



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100929/2022

5

Held via Cloud Video Platform (CVP) in Glasgow on 9 August 2022

Employment Judge Tinnion

10 **Dr Christian Mallon**

**Claimant
In Person**

AG Barr plc

**Respondent
Represented by:
Ms K Norval -
Solicitor**

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant's claim alleging the Respondent breached a duty under ss.20-21 and 39(1) of the Equality Act 2010 to make reasonable adjustments in relation to an employment application he made was not presented in time.
2. It is not just and equitable to extend time in respect of the claim.
3. The claim is struck out for lack of jurisdiction under Rule 37(1)(a).
4. The Respondent's application for a deposit order is moot and is dismissed.

20

REASONS

25 Claims

1. By an ET1 presented on 6 February 2022 [3-14], the Claimant presented a claim arising out of the Respondent's 12 August 2021 rejection of his application for an innovation-related employment post. The Claimant's application (or the attached CV) stated he had dyspraxia and autism and asked for an 'oral application'. In box 9.2 of his ET1, the Claimant referred to reasonable adjustments.

30

2. In its ET3 and Paper Apart [15-27], the Respondent resisted the claim on the grounds that (i) the Claimant's application was rejected because he lacked an essential attribute for the role – experience in a brand management role within the consumer goods sector (ii) when it rejected his application, the Respondent did not know his CV contained a requested for an oral application (iii) there had been no breach of any duty to make reasonable adjustments for the Claimant (iv) the claim was vexatious, the Claimant having made over 100 claims in the Employment Tribunal (**ET**) since 2008, at least 40 of them having been made since 2017 (v) the claim was presented out of time, the discriminatory act having occurred on 12 August 2021 (date application rejected, Claimant notified), the Claimant not having presented a claim (or contacted ACAS) by 11 November 2021.

Open Preliminary Hearing

3. By a Case Management Order dated 25 July 2022, the Tribunal ordered an Open Preliminary Hearing (**OPH**) to determine (a) whether the above claim had been presented in time and, if not, whether time should be extended (b) the Respondent's application for a deposit order (requested in its ET3).
4. On 9 August 2022, the OPH was held via video/CVP. The Claimant acted in person. The Respondent was represented by a solicitor. Only the Claimant gave evidence (the Respondent did not call any witnesses). At the beginning of the OPH, time was spent making sure the Claimant, Respondent and Tribunal all had the right documents before them. The Respondent's documents consisted of a production of 55 pages, relevant pages of which the Tribunal refers to herein in square brackets, plus an authorities bundle. The Claimant's documents consisted of three PDF files (undated impact statement, two statements by S. Musique dated 16 October 2021, March 2022) and approximately half a dozen screenshots. The parties were informed that if they wished to rely on any documentary evidence they had to bring that evidence to the Tribunal's attention during the course of giving evidence.
5. At the outset of the OPH, the Tribunal asked the Claimant if he required any adjustments. He requested questions be put to him in 'manageable size', and

he be allowed some time before providing his answers. The Tribunal considered these adjustments to be entirely reasonable, and was satisfied they were made by the Respondent's solicitor and the Tribunal when questions were asked.

- 5 6. Before giving evidence, the Tribunal checked – and the Claimant confirmed - that he is bringing only one claim against the Respondent – a claim under ss.20-21 of the Equality Act 2010 for failure to make a specific reasonable adjustment (an oral interview following his job application) when he applied for the relevant post.

10 **Findings of fact**

7. The Tribunal makes the following findings of fact, including any in its Discussion/ Conclusions section of this document, on the civil balance of probabilities.
8. The Respondent manufactures and distributes soft drinks. It employs around
15 900 people, and has headquarters in Cumbernauld.
9. The Claimant says he has been unemployed since 2018. He is unquestionably an intelligent individual, having obtained a doctorate in Chemical Engineering from Birmingham University in the mid-2000s. He has a partner and child.
- 20 10. The Claimant says he has been disabled from birth because of two impairments: dyspraxia (diagnosed in 2014) and autism (diagnosed in 2021). In its ET3, the Respondent denied the Claimant was disabled because of these impairments and put him to proof. At the OPH, the Tribunal proceeded on the basis that the Claimant would be assumed to be disabled under s.6 of
25 the Equality Act 2010 because of these two impairments.
11. In August 2021, the Respondent advertised a Senior Innovation Manager post, the essential criteria for which included brand management. The Claimant applied for the post via a recruitment website (it should be noted that the Claimant's application and CV were not produced at the OPH). It is not in

dispute that either the application and/or the CV requested an oral interview and mentioned the Claimant's dyspraxia and autism.

