EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Ahmed	**v**	**Capital Arches Group Limited**

Heard at: London Central (in public; in person)

On: 15 September 2023

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: in person

For the Respondent: Mr D Patel, counsel

JUDGMENT having been sent to the parties on 15 September 2023 and written reasons having been requested by the claimant on 19 September 2023, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background, Issues and Evidence

1. This was a preliminary hearing (in public) ordered by Employment Judge Snelson at a preliminary hearing (in private) on 26 June 2023 "*to determine whether the Claimant's complaints of direct discrimination are out of time and accordingly outside the Tribunal's jurisdiction*".

2. Having partially allowed the claimant's application to amend, EJ Snelson held that "*The result of that ruling* [to partially allow the claimant's application to amend] *was that the harassment or direct discrimination claims rest on the matters pleaded in the claim form as clarified in the Claimant's letter of 19 May, numbered paragraphs 1-3*.".

3. In ordering this hearing, EJ Snelson also stated that "*the point of jurisdiction is not complicated by any argument about 'conduct extending over a period' (see the Equality Act 2010, s123(3)), given the scope of the amendment permitted"*.

4. At the same time, EJ Snelson made two deposit orders against the claimant, because the Judge considered that the claimant's argument that his remaining discrimination complaints are not excluded from the Tribunal's jurisdiction on the time limit ground has little reasonable prospect of success. In giving his reasons for the deposit orders, EJ Snelson found that all the claimant's complaints in the claim "*rest on acts or events which occurred in 2018*", when the claimant's claim had been presented on 27 October 2022. Therefore, EJ Snelson held, the claim was presented outside the primary limitation period of three months, and the Tribunal would only have jurisdiction to consider the claim if it determined that it was "just and equitable" to extend time. EJ Snelson gave his reasons why he thought that the claimant's arguments that his claim would come within the Tribunal's jurisdiction (effectively by the Tribunal extending time on the "just and equitable" ground) had little reasonable prospect of success.

5. Whilst the EJ Snelson's deposit orders were included in the hearing bundle, in deciding the issue before me, I did not place any weight on his conclusions as to the claimant's prospect of success to find the Tribunal's jurisdiction by way of extending time on the "just and equitable" ground. I based my judgment on the evidence and arguments presented by the parties at the hearing.

6. The claimant appeared in person, and Mr Patel for the respondent. The claimant presented a witness statement. He gave sworn evidence and was cross-examined. The respondent submitted a bundle of documents, containing 209 pages. The claimant submitted an additional bundle, largely containing his medical records. Mr Patel submitted a short skeleton argument.

7. At the start of the hearing, the claimant applied to exclude Mr Patel's skeleton argument, because it had been sent to him late. I refused the application. Upon hearing Mr Patel, I was satisfied that the principal reason for the late submission of the skeleton argument was due to the late receipt of the claimant's witness statement, which meant that the respondent did not know what evidence the claimant would be giving to explain why he was unable to present the claim earlier. The delay in providing the skeleton was not material. The claimant had received the skeleton four days before the start of the hearing. It is a 4-page long document, containing 14 double-spaced typed paragraphs. The claimant had ample time to study it. In any event, excluding the opening skeleton would not assist either the claimant or the Tribunal, because Mr Patel would be able to make the same arguments orally in his closing submissions.

The Facts

8. The claimant has been employed by the respondent as a Crew Member since 18 May 2018. From mid-2019 he had been signed off as unfit to work periodically, predominately due to his shoulder problem. Since July 2021, he has been off work continuously due to his shoulder condition.

9. The claimant presented his claim on 27 October 2022, having gone through the Acas early conciliation procedure between 21 October 2022 and 24 October 2022. Accordingly, all complaints about something that happened before 22 July 2022 *prima facia* are out of time.

10. Following EJ Snelson's ruling, the remaining complaints in the claim are of direct race discrimination and of religion or belief direct discrimination (s. 13 EqA) and harassment related to race and religion or belief (s.26 EqA).

11. The remaining complaints are about the events in July – October 2018, when in July 2018 the claimant claims his work colleagues had made various unwanted comments about the claimant not sharing their Muslim practices during Ramadan. He complained about that to his manager. In response, the claimant claims, she put him on cleaning duties in October 2018. There is no extant complaint before the Tribunal in relation to anything after October 2018.

12. The claimant was signed off by his GP as not fit for work between 28 January 2019 to 11 February 2019 due to anxiety and depression. He was then signed off as not fit for work from 11 February 2019 to 18 February 2019 due to stress at work. From 18 February 2019 to 17 March 2019 GP signed him as fit for work on day shifts until 10pm because of stress at work.

