



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS
sitting alone

BETWEEN: Mr J Alton
Claimant

and

Royal Caribbean Cruises
Respondent

ON: 9 May 2022

Appearances:

For the Claimant: Mr L Rose, Solicitor

For the Respondent: Mr E Kemp, Counsel

RECONSIDERATION JUDGMENT

- 1 It is in the interests of justice to reconsider the decision of Employment Judge Sage (dated 26 November 2020 and sent to the parties on 1 December 2020) in respect of whether the claim was submitted in time.
- 2 The claim of disability discrimination was submitted out of time and is dismissed (in the alternative to it already having been dismissed for want of being within the territorial jurisdiction of the Employment Tribunal).

REASONS

1. In November 2020 in this matter Employment Judge Sage heard arguments regarding two preliminary matters arising in the claimant's claim of disability discrimination. The first - territorial jurisdiction - was decided in favour of the respondent and is the subject of an appeal by the claimant. Having made that decision, Judge Sage declined to determine the second preliminary matter – whether the claim was submitted in time. That decision is the subject of the respondent's reconsideration application.

2. Having been appointed by the Regional Employment Judge to consider that application in the long term absence of Judge Sage, I gave a preliminary indication in January this year that if the application was pursued I would allow it to proceed. Having heard submissions from both parties today, that is indeed the position. It is in the interests of justice that the respondent's reconsideration application proceed even though it was made considerably out of time. It is apparent that an alternative decision on the time point would greatly assist both parties in saving time and expense because it would dispense of a remitted hearing on time were the appeal (and any further appeal) on territorial jurisdiction to succeed.
3. That being the case I heard the time issue afresh. Although Judge Sage's Judgment and reasons dealt in part with the necessary findings of fact in order to make such a determination, there were relevant matters not dealt with in her Judgment that I feel are required in order to make such a determination.

Evidence & Submissions

4. Accordingly I heard from the claimant as well as reading written statements from both his mother and grandmother.
5. I also had a bundle of documents before me. A number of documents had been added to the agreed bundle by the respondent last week upon receipt of the claimant's revised witness statement. The claimant objected to the inclusion of those documents on the basis of late disclosure but I accepted the respondent's explanation that the documents only became relevant once they saw the matters referred to in his statement. I offered the claimant extra time to consider those documents with Mr Rose if that was required but after consultation it was confirmed that that was not necessary.
6. Both parties made oral submissions to supplement their written submissions on the conclusion of the evidence.

Relevant Law

7. Any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the Equality Act 2010). To facilitate early conciliation by ACAS that primary time limit may be extended if conciliation is commenced within that period but that was not the case here.
8. The burden is on the claimant to convince the Tribunal that the discretion should be exercised (*Robertson v Bexley Community Centre* [2003] IRLR 434). In deciding whether to do so, the Tribunal has a very wide discretion and is entitled to consider anything it considers relevant subject to the principle that there are good public policy reasons why time limits appear in our legislation and they should be exercised strictly in employment cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so.

9. Lord Justice Underhill in the Court of Appeal has confirmed that the best approach for a Tribunal in considering the exercise of this discretion is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23).

Findings of Fact

10. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

11. This claim arises from the withdrawal of employment from the claimant as an on-board entertainer on one of the respondent's cruise ships. The parties agree that the claimant was told this by telephone on 11 January 2019 and that was the latest date on which the alleged discriminatory act or acts took place. Accordingly the primary time limit to bring a claim of discrimination expired on 10 April 2019. In fact the claim form was submitted on 11 December 2019, significantly out of time.

12. The medical position of the claimant is relevant. There were two letters from doctors in the bundle. The first is dated 21 September 2016 and the second is dated 7 January 2019. They are written in very similar, and in some places identical, terms albeit that the concluding comments are specific to the context at the relevant time. Both confirm that the claimant's presentation did not fit the criteria for a classic bipolar illness and:

'...at most, if he needs to have a diagnosis, it is bipolar type 3 which is just a spectrum disorder rather than an illness.'

They both refer to the fact that the claimant has excellent insight into his condition, has learned to manage his emotions and was taking a low dose of relevant medication.

13. It is clear therefore that the claimant had a medical condition (whether or not it amounted to a disability) which would have had some impact on his state of mind and ability to deal with the steps needed to submit a Tribunal claim. I also note that the second of those medical letters pre-dates by a few days the events that give rise to the claim. There was no medical evidence as to his health thereafter. However I accept the evidence of the claimant, his mother and grandmother that those events had a significant detrimental impact upon him and I have no doubt significantly impacted his mood and ability to cope with everyday life.

14. The claimant very shortly after the events of 11 January sent a series of emails to the respondent asking for written confirmation of his position and making frequent references to the possibility, and then intention, of bringing legal proceedings. In his first email dated 16 January, headed 'Court Case', he referred to an intention to take the respondent to Court for unfair dismissal and mental health discrimination. He also asked for written

confirmation as to why he was not allowed to work for the company. That request, as well as other references to the possibility of legal action, was repeated in an email on the following day and then on 18 January he requested contact details for the respondent's legal team.

