EMPLOYMENT TRIBUNALS

Claimant: Mr JB Mandicourt

Respondent: Glen Grant Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: London South (by video conference)

On: 10 November 2020

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr Cordrey of counsel

JUDGMENT

The Judgment of the Tribunal is that:

The claimant's claim is dismissed.

REASONS

1. This hearing was to determine whether the claimant's claim was presented in time and, if not, whether it would be just and equitable to extend time.

2. At the start of the hearing, the respondent informed the tribunal that there had been a case management discussion on 25 March 2020, but that no written record was issued. The respondent informed the tribunal that the Employment Judge on that occasion had ordered the claimant to provide to the respondent by 19 June 2020 a witness statement for the time issue and that the claimant had not provided it. The respondent objected to the claimant being allowed to give oral evidence at this hearing on the basis of the claimant's breach of that order and the prejudice that the respondent may suffer from being taken unawares.

3. We asked the claimant why he had not provided the statement and he referred to the difficulty in obtaining statements from the respondent's current and former employees, from which we understood that the claimant thought the order related to evidence for the final hearing and not for this one. We decided to allow the claimant to give oral evidence because we had not seen the order of 25 March 2020 and so could not be certain of its terms. We invited the respondent to inform us if it felt it was being taken unawares in a prejudicial manner by evidence provided by the claimant, but no such information was provided to us.

4. The claimant was employed by the respondent from 19 October 2015 to 11 May 2017. After a period of early conciliation from 2 August 2017 to 16 September 2017, the claimant presented a claim on 9 September 2019. The claim was stated to relate to sexual orientation discrimination, 'data access (GDPR) disrespect', harassment, and slander and defamation. The tribunal does not have jurisdiction to decide cases relating to data access or slander and defamation. The claimant presented the claim himself, without a representative.

5. The claim was initially rejected by the Tribunal, inter alia, because, although the claimant had ticked 'sexual orientation' on his claim form, there were no details of this claim.

6. At the start of the hearing, the claimant stated that the latest act of discrimination of which he complained occurred on 3 Aug 2017. We take this date as the relevant date for deciding if the claim is in time. Mr Cordrey kindly did the maths of calculating the last date on which the claimant could have presented his claim in time, on this basis, as being 16 Dec 2017. The claimant did not disagree with this calculation, making the claim just short of 21 months out of time.

7. We were referred to a bundle of documents and the claimant gave evidence.

The law

8. The relevant law on this issue is set out in the Equality Act 2010 (EA). S123 EA provides that proceedings on a complaint within section 120 may not be brought after the end of the period of 3 months starting with the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. S140(B) EA extends these time limits to facilitate conciliation prior to presenting proceedings. These effectively give the claimant a month from the issuing of the ACAS early conciliation certificate to present his claim in time, and extend the time limit by the time spent on early conciliation.

9. The burden is on the claimant to show that it would be just and equitable to extend time.

10. In British Coal Corporation v Keeble [1997] IRLR 336, The EAT suggested that the tribunal would be assisted by the factors mentioned in s.33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

    (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 requests for information;

    (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

The facts

11. The details of the claim on the claim form were sparse and the main points could have been provided at the point of the claimant's dismissal.

12. According to the claim form, the claimant started to suffer harassment in the few weeks after he joined the respondent in October 2015. The claimant sought advice from Stonewall in August 2016 about potential discrimination he was experiencing in the workplace which referred him to their website and sources of free legal advice. On 13 August, the claimant contacted a law centre about his 'urgent and potentially important case'.

13. By 27 March 2017, the claimant had instructed a solicitor with regard to issues arising out of his employment. On 27 April 2017, the claimant submitted a detailed 9 page grievance regarding harassment and discrimination. The grievance quoted from the EA. On 2 May 2017, the claimant wrote to the respondent that, if the grievance process were not respected, he would bring an employment tribunal claim. By letter of 10 May 2017, the grievance was not upheld. The claimant was dismissed with effect from 11 May 2017.

14. The claimant appealed the grievance outcome by letter of 19 May 2017. On 12 June 2017, the claimant made a data protection subject access request to the respondent. The respondent provided data in response by letter of 21 July 2017. The grievance appeal decision was issued on 3 August 2017, rejecting the appeal.

15. On 2 August 2017, the claimant started early conciliation. It is a finding of fact in the Snacks International claim (see below) that the claimant knew about the three month limitation period for bringing discrimination claims in August 2017, after speaking to ACAS. By August 2017, the claimant had instructed Slater & Gordon solicitors. We agree with the respondent that it is inconceivable that they would not have advised the claimant to issue a claim within the time limit. The early conciliation period ended on 16 September 2017.