13. On 11 February 2019, the claimant told his GP that he felt that stress was much relieved with him being off work, and that he had been going to a gym. He also said that he was feeling much better and was looking to do a course for interpreters.

14. The claimant suffers from a physical condition, colloquially known as "frozen shoulder". He reported shoulder pains to his GP in April 2019. He was diagnosed with bilateral frozen shoulder by his GP in September 2019. Since then, he had several sick leaves due to his shoulder problem. He has undergone a surgery for his shoulder in March 2023. He is expecting a further surgery in 2024.

15. In late 2019 the claimant enrolled on a law degree course, which he completed in 2023. At the date of the hearing, he was awaiting his final exams results.

16. In 2020 and 2021, whilst being off sick the claimant corresponded with the respondent by email, sending his sick certificates and responding to the respondent's queries about his prospects of return to work.

The Law

Time limit

17. A discrimination complaint 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*" (section 123(1) Equality Act 2010 (**"EqA"**)).

18. The time limit for the presentation of a complaint is jurisdictional, meaning that the Tribunal does not have the necessary jurisdiction (power) to consider the complaint if it has been presented outside the limitation period.

Just and equitable extension

19. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal held that when employment tribunals consider exercising the discretion under S.123(1)(b) EqA: "*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 the discretion is the exception rather than the rule*." The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre EAT 0312/13**.

20. The relevant principles and authorities were summarised in **Thompson v Ark Schools [2019] I.C.R. 292, EAT**, at [13] to [21], and in particular that:
    a. Time limits are exercised strictly;
    b. The onus is on the claimant to persuade the tribunal to extend time;
    c. The decision to extend time is case- and fact-sensitive;
    d. The tribunal's discretion is wide;
    e. Prejudice to the respondent is always relevant;
    f. The factors under s33(3) Limitation Act 1980 (such as the length of and reasons for the delay and the extent to which the Claimant acted promptly once he realised he may have a claim) may be helpful but are not a straitjacket for the tribunal.

21. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** and the EAT's decision in **Bahous v Pizza Express Restaurants Limited UKEAT/0029/11/DA** it was held that the absence of an explanation for the delay does not prevent the Tribunal from exercising its discretion and extending the time limit, and the Tribunal is not obliged to infer that there was no acceptable reason for the delay (see para 25 in **Abertawe**). However, the reason or the absence of a good reason for the delay is a relevant factor (see para 19 in **Abertawe**).

Analysis and Conclusion

22. The claimant's claim was presented almost four years after the expiry of the primary limitation period. It is a very long delay.

23. The claimant gave the following reasons for the delay:

    (i) ill health by reason of:
        a. anxiety, and
        b. frozen shoulder, and
    (ii) ignorance as to the right to bring a claim.

24. I find the claimant's explanations wholly unconvincing and not credible.

25. With respect to anxiety, except for a brief period at the end of January - beginning of February 2019, the claimant did not present any medical evidence to show that he was suffering from anxiety and depression. On the contrary, the medical records show that by the middle of February 2019 the claimant was telling his GP that he was "*feeling much better*", was planning to start an interpreters' course, and was going to a gym. From 18 February 2019, he was signed as fit to return to work on shifts ending by 10pm.

26. And the claimant did return to work after that and worked through up until July 2021. He had some further periods of medical leave however, those were to deal with his shoulder problem, and not his claimed anxiety. The claimant gave evidence that he had a 20-mile commute to work, which he had been undertaking, including during the Covid-19 lockdown. In late 2019, he enrolled on a law degree course and studied law for four years. He was able to correspond by e-mail with the respondent. The claimant also gave evidence that he continued to manage affairs of his UK registered company, including by filling the necessary paperwork with the authorities.

27. This tells me that at all material times the claimant clearly had sufficient cognitive ability to undertake tasks, which are not less demanding than the task of filling in and submitting a tribunal claim form.

28. In short, I reject the claimant's contention that he was suffering from anxiety, or at any rate, suffering to such an extent that this stopped or hindered him from presenting his claim earlier.

29. I equally reject his contention that his shoulder problem stopped or hindered him from presenting the claim earlier. The claimant argued that he was not able to present the claim until he had received the final diagnosis of his shoulder condition from a specialist consultant. He referred me to a letter where that diagnosis was confirmed. However, the letter is dated 27 January 2023, that is three months after the claimant had presented his claim.

