



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr R Smurthwaite

Wilson James Limited

Heard at: London South
Employment Tribunal

On:

23 July 2020

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:

For the Claimant: In person

For the Respondent: Mr Chadwick (Consultant)

JUDGMENT ON PRELIMINARY ISSUE

The Tribunal does not have jurisdiction to hear the claim because it has been presented to the Tribunal outside the permitted time limit and it is not just and equitable to extend time. The claim is therefore dismissed.

REASONS

Background

1. By a claim form dated 8 August 2019, the Claimant brings a claim of disability discrimination.
2. The Claimant alleges that he is disabled within the meaning of the Equality Act 2010 ("EQA") by virtue of an on-going problem with his shoulder that gets more painful the more he uses it. He told me that he has had this problem since being injured when in the police force 7 years ago.

3. On 21 January 2019, he met with the Respondent having returned from a period of sickness absence unrelated to his shoulder condition. During this meeting, the Claimant said that he discussed his on-going disability and disclosed that he had been prescribed medication with some severe side effects.
4. On 1 February 2019, the Claimant says that his manager sent an email to everyone at the Claimant's level and the level below, the management team, training and admin staff, stating that he and a number of other managers had not met their performance targets in January 2019. The Respondent's case is that such targets had been adjusted to take into account the Claimant's shoulder condition. The Claimant says that the email stated that he and others were being placed on stage one of the Employee Management Programme, which is a local process for those whose performance is managed.
5. It is alleged by the Claimant that the sending of the email is an act of discrimination, albeit the claim form does not state what type of discrimination under the EQA. It is not alleged that the discriminatory act continued past 1 February 2019.
6. If the discriminatory act was February 2019, the latest date by which a claim ought to have been presented is 30 April 2019. The claim form was therefore submitted over three months out of time.
7. At the end of the preliminary hearing, I decided that the claim brought by the Claimant was out of time and that it was not just and equitable to extend the time limits to allow the claim to proceed. Reasons were provided orally at the end of the hearing. These written reasons are provided at the request of the Respondent.

Law

8. The time limits for bringing claims of discrimination are set out in s.123 EQA which states:

(1) Subject to [sections 140A and 140B] proceedings] on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.
9. What is clear from s.123(1)(b) EQA is that the three-month time limit for bringing a discrimination claim is not absolute: tribunals have a discretion to extend the time limit for presenting a complaint where they think it is 'just and equitable' to do so. Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases. That said, in the

case of **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA** the Court of Appeal stated that when employment tribunals consider exercising the discretion “*there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*”. Of course, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable.

10. In exercising a discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in s.33 of the Limitation Act 1980 (as modified by the EAT in **British Coal Corporation v Keeble and Others [1997] IRLR 336**). Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Analysis and conclusions

11. During this preliminary hearing, the Claimant gave evidence under oath as to the reason for the delay in presenting his claim, and was cross examined by the Respondent's representative.
12. Essentially, he explained that the delay was caused by advice given to him by ACAS. I found this assertion surprising, given that ACAS does not give advice, and in any event would know that there is a three month time limit to bring claims, starting with the discriminatory act. However, added to this, I did not find the explanation given by the Claimant particularly persuasive. He could not produce any email exchange between him and the ACAS conciliator showing the advice given, or any email from the Claimant himself to confirm the advice. He could not remember whether he spoke to the same person - or whether he spoke to different people – a feature of his evidence I again found surprising.
13. Being an ex-police officer the Claimant is perhaps more informed than others about the importance of being able to prove his case and the importance of documentary evidence in the form of supporting notes and emails. He claimed to have been unwell during some part of this period and under the care of the mental health team, but he did not produce any medical evidence to support such claims.
14. The Claimant said in evidence that he carefully researched his claim before

submitting it, yet he appears not to have researched the time limits for bringing claims and does not appear to have questioned the ACAS conciliator about the rationale for the advice apparently given. The Claimant is an intelligent person, capable of doing all of the above, yet he did not, and apparently relied entirely on what he says he was told. I do not accept this to be a credible version of what happened.

15. I am mindful that I must not reach my decision purely based on the reasons (or lack of reasons) for any delay in presenting the claim, but that I must also consider the balance of prejudice between the parties. In considering the prejudice to the Claimant, I am mindful that a refusal to extend time would deny him the ability to pursue his claim. At the same time, I bear in mind that the Claimant does not have a claim which clearly sets out the complaints which need to be determined by a Tribunal; neither do such complaints appear to have reasonable prospects of success, based on what I heard today and what I have read in the pleadings.
16. With regards the prejudice to the Respondent I take into account the fact that had the claim been brought in time, it is likely that this case could have been heard prior to the difficulties created by Covid19. The effect of allowing the Claimant's case to proceed will mean a considerable delay in this case being heard, which will likely have a knock on effect to the quality of evidence given, being so long after the discriminatory act. Taking the above factors into account I conclude there is greater prejudice to the Respondent in allowing the case to proceed, than to the Claimant in not allowing the case to continue.
17. For the above reasons, I am not satisfied that it would be just and equitable to extend time. The Tribunal does not therefore have jurisdiction to hear the claim, which is dismissed

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Employment Judge Hyams-Parish
9 October 2020

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