16. On 14 July 2018, the claimant complained to the ICO that the respondent had withheld data in responding to his subject access request.

17. By 9 October 2018, the claimant was complaining to his union about its failure to assist him legally. He wrote to them that his case justified an escalation to an employment tribunal.

18. The claimant's evidence was that, in November 2018, solicitors he instructed advised him to prioritise the Lucozade and the Snacks International claims, and to deal with the claim against the respondent as the lowest priority. The claimant provided no documentary evidence of this and we do not find it credible that solicitors would not have advised him to present a claim which was by then clearly out of time urgently, if he wished to proceed with it.

19. It is a finding of fact in a Judgment of 28 August 2020 in the Lucozade claim (see below) that the claimant was advised by his then solicitors, Robinson Wilson, on 20 December 2018, that he had missed the deadline to present that claim. We agree with the respondent's submissions that it must follow that the claimant was aware that he was out of time for presenting a claim against the respondent where he had been employed earlier. It is also a finding of fact in the Lucozade claim Judgment that the claimant

informed the tribunal that, in November 2018, he was prioritising his other two claims, IE those against the respondent (and Snacks International).

20. On 10 February 2019, the claimant presented a claim against a subsequent employer, Snacks International Development UK Limited claim number 3303766/2019 (the Snacks International claim), relating to his employment there from 30 October 2017 to 15 April 2018.

21. On 13 March 2019, the respondent wrote to the claimant, following a finding of the ICO that it had incorrectly relied on a management forecast exemption to withhold documents, providing further documents and asking for clarification from the claimant about the scope of his request. The respondent provided a final response to the claimant on 18 April 2019.

22. On 22 April 2019, the claimant presented a claim against Lucozade Ribena Suntory Limited claim number 3314153/2019 (the Lucozade claim) whose employment he entered on 16 April 2018 and left on 14 September 2018.

23. The claimant made further complaints to the ICO and, on 5 July 2019, the ICO sent the claimant a letter stating that it was satisfied with the respondent's final responses to him and that it could not assist the claimant further.

24. The claimant's explanation for his delay in presenting his claim was as follows. He said that, while still employed, he had contacts with solicitors, law centres and his union about his complaints and they all advised him that, with the evidence he had available, there was not enough chance of his winning his claim. Therefore, he began the process of obtaining personal data from the respondent to obtain more evidence. He said that the respondent was culpable in not providing the information he sought from it. He said he was still not satisfied that he had received all data from the respondent. He said that he thought that if he could get all the desired information from the respondent, a solicitor would agree to bring the claim for him.

25. When asked what changed so that he did present his claim, he said that he understood from the letter from the ICO of 5 July 2019 that he would get nothing further from the respondent under his subject access request and he would only get it under an employment tribunal order for disclosure. When asked why therefore he delayed bringing his claim until September 2019, he said that he was too taken up with the Snacks International and the Lucozade claims. He confirmed that, from July to September 2019, he was not working.

26. The claimant confirmed that he knew about time limits for tribunal claims and that extensions were only allowed in exceptional circumstances. He said that he was aware of the power of employment tribunals to order parties to order disclosure of documents from his discussions with lawyers in 2017. He said he had, in spite of this, pursued documentation through a subject access request because that was the legal advice he had received. The claimant was unable to point to this advice from lawyers in the bundle. The claimant confirmed that the basis of his claim was detailed in his grievance.

27. The claimant did not refer to a single document which he alleged was withheld by the respondent which was necessary for him to present his claim.

28. The claimant argued that the cogency of the evidence would not be affected by the delay because the events were covered by the documents and there were many witnesses. He said that he took steps promptly for example in raising a grievance.

29. He expressly did not rely on an argument that he had received incorrect legal advice. He expressly said that the lawyers he consulted did not encourage him to delay presenting his claim. He said the lawyers he consulted were clear about the time limits.

30. In a skeleton argument, the claimant stated that the bundle before us demonstrated 'a situation of harassment and unfair/less favourable treatment referring constantly to the sexual orientation of the Claimant.'

31. The respondent submitted that the cogency of the evidence would be affected by the delay and there would be prejudice to the respondent. It relied in particular on the fact that key individuals involved in the matters about which the claimant complained had left its employment. The Managing Director left at the end of 2017; the HR Manager left in July 2019. S Holme left in April 2020. The respondent submitted generally that memories would fade given the two year delay and the three month time limit reflects the turnover of staff and fading memories. The respondent made other general submissions about there being no good reason for the delay in presenting the claim.