30. I asked the claimant to explain why the absence of a definitive diagnosis from a consultant about the reasons of his shoulder pains meant that he could not

present his claim in time. The claimant did not give me a satisfactory answer. Instead, he argued that he should not have been expected to present a claim until after he had undergone and recovered from all his shoulder surgeries, including the one planned for 2024.

31. I see no causal link whatsoever between the timing of the final diagnosis and the claimant's ability to present a tribunal claim within the prescribed time limit. I find that the absence of a definitive diagnosis, and indeed the ongoing shoulder pains the claimant had, were not the true, and at any rate – not justifiable, reasons for the claimant's late presentation of his claim.

32. In any event, the claimant did present his claim in October 2022, whilst still not having the definitive consultant's diagnosis, and when, on his own evidence, he was experiencing more severe pains in the shoulder than before. Furthermore, despite his shoulder pains the claimant was able to fully engaged in the tribunal process and produce detailed and fairly lengthy applications and other submissions to the tribunal.

33. What I said earlier about the claimant's ability to undertake at the material times other activities,- enrolling on a law degree course, attending work, undertaking 20-mile journeys, writing emails, going to a gym, attending on his company's paperwork - further supports my conclusion that the claimant's shoulder problem was not so debilitating that it could reasonably be said to amount to a good reason for him presenting his claim late.

34. I also reject the claimant's argument that the reason he could not present his claim earlier was because he was ignorant of his right to sue the respondent for discrimination in an employment tribunal. I note that this reason did not feature in the claimant's 9-page witness statement he had prepared for this hearing. He raised it only at the hearing while being cross-examined.

35. In essence, the claimant argued that until he had completed (or nearly completed) his legal studies, he did not know the law in this country, and consequently did not know whether what his colleagues had said to him in July 2018 and the actions of his manager of placing him on cleaning duties (which he now complains about) was legal or illegal, that is because, he argued, the law in this country is different to his home country (Pakistan).

36. I reject this contention. I find it is simply not credible that the claimant, having raised a complaint with his manger about the alleged behaviour of his work colleagues, which behaviour he described as "unwanted", at the same time was operating under some misapprehension that if his complaint were not resolved to his satisfaction by the respondent, there would be no other legal recourse open to him.

37. Even accepting that the claimant might not have known the precise mechanics of presenting a claim to an employment tribunal, he is an intelligent person, and, in my judgment, it is inconceivable that if he wished to pursue the matter further he would have made no attempts to find out how to do that.

38. He had ample opportunities for that, especially considering that in late 2019 he had enrolled on a law degree course and would have had access to various sources of legal information, such as the college legal library and his law professors.

39. His witness statement for this hearing and his numerous prior legal submissions in these proceedings clearly demonstrate that the claimant is more than capable of undertaking legal research and finding the relevant statutory provisions and caselaw, which goes way beyond what he would have needed to find out to submit his ET1 in time.

40. Furthermore, I asked the claimants what enquiries he had undertaken at the time to find out about his rights. He said that he went to see a solicitor, but because he could not afford paid legal representation and the solicitor asked for "a cut" from any damages award he did not retain them. This further undermines his argument that he was ignorant of his right to pursue a claim against the respondent.

41. Turning to the issue of prejudice, I find that if I were to allow the claim to proceed, this would be seriously prejudicial to the respondent. The events in question are more than five years old. Memories fade. The bulk of the claimant's allegations are about verbal conversations in July 2018 between him and his former colleagues, who the respondent says are no longer employed by it, and some had left some years ago. To defend the claim the respondent would have to trace those former employees and persuade them to come and give evidence for the respondent. Without their evidence it would be very difficult, if not impossible, for the respondent to answer those allegations.

42. Of course, if I were to refuse to extend time, the claimant's entire claim would stand to be dismissed for lack of jurisdiction. However, it is not an exercise in balancing the relative hardship and injustice to the parties. The claimant's claim is *prima facia* out of time, and I must consider whether in all the circumstance of the case it would be just and equitable to extend time. Therefore, the fact that the claimant would not be able to pursue his out of time claim if an extension were not granted, cannot by itself be a valid reason for granting such an extension.

43. Considering my findings and conclusions on the length of the delay, the reasons for the delay advanced by the claimant, and the prejudice to the respondent, and looking at all other circumstances of this case, I have no hesitation in concluding that it will not be just and equitable to extend time.

44. It follows, that the claimant's claim was brought after the end of the period prescribed in section 123(1) EqA. Accordingly, the Tribunal does not have jurisdiction to consider it.

45. The claim is dismissed for lack of jurisdiction.

Employment Judge Klimov

30 September 2023

Sent to the parties on:

02/10/2023

For the Tribunals Office

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