



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr I Caka

**Respondent:** Givaudan UK Ltd

**Heard at:** London South via CVP **On:** 2 May 2023

**Before:** Employment Judge Khalil (sitting alone)

## **Appearances**

For the claimant: in person

For the respondent: Ms S Perry, Counsel

## **JUDGMENT WITH REASONS ON A PRELIMINARY ISSUE**

The Tribunal does not have jurisdiction to hear the claimant's complaint of Disability Discrimination as it was presented out of time and it is not just and equitable to extend time under S.123 Equality Act 2010.

The claim is thus dismissed.

## **Reasons**

### **Claims, appearances & documents**

1. This was an Open Preliminary Hearing to determine whether a claim for Disability Discrimination should be heard out of time.
2. The claimant was a litigant in person. The respondent was represented by Ms Berry, Counsel.
3. The Tribunal had a witness statement from the claimant and a witness statement from Ms Wright, HR Manager for the respondent. Both gave evidence.
4. The Tribunal had an E-Bundle running to 92 pages.

5. There was also an additional document admitted – an email dated 16 March 2022.
6. The Tribunal had also received the respondent's skeleton argument and a written closing argument from the claimant. Both parties supplemented their arguments with oral submissions too.

### **Relevant Findings of Fact**

7. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.
8. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.
9. The claimant was a contract worker for the respondent. He was employed by KGB Facility Services Ltd ('KGB') to work at the respondent as a Compounding Attendant.
10. The claimant was engaged under a Contractor Workers Agreement. Under such an agreement, the respondent, the end user, would select the best candidates for the role.
11. KGB also supplied workers under a Core Services Agreement under which it, rather than the respondent, would decide on who would work on site – for example, cleaners.
12. The claimant was engaged on a fixed term contract from 1 August 2017, which was extended until 31 December 2018 and then again until 31 December 2019.
13. On 31 July 2019, the claimant had an accident at work. He did not carry out any further work for the respondent thereafter.
14. The claimant was signed for as unfit for work with back pain for 3 months on 25 October 2019 (page 54).
15. On 20 December 2019 a decision was taken not to renew the claimant's contract beyond 31 December 2019 (page 57). This was due to the claimant's absence and because it was thought there was no likelihood of a sustained return to work in the near future.
16. The claimant was then dismissed by KGB on 20 December 2019 (page 61).

17. The claimant appealed against his dismissal on 14 January 2020 because he said his dismissal was because of his disability (his prolapsed disc) – page 63.
18. On 20 January 2020, the claimant was reinstated by KGB (page 64).
19. There was no evidence of any further engagement or activity between the claimant and KGB or the respondent until after the claimant had a back operation in September 2021. Thereafter, the claimant had a virtual meeting with KGB on 8 November 2021. This was a stage 3 sickness absence meeting. A letter dated 12 November summarised this meeting which, in summary, was about the claimant's capabilities. There was no mention or reference to the respondent in this letter. There was however a reference to the respondent in a copy of a letter dated 24 September 2021 (attached) but that was simply to record the location of the next meeting.
20. The claimant said in evidence that he referenced the respondent when he was referring to heavy lifting (page 66) but the Tribunal rejected that this was a reference to work for the respondent or to returning to work for respondent. The Tribunal considered this to be generic.
21. In his witness statement, paragraph 9, the claimant said he asked to return to work at the respondent at this meeting. This was not recorded or referenced in the contemporaneous letter. The Tribunal found this was not said.
22. The claimant was referred to Occupational Health ('OH'). On 10 February 2022, a report was written. In this report, there was reference to the referral form which contained the comment *"as we are unable to offer a contract worker position, as this is controlled and final selection made by our client. Furthermore, the restrictions employee is stating, would not short list him for any roles."*
23. On 24 February 2022, the claimant was offered a role as a Factory Hygiene Operative at the respondent's site which he declined. This was a Core Services role. The Tribunal accepted Ms Wright's evidence on this. Thus, it did not have input from the respondent. On the claimant's own case however, it did beg the question, why the respondent would offer a role to the claimant if it was concerned by the claimant's disability.
24. On 1 March 2022, the claimant said *"Since 8 November 2021, I have asked you to consider me for any job at: Small Scale, Dental Job, QC Lab, Technician Job, R&D job etc. You have stated your client (Givaudan) have not selected me in shortlist for those positions"*. In oral testimony, the claimant confirmed this was a reference to the OH letter and a statement made by KGB.
25. On 10 March 2022, KGB dismissed the claimant. In this letter it was stated:

