preliminary issue would be to establish your substantive claim can be heard in the employment tribunal as you have missed the deadline to lodge a claim."

29. In the Snacks International Development case the claimant brought complaints of discrimination because of sexual orientation and victimisation.

30. It is clear to me that the claimant had been active in prosecuting two previous employment tribunal cases prior to this one, had access to legal advice and was familiar with employment claims involving discrimination. His knowledge all pre-dated his employment with the respondent. Further, he was specifically advised in December 2018 that his claims were already out of time.

31. The claimant told me that in November 2018 he came into contact with his solicitor Robinson Wilson, and that at that time he was prioritising his other two claims.

32. I now turn to consider the various factors I should do in the exercise of my discretion.

33. Given the state of the claimant's knowledge, in my judgment he had sufficient information to bring his complaint within three months of 13 July 2018. As such, the length of the delay is six months. Even if I am wrong on that the length of the delay from the cessation of his employment is three months.

34. The claimant gave me a variety of reasons for the delay. Three of these were lack of permanent job security, no stable financial situation and stress due to his partner's ill health. However, I do not consider these are valid reasons as he told me he was prioritising two other claims at the time. If he was able to advance those claims notwithstanding the problems he has identified, then he could and should have been able to bring this case. In November 2018 he was still within three months of the end of his period of employment.

35. A further reason given by the claimant was that he was waiting for information before launching his case. He referred to a subject access request made on 8 February which was replied to by the respondent in March 2019. Although he referred to receiving key data as a result of this request, in my judgment there is nothing within his claim form that he would not have known about in July 2018. In my judgment, this is not a case where key facts were unknown or hidden by a respondent justifying a delay in bringing proceedings.

36. I find that the claimant has provided no good reason for the delay in bringing his claim.

37. Turning to the cogency of the evidence, in my judgment this factor is of less consequence in employment cases due to the fact that delays are generally measured in months rather than years as in the County Court. However, I take into account the respondent's submissions that the claimant's case will involve analysis of interviews that the claimant had and the reasons that the respondent's interviewers came to the conclusions they did. As such, I take into account that any delay is the enemy of justice in that memories fade.

38. In my judgment, the respondent co-operated with requests for information. It is notable that the request for information was only made in February 2018 after the primary limitation period had expired. Thus, it can be concluded that the respondent was not responsible for the primary limitation period expiring.

39. As I have already found, the claimant was well aware of the three-month time limit for bringing a claim. Further, I have already found that he knew the primary facts about which he complains back in July 2018. It was specifically pointed out to the claimant that he was out of time in December 2018. He only issued his proceedings in April 2019. I do not consider that the claimant acted promptly once he knew of the facts giving rise to his cause of action. He let a further three months expire.

40. The claimant has always had access to appropriate advice and did have access to advice in November 2018.

41. Lastly, I have considered prejudice. Obviously, there is prejudice to both sides in the sense that the claimant loses the opportunity to present a claim and the respondent may be deprived of a defence. However, taking into account all the circumstances, in my judgment it would not be just and equitable to extend time. Consequently, I strike out the claimant's claims.

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Employment Judge Alliott

Date:
28/08/2020……..

Sent to the parties on: .....

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For the Tribunal Office