Conclusions

32. The claimant's delay was extremely lengthy being the best part of two years.

33. We do not consider that the claimant's explanation for his delay in presenting his claim, that he needed to obtain information through a subject access request (SAR) in order to have the evidence to support his claim, is either reasonable or credible.

34. It is not reasonable because the claimant confirmed that he was aware of the time limits for his claim and that extensions would only be allowed in exceptional circumstances. Further, he confirmed that, in 2017, he was also aware that, in tribunal claims, there is a discovery process to allow him to access documents. It follows from this that he knew he need not rely in a SAR to obtain further information. He clearly did not need a solicitor (who had to be persuaded of the prospects of his claim through the provision of further documents) to submit the claim for him because he eventually submitted it himself. The claimant knew enough details about his complaint to compose a 9 page grievance letter, in April 2017. There was nothing to stop him presenting a claim in time with those details. Instead, the claim form as presented was much sparser and the claimant could have made the main points in it at the termination of his employment.

35. It is not credible because of the claimant's delay in presenting the claim from 5 July 2019 when the ICO informed him it would not take the matter further to 9 Sep 2019. The claimant's explanation for the delay was that he was taken up with the Lucozade claim and the Snacks International claim. That explanation lacks credibility because those claims had already been issued by 5 July 2019 and so it was the claim that had not been issued which should clearly have been prioritised, and the claimant was not working so should have had time to deal with everything.

36. Further, the claimant delayed in complaining to the ICO about the SAR response he had received from receipt of the response on or about 21 July 2017 until 14 July 2018. If the claimant were really so concerned to obtain further information in order to pursue his claim, he would have complained to the ICO as soon as he had had a chance to consider the data provided by the respondent.

37. Further, the claimant stated that the bundle before us demonstrated 'a situation of harassment and unfair/less favourable treatment referring constantly to the sexual orientation of the claimant.' The claimant did not receive any documents from the respondent after 18 April 2019 when the respondent sent its final response to the SAR

to the claimant. It follows that, if the claimant was, as he says, reliant on documents from the respondent to demonstrate his claim, he must have received all of them by 18 April 2019, if the bundle now demonstrates sexual orientation discrimination. Therefore, there was no requirement for the claimant to delay after 18 April 2019 in presenting his claim.

38. Further, the claim form, when eventually submitted, contained so little detail of the discrimination claim that it was initially rejected by the tribunal, partly on that ground. This was after the ICO was satisfied with the personal data response provided by the respondent to the claimant. The claimant did not refer to a single document which he alleged was withheld by the respondent which was necessary for him to present his claim.

39. For the reasons given in para 34 above, it would not be just and equitable to extend time to 5 July 2019 when the ICO informed the claimant it would not take the matter further. Even if it were so just and equitable, for the reasons given in para 35 above, the claimant did not then act promptly enough after 5 July 2019 for it to be just and equitable to extend time to 9 September 2019.

40. The claimant did not act promptly when he knew of the claim, for example when he presented his grievance citing the EA, or when he was informed by the ICO that his complaint was closed.

41. The claimant took professional advice from numerous sources, a law centre, at least two firms of solicitors and probably his union. It is inconceivable that they did not advise him to present his claim in time, or if the time limit had passed, as soon as possible.

42. We consider that there would be prejudice to the respondent if the claim were allowed to proceed. Generally, it did not become aware until September 2019, more than two years after the claimant's employment had ended, that it prospectively would need evidence to defend a claim and so it did not have chance to collect evidence while matters were still fresh in memories. Particularly, two of its employees involved in the matter had left the respondent's employment before the claim was presented and so the respondent did not have chance to get statements from them before they left.

43. The claimant will also be prejudiced if we dismiss the claim because he will not be able to proceed with it at all. However, the claimant has brought this on himself by his unreasonable delay and, when our decision will inevitably prejudice one of the parties, we consider it more equitable for the claimant to be prejudiced when it was within his control to bring the claim in time.

44. For these reasons, we consider it would not be just and equitable to extend time to allow the claimant to bring his discrimination claim.

45. For completeness, given that the non discrimination claims cited on the claim form cannot be considered in an employment tribunal, all the claimant's claims are dismissed.

Employment Judge Kelly

Signed on: 11 November 2020