15. The claimant's evidence is that he innocently but mistakenly believed - based he said on common sense - that he needed that written confirmation in order to be able to commence any sort of legal proceedings. He confirmed that he did not have a legal team throughout this period, he did not take any advice and he did not do any form of research himself.
16. Correspondence of this nature then resumed in August and on 17 September the claimant twice emailed the respondent saying as no one was replying to his emails he would get in touch with a solicitor. That email was headed 'legal action will commence'. He also requested copies of all communications between the parties pursuant to freedom of information and GDPR rules.
17. Those emails did prompt a response from the respondent on 24 September which provided the written confirmation the claimant had been seeking. The claimant acknowledged that on the same day and again referred to seeking legal advice and taking the respondent to Court for discrimination
18. In late October that the claimant consulted the Derby Citizens Advice Bureau who advised him regarding time limits.
19. In 2019 the claimant had also been - at least to some extent - pursuing his own media business which is incorporated under the name 'Now That's Entertainment Online Entertainment Competition Ltd'. In the course of his evidence the claimant referred to this company as 'his baby'. Until November 2019 the claimant had been the sole director. On 25 November two additional directors were appointed. The claimant confirmed that he was responsible for making the necessary filings with Companies House.
20. In the meantime, the claimant appeared in March 2019 on the Judge Rinder television show. I accept his evidence that he did not initiate this appearance in that the 'claim' was brought by somebody else but he was the 'respondent' to it and clearly agreed to participate in the show. His evidence was that he enjoyed doing these sorts of things. The respondent says that this was all a publicity stunt in order to gain attention for the forthcoming live show produced by the claimant's company and that the claimant's apparent breakdown during the show was staged. The claimant denies this and says it was all entirely genuine. I accept the claimant's evidence in that regard but, as noted, he did freely agree in the first instance to take part in the show at that time.
21. I was referred to various social media messages which seem to indicate that the claimant's company was active in the relevant period and that a show, part of which had been recorded in 2018, was going to go live in the course of April 2019 onwards. The claimant's evidence was that all of his social media in this respect (which started in January 2019) was conducted by an

external organisation on his behalf, that he had no involvement and although he was 'the boss' he did not know what was going on on his behalf. I find this evidence extremely surprising and lacking in credibility. On the balance of probabilities the claimant must have been aware at least to some extent of the activities being advertised on behalf of his own company (of which at the time he was the sole director) and that some of those activities were happening and that he must have been involved to some extent to make them happen.

22. Another significant matter taking place in the claimant's life during this period was a criminal prosecution of an individual who had been harassing him. The defendant pleaded not guilty in the Magistrates Court, the claimant gave evidence and on 21 October 2019 a restraining order was granted for one year against the defendant.
23. The claimant commenced the early conciliation process with ACAS on 28 November and the ET1 was submitted on 11 December.

Conclusions

24. I remind myself that I am exercising a broad discretion taking all relevant factors into account although in accordance with Underhill LJ's advice in *Adedeji*, I start with the length of and reasons for the delay in submitting the claim.
25. Overall there was a significant delay between the expiry of the primary limitation period and the claim form being filed – some 8 months. Also there was a specific delay within that namely the delay between the claimant being advised by the CAB of relevant deadlines in late October and him contacting ACAS in late November.
26. In broad terms the claimant relies upon two reasons for the delay in filing his claim. His mental health and his mistaken belief that before he could file a claim he needed to get a written confirmation from the respondent as to the reason for the termination.
27. As far as the first is concerned, I note the limited medical evidence before me and accept that the period following the ending of his employment with the respondent was an extremely stressful time for him and a matter of great disappointment which must have exacerbated his condition at least to some extent. Also, there were clearly many other things going on in his life. Whilst I accept the point made by Mr Rose on behalf of the claimant that just because a person can do one thing does not mean that they are able to do another, I am very mindful that the claimant was able to participate in the Judge Rinder show during the primary time limit, was at least to some extent involved in running his own company throughout and by 25 November had agreed to two additional people coming on board as directors and participated as a witness in a criminal prosecution. All these matters lead me to believe that the claimant was able, notwithstanding his mental health issues, to participate in serious matters that required him to apply his mind to matters out of the usual course of everyday living.

28. As far as his mistaken belief is concerned, whilst I accept that this was a genuine mistake on his part, what the relevant correspondence does show is that the claimant, even if he did not understand the legal technicalities behind the words, was at least familiar enough with the relevant concepts to threaten legal proceedings, refer to unfair dismissal and discrimination. As someone who ran his own business and clearly participated in a number of different activities in the media world, he clearly could have done even a very basic level of research and discovered the more accurate position for himself. Instead of that he made an incorrect assumption.
29. As for the claimant's allegation that the respondent deliberately delayed replying to his requests in order to ensure that he missed the relevant time limit, there is nothing to back up that allegation other than simply an absence of reply. Indeed, another possible explanation is that it was his reference to freedom of information and GDPR that prompted the respondent to reply when they did.
30. For all these reasons I am not persuaded that the reasons relied upon by the claimant for the lengthy delay are cogent. Even if I was so persuaded, I note that he went to the Derby CAB in late October and yet then waited the best part of another month before he started the ACAS early conciliation process (and it was in that period that he appointed two additional directors to his Company).
31. Turning finally to the question of prejudice. Undoubtedly the claimant would be more prejudiced than the respondent by a decision that his claim was out of time. Mr Kemp says that it is possible that respondent would not be able to call all of the witnesses that it may wish to at a future hearing as they now live out of the jurisdiction. That may be correct but is by no means guaranteed. In contrast the claimant loses the opportunity to have his claim heard if I do not exercise the discretion in his favour.
32. However, prejudice is just one factor to take into account and in light of my findings and conclusions regarding the length of and reasons for the claimant's delay, I am not persuaded that it is just and equitable to extend time.
33. Accordingly I find that the claim of disability discrimination was submitted out of time and should be dismissed on that basis as an alternative to it already having been dismissed as being outside the territorial jurisdiction of the Employment Tribunal.

Employment Judge K Andrews
Date: **10 May 2022**

Judgment sent to the parties and entered in the Register on: **11 May 2022**

for the Tribunal Office