



EMPLOYMENT TRIBUNALS

Claimant: Mr P Navarro Molina

Respondent: Accor UK Business and Leisure Hotels Limited

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: Wednesday 24 March 2021

Before: Employment Judge B Elgot

Representation
Claimant: Mr C Devlin, Employment Tribunal case worker, UVW Union
Respondent: Mr S Hoyle, Legal Consultant

JUDGMENT having been sent to the parties on 26 March 2021 and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant's claims of disability discrimination and victimisation were dismissed on 24 March 2021 at a Preliminary Hearing on the ground that an employment tribunal has no jurisdiction to hear them. The reason for that decision is that the Employment Judge decided that all the claims were presented out of time and it is not just and equitable to extend the time limits as provided for in s 123 Equality Act 2010.

2. The Claimant gave evidence on his own behalf and had the benefit of an interpreter in Spanish when giving his evidence and responding to cross examination. His other witness was Ms Sonia Montero Sanchez, a caseworker employed by the Claimant's trade union United Voices of the World (UVW). Ms Montero Sanchez has some legal qualifications and education in both Colombia and England. She was only able to dial in to the call without a video connection. I am satisfied that her evidence was given in full so that all participants in this Preliminary Hearing could understand her evidence in chief and responses to cross examination.

3. There was an agreed Preliminary Hearing bundle and I had the benefit of a skeleton argument and a bundle of case authorities prepared by the Claimant's representative.

4. The Claimant was a maintenance technician employed by the Respondent since July 2017. The parties agree that his employment came to an end on 30 January 2020 with notice to 29 February 2020. The Claimant makes claims of disability discrimination including harassment and victimisation. There is no complaint of unfair or wrongful dismissal. His alleged disability arises from an injury to his right elbow which he says occurred at work in September 2017 as a result of the Respondent's negligence. Ms Montero Sanchez confirmed in evidence that both she and the Claimant knew '*the clock began to run*' at the latest from 30 January 2020 which is the date on which the Claimant was dismissed.

5. By reference to the time limits set out in s 123 (1) (a) Equality Act 2010 the latest date by which the Claimant must present his claim to the Tribunal or take advantage of the extended time limit by entering in to mandatory early conciliation via ACAS was 29 April 2020. In fact ACAS were not notified until 14 May 2020, just over two weeks late. The conciliation period ended on 29 May 2020 and the ET1 Claim was lodged with the Tribunal on 19 June 2020.

6. The Claimant says he has been represented by his trade union UVW since February 2019 in connection with disciplinary/ performance and capability reviews which he was required to attend. The UVW trade union and specifically Ms Montero Sanchez in paragraphs 8-10 of her witness statement candidly admit that the deadlines in this case were missed as a result of her very heavy workload and consequent failure to remember to contact ACAS or the Tribunal and thereby adhere to the necessary time limits. Ms Montero Sanchez consulted a legally qualified colleague Ms Beech who also seems to have failed to fully appreciate the urgency of the situation.

7. It is clear from case law such as Steeds v Peverel Management Services Ltd 2001 EWCA Civ 419 Court of Appeal that it is not sufficient for the Tribunal to refuse an extension of time in this type of case simply on the basis that the Claimant is 'stuck' with the mistakes of his professional advisers and must pursue them for remedy through separate litigation. The 'just and equitable' test requires a consideration of all the relevant factors and not just a decision to inevitably attribute the mistakes of his advisers to the Claimant.

8. S 123 (1) (b) of the 2010 Act provides that complaints of unlawful discrimination which are out of time may nevertheless be considered by the Tribunal within '*such other period as the employment tribunal thinks just and equitable*'. This wording permits of a broad test with a wide discretion but there is no presumption of extension.

9. I have taken into account all the circumstances of this case including the length of and reasons for the delay and been guided by the factors set out in the 'checklist' provided by s 33 Limitation Act 1980. I decline to extend the relevant time limit in these proceedings for the following reasons:-

10. I am satisfied that not only was there incorrect advice and mistakes of law and practice made by the Claimant's trade union advisers but that he personally was also responsible for the delay and lack of promptness which occurred in this case.

11. I find that the Claimant has demonstrated only a limited amount of motivation or interest in robustly pursuing his claim within the relevant time limits. He met with Ms Montero Sanchez, his allocated case worker since October 2019, on at least four separate occasions when I am satisfied his potential claims in the Tribunal were discussed including the fact that there must be a referral to ACAS for early conciliation within a set timescale. He also spoke to her several times on the telephone and/or using text and WhatsApp and was aware of the time limits.

