EMPLOYMENT TRIBUNALS

Claimant: Mr R Bermingham

Respondent: DHL Services Limited

Heard at: **Midlands West** **On:** **28 June 2021**

Before: **Employment Judge Woffenden**
Members: **Mrs B Astill**
Mr G Murray

Representation
Claimant: In Person
Respondent: Mr R Lassey of Counsel

JUDGMENT having been sent to the parties on 29 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1 The claimant had presented a claim of disability discrimination against the respondent on 3 December 2019. The impairment on which he relied was hypersomnia. The ACAS certificate was received on 4 October 2019 and issued on 18 November 2019.Employment Judge Meichen conducted a preliminary hearing on 24 June 2020 and listed the final hearing for 4 days starting on 28 June 2021.

2 We were to conduct that hearing today. Before the hearing commenced we asked the claimant about any reasonable adjustments that might be made for him. He said he had taken his medication ,there were no reasonable adjustments but he asked that we kept an eye on him which we did .

3 At the preliminary hearing Employment Judge Meichen had identified the complaints as direct disability discrimination and /or discrimination because of something arising in consequence of disability. The act of direct disability discrimination or unfavourable treatment complained of was said to be the respondent's banning of the claimant from using manual handling equipment ('MHE') in either December 2015 or on or about 24 April 2019.

4 Employment Judge Meichen had made it clear in his order that there were two preliminary issues to be determined at the final hearing: a) whether the claimant was a disabled person at the relevant time and b) whether the claims had been made out of time and if so whether it was just and equitable to extend time. The claimant told him that he would say that it was just and equitable that time be extended. Employment Judge Meichen recorded it was not clear to him how (even if the act was taken as having occurred on 26 April 2019) the act might be said to be a continuing act. Having identified the issues to be determined at the final hearing, Employment Judge Meichen gave the parties 14 days to inform each other and the tribunal in writing if what was said in his order about the case and the issues was inaccurate and/or incomplete in any important way.

5 We initially decided to determine whether the claimant was disabled. However, during an adjournment to enable us to read documents from the agreed bundle for the final hearing, it became apparent that as there was a dispute about when the discrimination took place this had an impact on the date when disability was assessed. We therefore told the parties that we had decided that the out of time issue should be addressed first because whichever date the banning occurred the claims were made too late unless it was just and equitable to extend time .

6 Although Employment Judge Meichen had said there were two potential dates on which the banning took place the claimant then told us that he did not allege the banning had occurred in December 2015 but that it happened on or about 24 April 2019.If so, the claim should have been presented by 23 July 2019 and no extension is afforded by the ACAS certificate .

7 After a further adjournment to enable the parties to prepare, we proceeded to determine the out of time issue.

8 We read only those documents from the agreed bundle for the final hearing to which we were referred by the parties. We heard oral evidence from the claimant.

Facts

9 From the evidence we saw and heard we made the following findings of fact:

9.1 In the past the claimant had held a trade union position while employed by the respondent. He was aware of the existence of employment tribunals but did not know about time limits . The claimant had not worked on a fork lift truck since 2014.In February 2019 the claimant attended a fact finding meeting at which he asked for a transfer out of the area in which he was working and for retraining so he could work on MHE.A second meeting took place on 24 April 2019 at which he was told that he was banned from using MHE. He did not take advice from the union about this because by at the time of the events which ended in the ban on 26 April 2019 he was not a union member.

9.2 The ban from using MHE was confirmed in writing on 26 April 2019 and the claimant appealed. On 2 June 2019 the decision was upheld and on 27 August 2019 he was told that the decision was final and there was no further right of appeal.

9.3 The claimant discussed the position with his wife and on 27 August 2019 he raised a grievance in which he complained about the process but he heard

nothing. He subsequently emailed the respondent's health and safety manager seeking a review of the ban and was told in September 2019 there would be no review because of his health condition.

9.4 In September 2019 (on a date he could not recall) the claimant contacted ACAS and asked what he should be doing. He was told he had three months less I day to present a claim and that he might have an issue . Despite that information he waited two weeks before contacting ACAS for the purpose of the ACAS certificate on 4 October 2019 but, that certificate having been issued on 18 November 2019, he then waited another two weeks before presenting the claim to the tribunal. In his oral evidence he said he thought his claim was in time because there was an ongoing process and even up to September 2019 he believed there was continuing discrimination relating to his grievance dated 27 August 2019 and the review of the ban sought from health and safety. Under cross examination he said he believed he could not present his claim until the internal process was finished and did not know why he had delayed two weeks after the issue of the ACAS certificate before presenting his claim but presumed it was because he did not have access to stuff in his head and waited to gather his thoughts together before presenting the claim.