*You will recall and as confirmed to you in writing that presently, we do not recruit for any of the positions that you refer to and as such we are unfortunately not in a position to put you forward or shortlist you for these. If you*

*are interested in being considered for any such roles, then you would need to apply directly to Givaudan UK and be taken through their recruitment procedure for the same.*

26. The Tribunal found that it was clear cut from this letter that KGB were taking full responsibility not to put the claimant forward for Small Scale, Dental Job, QC lab Technician Job R&D etc.
27. The Tribunal also found that there was no involvement at all by the respondent in relation to any other opportunities that the claimant might be suitable for as they had simply not been asked to consider the claimant for any further work which had been ignored or declined. The claimant's interpretation of what OH had said was not evidence of any interference or involvement from the respondent, rather, the thoughts and suggestions of KGB.
28. The claimant appealed and was reinstated by KGB on 21 March 2022 (page 79).
29. On 25 March 2022, the claimant commenced Early Conciliation against KGB. An Early Conciliation certificate was issued on 6 May 2022. The claimant presented an ET1 against KGB on 15 June 2022.
30. On 28 June 2022, the claimant commenced Early Conciliation against the respondent. An Early Conciliation certificate was issued on 30 June 2022. The claimant presented an ET1 against the respondent on 4 July 2022.

### **Applicable Law**

#### S.123 (1) Equality Act 2010: Time limits

31. Subject to S.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.
32. Pursuant to ***British Coal Corporation V Keeble 1997 IRLR 336***, a Tribunal can take into account as guidance only, in its assessment of the balance of prejudice, the length 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 parties sued had cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action. These factors mirror what is set out in section 33 of the Limitation act 1980, referred to by the EAT in ***Keeble***.

33. The burden is on the claimant to persuade the Tribunal that it is just and equitable to extend time (***Robertson v Bexley Community Centre [2003] EWCA Civ 576***). Further, in this case it was also said by the Court of Appeal:

*“It is also of importance to note that the time limits are exercised strictly in employment and industrial 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 unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”*

### **Conclusions and analysis**

34. The Tribunal concluded that the claimant’s complaint of discrimination was in relation to the decision to terminate the claimant’s engagement with the respondent on 20 December 2019.
35. There was no evidence at all to suggest that the respondent had anything more to do with the claimant’s return to work dialogue or discussions with KGB thereafter.
36. The references relied upon by the claimant were misconceived and did not show evidence that the respondent was directly or indirectly preventing or dissuading KGB from re-engaging the claimant to work for the respondent. The contemporaneous written evidence did not point to involvement of the respondent at all.
37. The decision to pursue Early Conciliation and then present an ET1 against the respondent was strangely not made at the time the claimant pursued Early Conciliation and a claim against KGB. The claim against the respondent appeared to be an afterthought.
38. There may have been an arguable complaint of discrimination against the respondent when it made its decision on 20 December 2019. However, nothing was said at the time against the respondent or any time since.
39. The claim was not presented until 4 July 2022, Early Conciliation having commenced on 28 June 2022. That was around 2.5 years after the decision to release the claimant by the respondent.
40. There was no cogent reason for the delay. The claimant said when he got reinstated by KGB, he was back at work. However, he did not actually return to any working role. There was no evidence of what (if any) communications took place between January 2020 and November 2021. That was about a 20-month period. In November 2021, the claimant said he asked to go back to work to the respondent but he still did not present his claim until over 7 months thereafter.

41. There was no evidence of any dealings or involvement of the respondent, let alone one which showed any lack of cooperation or engagement which might have contributed to delay.
42. There is prejudice to the respondent in being asked to meet a discrimination claim based on a decision made over 2.5 years before the claim was presented and which would unlikely now be heard until 2024. The respondent said in this regard the claimant's claim was unspecific and he didn't complain at the time.
43. To the extent that the Tribunal might be wrong about whether the claimant has reasonably asserted a more proximate alleged act of discrimination, the merits of that assertion are so evidentially weak and extremely tenuous, it is not just and equitable to allow the claim out of time. (*Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132*). The gist of the claimant's assertions were at their highest far-fetched speculation. Even a claim based on an alleged act of discrimination of 10 March 2022 was out of time.

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**Employment Judge Khalil**

**22 May 2023**