



EMPLOYMENT TRIBUNALS

Claimant: Mr Patrik Tong

Respondent: GXO Logistics (UK) II Limited

HELD AT: Manchester (Via CVP)

ON: 18th May 2023

BEFORE: Employment Judge Anderson

REPRESENTATION:

Claimant: In Person

Respondent: Ms Levine (Counsel)

JUDGMENT having been given orally at the hearing and written reasons having been requested at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant Mr Patrik Tong brings complaints of direct race discrimination and harassment related to race against the Respondent GXO Logistics UK II Limited. These complaints relate to a single act of discrimination, the detail of which I set out further below.
2. I had before me an agreed bundle of documents. Within that bundle were three witness statements. The Claimant, Ms Urbanova and Ms Mathison.
3. Initially, the Claimant intended only for himself to give live evidence. I pointed out the wording of the previous case management order and emphasised the importance of any witness giving live evidence. Ms Urbanova had potentially relevant evidence to give so I stood the matter down to enable the Claimant to secure her attendance, which he did.
4. The Claimant gave live evidence and was cross-examined. Ms Urbanova was also called to give evidence and was cross examined.

5. An interpreter was present throughout. At the outset I sought to establish from the Claimant the extent to which he would be assisted by translation. The Claimant asked for translation on request, that is to say he could ask for a question or answer to be translated. I also added that the Claimant could ask for any aspect of the proceedings to be translated at any point. This worked well during the hearing, occasionally the Claimant would ask for a translation and occasionally it would be undertaken at my direction.
6. In addition, during cross-examination, the Claimant sought a break. This was facilitated and the Claimant was able to get some fresh air away from the screen.

The Claim

7. At the outset, I queried the specific act of discrimination relied upon. Essentially, the Claimant relies upon Ms Waterfield alleging that he was guilty of a criminal offence that the Police were investigating. The date given is the 10th May 2022.
8. The Claimant relies upon the protected characteristic of nationality. There is still some doubt as to how this is put and how it is said to be 'because of' the Claimant's nationality. As part of our initial introduction, the Claimant explained that reliance was put on particular facial features and a foreign accent by Ms Waterfield when making the accusation of criminal conduct.
9. The previous list of issues defined the time point as follows:

Time limits

4.1.2 Early conciliation was started on 26 September 2022.

4.1.3 The claim form was presented on 20 November 2022.

4.1.4 Given the above date it appears that the claim was presented some 3 months out of time and in the circumstances the Tribunal will determine whether the discrimination complaints were made within the time limit in section 123 of the Equality Act 2010? In considering that, the Tribunal will decide:

4.1.4.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

4.1.4.2 If not, was there conduct extending over a period?

4.1.4.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

4.1.4.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

4.1.4.4.1 Why were the complaints not made to the Tribunal in time?

4.1.4.4.2 In any event, is it just and equitable in all the circumstances to extend time?

10. I sought to clarify the 10th May date when understanding the case. There was a Police report from am on the 10th May. It was conceivable that the act of discrimination, which is distinct from C's knowledge could have been a few days earlier. The relevant window appears to be the 6th to 10th May 2022. The 10th May date is the most generous date to the Claimant and for today's purposes, I have proceeded on that basis.

11. It was agreed early on that this is not an act extending over a period case. The Claimant's complaint is clearly about the act of making an allegation against him in respect of which he is then arrested. That is a single alleged act with continuing consequences rather than an overarching act or a series of acts or a continuing state of affairs. (c.f. Hendricks v Commissioner of the Police for the Metropolis [2003] IRLR 96). The parties therefore needed to focus on the question of a just and equitable extension of time.
12. It follows that the primary time limit for the purposes of this case was the 9th August 2022 and that an extension of three months plus 11 days is sought to the 20th November 2022.