12. Ms Montero Sanchez described that they met on 4 February 2020 in order to make the referral to ACAS. They were unsure whether proper contact had been made with ACAS because of computer connectivity problems. The Claimant was asked to confirm to his case worker that he had received a reference number from ACAS. He received no such number but he did not notify Ms Montero Sanchez of the failure even by the time that they both attended at the internal appeal hearing on 24 February 2020. The Claimant did not inform his case worker that ACAS had not been in touch with him until she asked him again in mid-March at a meeting between them. He demonstrated no urgency in pursuing his own claims even though he was fully informed of the time limits and despite the fact that he and Ms Montero Sanchez, according to her evidence, communicated several times between 24 February and mid-March 2020. It is difficult to understand why he did not remind her to ensure that she promptly contacted ACAS and/or the Tribunal

13. Their fourth meeting was on 14 April 2020 when Ms Montero Sanchez told the Claimant that she would try again to notify ACAS. Again, she had communication problems with the ACAS webpage. She told the Claimant she would try the next day but thereafter she forgot to pursue this task. The Claimant did not check with her that she had succeeded in the notification, he did not remind her, he did not enquire where the ACAS reference number was. He was entirely passive in following through on any one of their four meetings and discussions about the necessity to notify ACAS within time. When the Claimant received an email dated 14 April 2020 saying (inexplicably) that he had two more months in which to '*bring his case to court*' he did not query this statement despite four meetings with Ms Montero Sanchez when the urgency of contacting ACAS had been discussed. The first of those meetings on 4 February 2020 had been over two months previously.

14. Both the Claimant and Ms Montero Sanchez are fluent in Spanish as is the legal caseworker Mr Devlin; there was no linguistic obstacle to communication between them. The Claimant told me that he understands English '*more or less*', because that is the language used at work, and that he can read English '*partially*', better than he can speak. He demonstrated those skills during the Preliminary Hearing. He has access to a mobile phone, a computer and at least one other device which he used at the Hearing.

15. On 14 April, in a short email from Ms Montero Sanchez to the Claimant written in Spanish, translated by Mr Devlin, and helpfully interpreted by the interpreter Ms McLintock,

she again stresses the requirement to contact ACAS '*this is the requirement as I told you before*'. This email, despite the incorrect reference to a further 2 month period of grace, confirms the several previous discussions between the Claimant and his case worker stressing the importance of prompt referral for early conciliation. The Claimant confirmed in cross examination that the timeline described in the witness statement of Ms Montero Sanchez is true and accurate. He said '*I knew there was a unit of time and it could be detrimental to my appeal*'. However he took no personal responsibility to pursue his claims or remind his advisers of what they had agreed to do on his behalf.

16. Ultimately UVW did not contact ACAS until 29 May 2020 and the ET1 Claim was not lodged until 19 June 2020. The Claimant made no application to the Tribunal in the period from 14 May to 19 June 2020 for an extension of time. The first application is in paragraph 55 of the Particulars of Claim, an application which was not pursued by the Claimant until identified at a Case Management Preliminary Hearing on 5 October 2020 before Employment Judge Barrowclough.

17. In addition I find that the merits of the Claim are somewhat weak: the submissions of the representatives confirm this assessment. The nature of the Claimant's disability from an injured elbow which has nonetheless permitted him to work at the same manual job without adjustments is unclear. There has been no disclosure of medical or other evidence and no Schedule of Loss. His depression has arisen post-dismissal. He has raised no grievance or formal employee complaint about the alleged harassment he has suffered related to his disability since 2017.

18. There was no evidence presented to me that the nature of the Claimant's alleged disability itself was a causative factor in missing the time limits in this case. He has an ongoing elbow injury. Ms Montero Sanchez and the Claimant both mentioned that he now has some 'emotional health' symptoms of depression and anxiety but this is not mentioned as a mental health impairment or disability during his employment.

19. I conclude that the Claimant's prejudice in being prevented from pursuing these claims (as a result of the failures of both UVW and the Claimant himself) is outweighed by the prejudice faced by the Respondent in responding to his disability discrimination allegations including harassment and victimisation which go back potentially as far as September 2017. The cogency of the evidence is likely to be affected by a delay in excess of 4 years particularly in the hospitality industry where, the Respondent's representative realistically submits, there is a high turnover of staff. Many of the Claimant's colleagues or ex colleagues, including some of the alleged discriminators, are foreign nationals who for various reasons have now left the UK and are not available as witnesses. There would be a necessity to search through considerable documentation.

20. The protected acts pleaded in relation to the Claimant's victimisation claim do not on their face fall within the parameters delineated by s 27 of the 2010 Act.

21. In all the circumstances of this case I am not persuaded that it is just and equitable to extend time in accordance with s123 (1) (b) Equality Act 2010. Consequently a tribunal

has no jurisdiction to hear the claims of disability discrimination because they are presented out of time.

**Employment Judge B Elgot
Date: 20 April 2021**