9.5 Having put in the claim ,the respondent drew the claimant's attention to the contention the claim was out of time. He looked up what 'out of time 'meant on the ACAS and Citizens Advice Bureau websites. The information from ACAS said it would be up to the judge to decide. He prepared a time line and sent it in an email to the tribunal on 28 April 2020 with an explanation for the delay in making claim attributed to deliberate delay by the respondent so that he ran out of time. He had explained the time line to Employment Judge Meichen at the preliminary hearing.

9.6 We reject the claimant's evidence that he had delayed presenting the claim because he believed he could not present a claim until the internal process was finished .We did not find that evidence credible because he was informed of the ban on 24 April 2019 and it was confirmed to him in writing on 26 April 2019 and he knew the outcome of his subsequent appeal by 27 August 2019 and was informed unequivocally there was no further right of appeal. Further we reject his evidence to us that he had believed that there were continuing acts of discrimination relating to his grievance dated 27 August 2019 and the review of the ban sought from health and safety and that his claim was therefore in time. He did not put his case to Employment Judge Meichen on the basis that there were continuing acts of disability discrimination which postdated the ban. Employment Judge Meichen recorded the ban as the only act of disability discrimination. As we have already found , the claimant knew from the contemporaneous correspondence that the respondent's internal process had been concluded and (although he had been told by ACAS in September 2019 that there might be an issue) it was not until after his claim had been presented that he researched time limits. We find that he did not have the requisite belief in his mind at the time he presented his claim.

The Law

10 Section 18 A (1) Employment Tribunals Act 1996 imposes on claimants the requirement to contact and provide certain information to ACAS before instituting proceedings.

11 Section 140B Equality Act 2010 extends time limits for bringing claims for the purpose of facilitating early conciliation before proceedings are instituted. It provides that:

> ‘1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).
>
> But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.
>
> (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
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> (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.
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> (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.

12 In relation to time limits for discrimination claims section 123 Equality Act 2010 states that:

> ‘(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
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> (a)the period of 3 months starting with the date of the act to which the complaint relates, or
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> (b)such other period as the employment tribunal thinks just and equitable.
>
> (2)Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a)the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.'

13 There is a public interest in the enforcement of time limits which are exercised strictly in employment cases. The 'just and equitable' test is a broader test than the 'reasonably practicable' test in section 111 Employment Rights Act 1996.However,the burden is on the claimant to persuade a tribunal that it is just and equitable to extend time **(Robertson v Bexley Community Centre [2003] IRLR 434.**

14 In the case of **British Coal Corporation v Keeble [1997] IRLR 336 EAT** it was suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980 .Those factors are consideration of the prejudice which 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 ;whether the party sued had cooperated with any requests for information ;the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action ;and the steps taken to obtain appropriate advice once he or she knew of the possibility of taking action. However, a tribunal is not required to go through the matters listed in section 33 (3) of the Limitation Act, provided that no significant factor is omitted **(London Borough of Southwark v Afolabi [2003] IRLR 220 ; Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 33).**

Submissions

15 We thank the parties for their oral submissions which we have carefully considered.

16 Mr Lassey reminded the tribunal about what section 123 Equality Act 2010 said about time limits and of the public policy argument that time limits should be strictly enforced. He said the 'just and equitable' test did not set a low bar. He referred to section 33 Limitation Act 1980.He reminded the tribunal the claimant knew of the respondent's decision to ban him on 24 April 2019, confirmed in its letter to him dated 26 April 2019.That decision was the act of discrimination in the claimant's mind. His appeal concerned only the process adopted by the respondent. The decision would not be altered by his appeal ;even if it were successful the claimant could still argue the above act was discriminatory. But even if the claimant had good reason to engage with the appeal process he was told that was concluded by 27 August 2019.He did not contact ACAS until September 2019 and did not contact ACAS about the ACAS certificate until 4 October 2019.When he had been informed of the time limit he did nothing until 4 October 2019 and after the ACAS certificate had been issued he did not present the claim until 3 December 2019.The only reason given for the delay was the need to gather his thoughts but that was not a good enough explanation to satisfy the tribunal; if it had taken him a day or a week maybe but the period was 6 weeks. There was real and tangible prejudice to