The Law

13. The relevant statutory provision is s.123(1) Equality Act 2010. The extension of time provision is that the claim must be brought within '*such other period as the employment tribunal thinks just and equitable*'.
14. Where Early conciliation is commenced after the primary time limit has expired, the extension of time provisions contained within the early conciliation regime do not apply: Pearce v Bank of America Merrill Lynch & Others (2019) UKEAT/0067/19/LA
15. The just and equitable regime is more liberal than the restrictive reasonable practicability test. A Tribunal is entitled to take into account a wide range of factors when looking at all of the relevant circumstances. Having noted that, there are two commonly cited points:
- a. The burden of proof is on the Claimant to persuade the Tribunal that there should be an extension.
 - b. There is no presumption that time will be extended: Robertson v Bexley Community Centre [2003] IRLR 434.
16. The Tribunal need not follow s.33 Limitation Act 1980, but the list can be of some assistance in identifying relevant factors. In the present case, Ms Levine structured some of her submissions around the broad points associated with s.33. The Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 identifies the limits on the use of these factors. The focus should be on the length of and the reasons for the delay.

Findings of Fact

17. I made the following findings of fact on the balance of probabilities.
18. The Claimant was on annual leave prior to the 10th May 2022. On the 10th May 2022, he was arrested on suspicion of theft and other offences. The Claimant was subsequently released under investigation and then no further action was taken.
19. I have seen a Police report from the morning of the 10th May 2022, which sets out the intention to arrest the Claimant.
20. Following the 10th May 2022 and the arrest of the Claimant, there are a series of fit notes citing stress, later developing into anxiety and depression. One fit note does not appear to be present, though nothing in particular is said to turn on that.

21. I also have the benefit of the Claimant's GP records. They record the fact of the Claimant's low mood and the steps taken by the Doctor to assist the Claimant. The GP records twice refer to the Claimant seeking assistance from a solicitor.
22. The parties are agreed that the Claimant did not return to work.
23. The Claimant sought advice from his local Citizens Advice Bureau. A meeting took place on the 26th May 2022. He says that he was advised that he must first complete an internal grievance process with the Respondent before submitting a claim to the ET 1.
24. The Claimant then says that Ms Urbanova contacted ACAS on the 18th July 2022 and was told that the claimant must complete the internal procedure before taking legal action.
25. On the 20th July 2022, the Claimant submitted a grievance. It is worth noting that this document refers to advice from Citizens Advice, ACAS and EEAS. The grievance document also refers to 'legal action'. I find that the Claimant was had basic knowledge that he had rights in the workplace and the ability to make a claim about those rights.
26. There is little by way of chronology after this period to specify what additional actions the Claimant took beyond the ACAS EC dates and the date of the ET1.
27. On the 26th September 2022, the Claimant commenced ACAS Early Conciliation. The Claimant's witness statement does not identify any specific steps taken between Date A and Date B.
28. On the 7th November 2022, the ACAS Early Conciliation certificate was produced.
29. The Claimant's witness statement suggests that it was at this point (between Date B and the ET 1) that he was told by solicitors that his claim was out of time.
30. On the 20th November 2022, the ET 1 was submitted.

Conclusions

31. I start by discussing the cogency of the evidence. It has been difficult to establish a chronology, not least because the Claimant's position in terms of his knowledge and the advice that he was seeking altered during the course of the evidence.
32. It is important that I make allowance for the fact that the Claimant was giving evidence with the assistance of an interpreter. There will inevitably be imperfections. Minor points should not be seized on. The same can be said of the Claimant's mental health. I did not treat his evidence as a memory exercise, it is well recognised that mental illness can impact on memory.
33. The difficulty here, is that even with all of those allowances, the Claimant would give opposing answers during cross-examination. The timing of the alteration in the answer would appear to be the timing of when it was most beneficial to answering that question. I was left with the impression that the Claimant was trying to second guess matters and advocate for his case rather than give the correct answer. I was not able to rely upon his evidence.
34. For example,, the Claimant differed on whether or not he had undertaken internet research and the extent of that research.

