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EMPLOYMENT TRIBUNALS

Claimant

Mr C Joseph

AND

Respondents

The Royal Borough of
Kensington and Chelsea

Heard at: London Central (By CVP videolink)

On: 11 May 2021

Before: Employment Judge Brown

Representation:

For the Claimant: In person

For the Respondent: Ms J Bann, Solicitor

JUDGMENT

The judgment of the Employment Tribunal is that:

1. The claim was presented out of time and the Tribunal does not have jurisdiction to hear it. The claim is dismissed.

REASONS

Preliminary

1. The Claimant, an agency worker, brought a complaint of age discrimination against the Respondent, arising out of the termination of his assignment with the Respondent, the end user.
2. This hearing was listed as a Final Hearing for 1 day to determine the Claimant's claims against the Respondent.
3. One of the issues to be decided was whether the claim had been brought in time and, if not, whether time should be extended for it.
4. It was not in dispute that the decision to end the Claimant's assignment was communicated to the Claimant on 26 April 2019, but that the Claimant did not submit his claim until 16 September 2019. Day A on the Claimant's ACAS EC certificate was 5 August 2019 and Day B was 5 September 2019. The Claimant

contended that his manager, Mr Logue, had told him on 27 July 2019 that his assignment had been terminated because he was too old. The Respondent acknowledged that, if the Claimant had only discovered on 27 July 2019 that age was the reason for termination, this would be a reason for extending time for the Claimant's claim.

5. I had been allocated to the case as a Judge sitting alone, on the basis that the case was a listed for Preliminary Hearing. It emerged, during the hearing, that the parties had anticipated a Final Hearing. The issue of time limits was, however, suitable for determination at a preliminary hearing. As I had sat as a Judge alone, I have decided to determine the preliminary issue regarding time limits, only. I do not make any findings on the substantive merits of the claim.

6. I was provided with: an indexed Bundle of documents (page references in these reasons are to pages in that Bundle); a skeleton argument from the Respondent and 2 cases; a witness statements from the Claimant; and 2 witness statements on behalf of the Respondent, from Mr Phillip Logue and Mr James Harris. In the event, Mr Harris did not give evidence. I therefore disregarded his witness statement.

7. The Claimant asked for a postponement of this hearing because he had made a Data Subject Access Request ("DSAR") which the Respondent had not yet answered. I explained that the DSAR process was separate from the Tribunal processes and failure to answer a DSAR request was not grounds for a postponement. I was told by Ms Bann for the Respondent that disclosure had taken place and that all relevant documents had been exchanged. The Claimant did not identify any particular document which he said should have been disclosed. There were no grounds for a postponement and I proceeded with the hearing.

8. The hearing was conducted by CVP videolink. The Respondent's representative, Ms Bann, had significant connection problems at the start of the hearing. There were frequent pauses as the Tribunal waited for her to rejoin. By the time the witnesses gave evidence, however, Ms Bann's connection difficulties had been resolved. The hearing then proceeded without difficulty. The parties and representatives were able to hear what the Tribunal heard. Members of the public were entitled to attend the hearing but none did.

9. I heard evidence from the Claimant and from Mr Phillip Logue.

10. I reserved my judgment.

Findings of Fact

11. The Claimant was an agency worker assigned to work for the Respondent, the end user from early 2018. He was engaged as a multi tradesman, carrying out repairs and maintenance on the Respondent's housing stock.

12. The Claimant's line manager from 11 February 2019 was Phillip Logue.

13. On 26 April 2019, James Harris, Mr Logue's manager, asked Mr Logue to attend a meeting with him and the Claimant. The meeting took place in the downstairs meeting room at the Respondent's Kensal Rise premises.

14. The Claimant told me, and I accepted, that he was informed, at that meeting, that his work for the Respondent was being terminated because the Respondent was 'downsizing'.

15. The Claimant agreed that the decision to terminate his assignment was made and communicated to him on 26 April 2019. He agreed that he was not employed by the Respondent at any time.

16. The Claimant told the Tribunal that he continued to work for the Respondent until 10 May 2019, when his assignment ended.