the respondent in this case in addition to the 'ordinary prejudice' of memory fading and increased costs because the decision maker had now left the respondent's employment. Had the claim been made in time a witness statement could have been taken from him before his departure. There was no conduct of the respondent which should be taken into account; it had conducted and concluded an appeal process by 27 August 2019. The claimant had not argued that his disability was a factor to be taken into account nor was there any relevant medical evidence. As far as steps taken to get advice were concerned he did not contact ACAS till September 2019 and when he was told about time limits he did not do anything. He got advice and did not act promptly. Mr Lassey reiterated the prejudice to the respondent and submitted an extension should be refused.

16 The claimant submitted that on a number of occasions ACAS had not responded promptly. He had wanted to weigh things up so he asked the respondent for a review and raised a grievance .He did not want to go in 'gung ho'. The time line at each stage was 10 to 12 weeks and the respondent put him out of time. There was no justification for the delay ;the respondent had put him out of time purposely. He had not known the decision maker had left the respondent's employment. He had dwelled on whether he was in the right or in the wrong; he repeated he had not wanted to go in 'gung ho'. He had given the respondent loads of opportunities so that it would not get to this point. It was only fair that he got a fair hearing but he was not being treated fairly. He was not here to 'do one over'. He liked work and the managers even when he put in his claim about disability discrimination. He believed he was doing the right thing .He wanted to be fairly heard and treated.

Conclusions

17 This claim should have been presented by 23 July 2019 (see paragraph 6 above).It was not presented until 3 December 2019 (a delay of 19 weeks).

18 The claimant has attributed his delay in presenting his claim to deliberate delay on the part of the respondent so that he ran out of time. However, there was no evidence before us to support that assertion.

19 The claimant also attributed the delay to his belief that he had to wait until an internal process had been concluded and/or that at the time he presented his claim he had believed that there were continuing acts of discrimination relating to his grievance dated 27 August 2019 and the review of the ban sought from health and safety and that his claim was therefore in time but we found he did not in fact have those beliefs.

20 The only other explanation for the delay provided by the claimant was the need for time to gather his thoughts but in our judgment that is not an adequate explanation, particularly given the brevity of the contents of Section 8.2 of the claim form which consisted of 2 short paragraphs (7 lines in all).It would not have taken very long to provide that level of detail, even when account is taken of the seriousness of the decision to present a claim against one's current employer , a decision which no doubt requires time for reflection .We conclude that he was the victim of his own misfortune and was dilatory in his approach to the issue of proceedings.

21 The cogency of the evidence is likely to be affected by the delay because the decision maker is no longer employed by the respondent and no witness statement was taken before his departure. His evidence (should he be able and willing to attend on behalf of the respondent at the final hearing) will concern events which occurred in 2019, already a number of years ago.

22 We have not found that the respondent failed to cooperate with any requests for information or in any way misled the claimant as to its position.

23 In our judgment the claimant knew of the facts giving rise to the cause of action by (at the latest) 26 April 2019 when he received the respondent's letter of that date confirming the ban. By 27 August 2019 he knew the internal process was concluded .However, he did not seek any advice until September 2019 when he contacted ACAS (although he was aware of the existence of employment tribunals and had the ability to undertake research independently) and ,when he was told about the time limit and that there might be an issue, he waited until 4 October 2019 to contact ACAS about the ACAS certificate and ,having obtained this, then waited a further two weeks before presenting his claim. We conclude he did not act promptly.

24 As far as the prejudice which each party would suffer ,if the extension was not granted on just and equitable grounds, the claimant would not be able to pursue a claim based on 24 April 2019 ban .However ,if it were granted , the respondent's decision maker is no longer employed by the respondent and there will be further delay and costs expended in trying to ascertain his ability and willingness to attend the final hearing and obtain evidence from him ,the cogency of which is likely to affected by the delay.

25 The claimant has not persuaded us that we should exercise our discretion in his favour. No extension of time is granted on just and equitable grounds and his claim is dismissed.

Employment Judge Woffenden
24 September 2021