35. When challenged, the Claimant was unable to explain why his medical records twice refer to seeking advice from solicitors (in a period prior to EC being commenced) but the Claimants position differing as to whether such advice was sought or not.
36. In another example, the Claimants position was that he did not know his claim was out of time as he was relying on the advice given by Citizens Advice. However, in closing submissions, he said that he told ACAS that his claim was out of time but that they told him that he had one month from the ACAS certificate to submit his claim. This latter explanation came when the Claimant was seeking to address the Tribunal on the reasonableness of the gap between the 7th November (Date B) and the 20th November (ET1). This also contradicts para 21 of the Claimant's witness statement, which says it was solicitors who informed him his claim was out of time after Date B.
37. In addition, this is a further exacerbation in that the claimant is now suggesting that in addition to all of the bodies mis-advising him in relation to time limits, ACAS did this a further time in relation to the immediate post-conciliation period.
38. On the balance of probabilities, I do not find that the Claimant was given misleading advice by citizens advice. This is at best an assertion that isn't immediately plausible. It is more likely that the Claimant and Ms Urbanova misunderstood the position and failed to take steps such as undertake internet research that can be expected of the ordinary litigant, acting reasonably.
39. The Claimant was also engaging with other services in order to find help. He described the Czech Embassy, a support service and ACAS itself. I find that it is unlikely that all of these organisations would have maintained that the Claimant must first complete the internal process before he was able to submit an ET 1. The Claimant specifically suggests in his witness statement that ACAS made exactly the same error with regards to time limits as Citizens Advice. (see para 18) I find this to be inherently implausible.
40. When EEAS as a third organisation (it is known advice was sought prior to the grievance on 20th July 2022) is added to the mix, the suggestion that all three organisations were wrong when it came to time limits adds only further to the point. There is then the further exacerbation point in the most recent suggestion that ACAS got the law wrong in the period immediately following the issue of the early conciliation certificate.
41. Furthermore, based upon the contents of the grievance, it is right to say that the Claimant was aware of the possibility of taking action within the primary limitation period.
42. The medical position does vary. By August 2022, the GP notes do record an improvement. In any event, the Claimant is capable of pursuing the grievance process and even if with assistance, he would have been capable of putting in an ET 1. The medical position was not a barrier to putting a claim in or even on a lower threshold of being an impediment, the Claimants other actions indicate that he was capable of taking steps to progress an ET claim.
43. The Claimant puts forwards two strands in respect of why it is just and equitable to extend time, namely: a) he was misadvised and b) his medical position.
44. Combining these points, considering the effect of them cumulatively, takes this case no further. My finding is that the Claimant failed to take reasonable steps to progress his claim and ascertain the correct position regarding time limits as any litigant would be expected to do. I further find that his medical situation, which did vary did not prevent him from ascertaining the correct position with regard to time limits.

45. I accept that the failure to reasonably explain the delay is not absolutely conclusive or obliges me to refuse an extension of time (c.f. Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640). The just and equitable criteria does not deal in absolutes. It is important that I take all matters into account.
46. The prejudice to the Claimant is not being able to take an otherwise out of time case to a full hearing. I accept that is a prejudice as it would be in any case.
47. There is prejudice to the Respondent in facing an out of time claim, which is three months and 11 days later than it otherwise would have been, also taking into account that this in effect doubling the primary time limit. It is a significant extension of time that is being sought, even in the more liberal just and equitable regime.
48. This case is out of time because of the actions of the Claimant in failing to take reasonable steps to progress a claim with a primary time limit of three months less one day and I am not persuaded that there is any particular reason to extend time.
49. It is therefore not just and equitable to extend time.

Employment Judge Anderson

Date 19th May 2023

REASONS SENT TO THE PARTIES ON

1 June 2023

FOR THE TRIBUNAL OFFICE