12. By email on 12 August 2021 at 11:20, William Brown (Respondent Recruitment Specialist) notified the Claimant his application had been unsuccessful: *"Hi Dr Christian (LION), Thank you for your interest in and for applying to the Senior Innovation Manager position. We appreciated the chance to learn more about you and your professional experience. We have reviewed your application carefully and unfortunately, we won't be progressing at this time. However, we'll keep your information on file, and if another role becomes available that we think you're suitable for, we'll be in touch. In the meantime, we wish you success with your job search and in your career. Thanks again for your interest in AG Barr."* [32].
13. By email to Mr. Brown on 12 August 2021 at 11:29, the Claimant replied: *"Can I ask why my reasonable adjustments [sic] did not happen? As I was really clear on my CV for my request attached. I cannot help my disability and the equality act has been in place for 11 years. Please copy in your manager in your reply."* [32].
14. By email to the Claimant on 13 August 2021 at 11:15, Mr. Brown replied: *"Please accept our apologies about you receiving an automated email to reject your application for our Senior Innovation Manager position. There has been an error in the process that did not take account of your request for a verbal application. We would very much like to correct this situation and invite you to an online meeting with Jude Holt, Human Resources Business Partner (HRBP). The meeting will be an opportunity for you to discuss your application and for us to find out how your skills and experience match our role requirements. Would you be available for a 30 minute conversation on Tuesday 17th August? If so, please let me know your preference for when this call will take place and I will send a calendar invitation to a Google Hangout. I have also attached a copy of our Getting to know AG Barr which will give you insight into our values and vision before we speak. If you you [sic] require any further reasonable adjustments, please do not hesitate to contact me in advance of your call."* [35].

15. By email to Mr. Brown on 13 August 2021 at 11:22, the Claimant replied: *"Please prove to me I received an automated rejection. As k [sic] should not have a battle with a company when I apply for a job. My request on my CV cannot be missed as it's on the first page and in detail at the end of the CV."* [35].
16. By email to the Claimant on 13 August 2021 at 11:41, Mr. Brown replied: *"Hi Christian, Thank you for your reply. Once again, I can only apologise for the error that has taken place in our process. Your disclosure was brought to my attention this morning and we would greatly appreciate the opportunity to rectify this. As such, it would be fantastic if we could arrange a call for next week so we can provide a reasonable adjustment for your verbal application and discuss your CV further. Please let me know what times suit you best for Tuesday 17th August and I will gladly send a Google Hangout invitation across to you. Please let me know if you have any further questions."* [34].
17. By email to Mr. Brown on 13 August 2021 at 11:43, the Claimant replied: *"You have 14 days for your companies formal reply and then ACAS get involved. If you were disabled you would not expect to be blocked so you need to look at your staff as if ACAS does not work the employment tribubial [sic] will decide."* [34]. Mr. Brown did not reply to this email, likely because of the Claimant's clear threat of litigation in the Employment Tribunal.
18. By email on 16 November 2021 at 18:45, the Claimant emailed the Respondent (likely Mr. Brown) stating: *"What has happened to my application?"* [34]. Mr. Brown did not reply to this email either, probably for the same reason as before. By this point in time, the Claimant was aware that (a) on 13 August 2021 the Respondent had offered him a video interview on 17 August 2021 (via Google Hangout) (b) the Claimant had not accepted that offer.
19. By email to Mr. Brown on 24 November 2021 at 06:37, the Claimant stated: *"hiya I hope you're well. I am writing to follow up on a role that I sent my CV in for recently. I'd appreciate you getting back to me to let me know the current*

status as I am keen on the role and would like the opportunity to progress with arrangements for an oral application. I look forward to hearing back from you.”

[34]. Mr. Brown did not reply to this email.

20. On 29 November 2021, ACAS received the Claimant’s EC notification [2].
 5 On 6 January 2022, ACAS issued the EC certificate [2]. On 6 February 2022 the Claimant presented his ET1 claim form [3].

Relevant law

21. Section 123 of the Equality Act 2010 provides:

123 Time limits

- (1) ^[F1]Subject to ^[F2]^[F3]section 140B] proceedings on a complaint within section 120 may not be brought after the end of—
- (a) the period of 3 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.
- (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.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
- (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

10 Issues

22. First, was the Claimant’s claim presented in time, ie, within 3 months of the act/omission complained of?

23. Second, if not, it is just and equitable for the Tribunal to extend time?

24. Third, if it is just and equitable to extend time, should the Claimant be ordered
 15 to pay a deposit under Rule 39 as a condition of being allowed to pursue his claim?