17. The Claimant also told the Tribunal that he had returned to the Respondent's premises on a number of occasions thereafter. He said that on Friday 28 July 2019 the Claimant had been attending an interview and bumped into Mr Logue outside the Respondent's premises. He said that he asked Mr Logue to fetch some certificates from the Respondent's premises but that Mr Logue returned to say that the relevant file was locked and he could not obtain the key. The Claimant said that he had a conversation with Mr Logue "in the dining room" when Mr Logue had said that the Claimant's assignment with the Respondent had been ended because the Claimant was too old, had a scar on his face and I did not meet RBKC's criteria.

18. Later, when cross examining Mr Logue, the Claimant said that the relevant conversation had taken place outside and that the certificates were in a safe.

19. In evidence, Mr Logue emphatically denied that this conversation had taken place. He said that it was a complete fabrication and that he had never seen the Claimant again after the meeting on 26 April 2019. Mr Logue said that, since he started work for the Respondent in February 2019, he had only ever known that certificates were stored online in a folder.

20. I preferred the evidence of Mr Logue. The Claimant's evidence was vague and unconvincing. His case appeared to change between his evidence and his cross examination of Mr Logue. He gave very little detail of the alleged conversation between the two men about the reason for the Claimant's engagement being ended.

21. There was nothing else to support the Claimant's version of events. The Claimant agreed in evidence that he had been told on 26 April that the reason for termination was downsizing.

22. I decided that the Claimant did not encounter Mr Logue on 28 July 2019 and that Mr Logue did not tell the Claimant that his assignment had been ended because he was too old.

23. The Claimant did not give any other reason for submitting his claim out of time, other than he had continued working until 10 May 2019. He did not say he

had been unable to bring a claim earlier, or that he had been unaware of his right to bring a claim, or that he had been misled by anyone.

Law

24. By s123 *Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of

- a. the period of three 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.

25. By s123(3) *EqA*, conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it

26. S 207B *ERA 1996* Extension of time limits to facilitate conciliation before institution of proceedings, provides

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).[...]²

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

27. There is a distinction between a continuing act of discrimination and a one-off act with continuing consequences, *Chaudhary v Specialist Training Authority of the Medical Royal Colleges* EAT/1410/00, [2001] All ER (D) 294 (Nov); affirmed by the CA [2003] ICR 1510.

28. Where a discrimination claim has been brought out of time the Employment Tribunal can extend time for its presentation where it is just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure Link* [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless they can justify a failure to exercise the discretion. Quite the reverse; a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of

time claims to proceed, Tribunals may have regard to the checklist contained in s33 Limitation Act 1980 as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, 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 of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action..

Discussion and Decision

29. The relevant act of alleged age discrimination was the decision, made and communicated to the Claimant on 26 April 2019, that his assignment with the Respondent would be ended. The Claimant was not employed by the Respondent so there was no act of dismissal. The Claimant's assignment actually ended on 10 May 2019. Nevertheless, the Claimant did not argue that there had been any different decisions made between 26 April 2019 and 10 May 2019. 10 May 2019 was simply the date on which the decision, made on 26 April 2019, took effect.

30. By s123 *Equality Act 2010*, the Claimant's complaint of age discrimination should have been brought within 3 months starting with the date of the relevant act; that is, within 3 months starting on 26 April 2019.

31. The Claimant did not submit his claim until 16 September 2019. Day A on the Claimant's ACAS EC certificate was 5 August 2019 and Day B was 5 September 2019. The period between the day after Day A and Day B is discounted in determining whether the Claimant brought his claim in time.

32. However, given that the relevant decision was made on 26 April 2019, the Claimant would need to have contacted ACAS by 25 July 2019 in order for the claim to have been in time. He did not contact ACAS until 5 August 2019, when his claim was already out of time.

33. I decided that it was not just and equitable to extend time for the claim. While the delay was relatively short, there was no explanation for that delay. I rejected the Claimant's evidence that he had only discovered that he had been subjected to age discrimination on 28 July 2019.

34. The Claimant did not argue that he was ignorant of his right to bring a claim, or that he had been prevented in any other way from bringing a claim earlier than he did.

35. The Claimant was aware on 26 April 2019 that the decision had been taken to terminate his assignment. He had 3 months from that date to bring his claim. He failed to do so, for no good reason.

36. The Claimant presented his claim out of time. The Tribunal has no jurisdiction to hear it.

Employment Judge Brown

Dated: ...11 May 2021.....

Sent to the parties on:

12/05/2021.

For the Tribunal Office