Issue #1: Discussion/Conclusions

25. The Claimant's claim against the Respondent was presented out of time, and the Claimant admits this. By 12 August 2021, the Respondent had rejected the Claimant's application for employment and notified the Claimant of this by email. There is no dispute that on 12 August 2021 the Claimant received that email and knew his application had been unsuccessful. Applying the ordinary 3 month time limit, the Claimant had until 11 November 2021 to present a timely claim against the Respondent arising out of its initial rejection of his application.
26. The Claimant did not present an ET1 against this Respondent in the period 12 August 2021 – 11 November 2021 (it is entirely possible that during this period the Claimant did present other ET claims against other respondents – the Tribunal asked him whether he had done so, he replied he couldn't remember). The Claimant did not contact ACAS during the period 12 August 2021 – 11 November 2021, hence did not benefit from any 'extension of time' to present a claim which potentially takes place when a claimant contacts ACAS.

Issue #2: Discussion/Conclusions

27. For the reasons/grounds set out below, the Tribunal determines that it is not just and equitable to extend time for the presentation of the Claimant's claim.
28. First, although not legally trained, the Claimant is a highly intelligent individual who, by August 2021, had far greater than average experience in bringing ET claims [49-54].
29. Second, before, during and after the period 12 August 2021 – 11 November 2021, the Claimant knew there was a 3 month time limit to bring an ET claim alleging disability discrimination, and knew (or must have known) the potential consequence of failing to present his disability discrimination claim against this Respondent in time.
30. Third, the most likely reason for the Claimant's failure to present a timely claim against this Respondent was because by August 2021 he had presented a large number of ET claims (likely over 50) against a large number of

respondents (likely over 50), and failed to keep track of this particular claim against this particular respondent – cf [49-54]. In the Tribunal's view, that does not provide a good reason for the Claimant's failure to present this claim in time.

- 5 31. In the absence of supporting evidence, the Tribunal rejects the Claimant's
assertion that he cannot (and could not) create separate folders on his
computer for each ET claim he presented (or was intending to present) in
order to keep track of them all. Absent a civil restraining order, the Claimant
has not acted unlawfully in presenting a large number of ET claims against a
10 large number of respondents. However, if the Claimant is to engage in ET
litigation on what appears to be almost an industrial scale, the Tribunal
considers it to be his responsibility, no-one else's, to keep track of all his
claims and ensure they are presented in time.
- 15 32. Fourth, the Tribunal is not satisfied the Claimant's failure to timely present his
claim was because of forgetfulness or a lack of organisation on his part
caused or contributed to by his disabilities – in sum, the Claimant's case.
There was no medical evidence to that effect. The Claimant is not a medical
doctor/expert, and cannot give expert evidence to that effect. The Claimant's
20 10-page "*impact statement*" did not make this claim. The two statements by
S. Musique the Claimant referred the Tribunal to to 'evidence' this link do not
state or imply this.
- 25 33. Fifth, the Tribunal is not satisfied the Claimant's reason (or principal reason if
more than one) for applying for employment with this Respondent was ever
genuinely to seek employment. Based on his decision not to take up the
Respondent's 13 August 2021 offer to provide a video interview on 17 August
2021 - the precise adjustment the Claimant alleges he was seeking and
entitled to – the Tribunal infers the Claimant's real reason for applying for this
employment was (a) to see if his application was rejected on paper without an
interview (b) if it was rejected, to bring an ET claim against this Respondent
30 alleging a failure to make reasonable adjustments, as he has done before on
many previous occasions.

34. When asked to explain why he failed to take up the Respondent's offer of an interview, the Claimant alleged that by the time he received the initial rejection on 12 August 2021 his 'trust' in the prospective employer had already gone. The Tribunal rejects this explanation: the Claimant admitted this employer was a stranger to him, and he accepted he did not know what process it had applied to screen his job application (he did not know whether it was screened out following human review/intervention or after a computer 'key word search' on his application/CV). On the balance of probabilities, the Tribunal finds that the most likely reason the Claimant did not accept the Respondent's offer of an interview was because he was not genuinely interested in obtaining employment with the Respondent, and was aware that taking up that offer might prejudice his ability to bring an ET claim against the Respondent alleging it had failed to offer an interview as a reasonable adjustment.
35. Sixth, the Tribunal accepts the Claimant's submission that there is a strong public interest in determining disability discrimination claims on their merits. However, the Tribunal finds there is also a strong public interest in time limits set by Parliament for bringing disability discrimination claims being met.
36. Seventh, in considering whether to exercise its discretion, the Tribunal was unswayed by the Claimant's verbal offer to contribute some or all of any compensation he received to a charity in the event of a successful claim.

Issue #3: Discussion/Conclusions

37. In light of the Tribunal's conclusions regarding Issues #1-2, the Respondent's application for a deposit order under Rule 39 is moot and dismissed on that basis.

5

Employment Judge: Antoine Tinnion
Date of Judgment: 30 August 2022
Entered in register: 09 September 2022
and copied to parties

10

Note

Judgments are published online after they have been sent to the parties.

15