



EMPLOYMENT TRIBUNALS

Claimant: Mr P Wright

Respondent: Walgreens Boots Alliance Services Limited

Heard at: London South, by CVP

On: 24 August 2023

Before: Employment Judge Rice-Birchall

Representation

Claimant: In person

Respondent: Mr Ismail, Counsel

JUDGMENT

The claimant's claims of race and sex discrimination were not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claims are therefore dismissed.

Background

1. This preliminary hearing was listed at a preliminary hearing, which took place on 25 July 2023 before EJ Sudra, to determine the question of whether the claimant's race and sex discrimination claims should be dismissed on the basis that they were presented outside of the primary time limit for bringing a claim of discrimination.

Issues

2. The issues for the Tribunal to determine were therefore as follows.
3. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - b. If not, was there conduct extending over a period?

- c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - i. Why were the complaints not made to the Tribunal in time?
 - ii. In any event, is it just and equitable in all the circumstances to extend time?

Evidence

4. The Tribunal had the benefit of a Bundle of documents and a witness statement from the claimant which was entitled: "Gender and Race Discrimination Claim". The claimant gave oral evidence and was cross examined by the respondent's representative. There was no witness evidence from the respondent.

Factual background

5. The claimant was employed by the respondent from 1 October 2016 until his dismissal for reason of redundancy on 24th September 2021.
6. The claimant's claim was lodged on 11 January 2022 and early conciliation took place between 10 December 2021 and 22 December 2021.
7. The allegations made by the claimant are that he was discriminated against on the grounds of sex at the end of 2019 and in June 2021, and on the grounds of race in June/July 2021, in all cases in circumstances in which the claimant was overlooked or not provided with an opportunity to apply for promotion and the role given to someone else. Separately, there is an allegation that the claimant was unfairly dismissed, but this is not linked to the alleged acts of discrimination in the list of issues, nor is it alleged that the dismissal was discriminatory.
8. Specifically, the allegations which are the subject of this application are set out in the Record of Preliminary Hearing which took place on 25 July 2023 as follows:

Direct Race and Sex Discrimination (Equality Act 2010 section 13)

- a. The Claimant is a white man.
- b. Did the Respondent do the following things:
 - i. Overlooking the Claimant for promotion to IT finance, planning and analysis director in January 2019 (as confirmed by the claimant at this preliminary hearing – the claimant had previously believed it was at the end of 2019/January 2020) (Sex discrimination allegation 1 – SDA1);

- ii. In June 2021, not providing the Claimant with an opportunity to apply for the IT Project Director role (Sex discrimination allegation 2 – SDA2); and
 - iii. Promoting Rajan Kakar (who is of Indian origin) to Head of IT Finance over the Claimant at some point between June and July 2021(Race discrimination allegation - RDA).
- c. Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
 - d. The Claimant's comparators are: Michelle Cannon (for allegations i and ii) and Rajan Kakar (for allegation iii).
 - e. If so, was it because of race or sex?
9. Any allegation which took place before 11 September 2021 is out of time unless it forms part of a continuing act or a Tribunal considers it just and equitable to extend time.

Findings of fact relevant to the issues

10. The claimant was employed by the respondent as Global IT Finance Planning and Analysis Manager until he was dismissed by reason of redundancy. He was employed in a leadership role.
11. The claimant is also a qualified chartered accountant of more than twenty years' standing.
12. Ms Cannon was promoted to the role of Director of Finance Planning and Analysis in January 2019. She was appointed by Mr Bergman, then Vice President of IT Finance. The claimant expressed an interest in and desire to apply for this role. The claimant believed that the role had not been advertised and raised it internally, including to the HRBP, who told him that he could move him to another department or get him a redundancy payment tax free, and that the problem was that "he didn't have devil lumps".. The claimant confirmed in cross examination that he felt discriminated against at this time.
13. For the financial year 2019, Mr Bergman shared his objectives with the claimant. Those objectives included: "Promote the development of an inclusive culture through significant involvement in and demonstrated commitment to Diversity and inclusion initiatives, programs and activities." There are two sub points as follows: " increase representation of women in leadership year on year" and "increase representation of People of Colour (POC) in leadership year over year".
14. The reason the claimant gave for not pursuing this complaint at the time was that he felt he had no choice but to not pursue any complaint at this

- time as he feared for his job and career. The claimant was also in a divorce process at that time.
15. The claimant was notified that his role was at risk of redundancy on 10 June 2021.
 16. The claimant was off sick from 11 June 2021 to 29 August 2021.
 17. Around July 2021, Mr Kakar was promoted to Head of Finance. The claimant considered that this role was within his skill set and at his level. The claimant believed that, as he was at risk of redundancy, he should have been advised that the role was available and prioritised for it. Mr Kakar was promoted by Slavica Gjerdovska, Finance Director, and was discussed and agreed with Jeanne Kemp. Ms Gjerdovska sought approval from Francesco Tinto.
 18. Around June/July 2021, Ms Cannon, who had also been put at risk of redundancy, had been appointed into a project leadership role, a role which the claimant felt he was suitably qualified for. She was appointed by Jeanne Kemp. Again, the claimant wasn't provided with an opportunity to apply.
 19. The claimant raised a six page grievance on 3 August 2021, whilst on sick leave. The claimant complained, as part of that grievance, and under the heading "Redeployment Opportunities", in general terms about the sex and race discrimination allegations he now makes, but without referring to his treatment as discriminatory. He alleges, in the grievance, that his treatment was unfair as he was unaware that these roles were being created despite being at risk of redundancy.
 20. The claimant sought legal advice during the consultation process. In the grievance hearing which took place on 11 August 2021, he refers to having taken legal advice during the consultation process, more specifically around July and August 2021. The claimant is recorded as saying, "I have engaged with an employment lawyer as I feel so strongly as to where we are, I've spent a lot of time putting this together so I want to ensure this is investigated properly." The claimant says in evidence that he only consulted the lawyer about the redundancy and the consultation process. The Tribunal's conclusions as to this are set out below.
 21. The grievance outcome was sent on 20 August 2023 and the claimant appealed against the outcome on 24 August 2023. An appeal hearing was held on 14 September 2023.
 22. On 7 October 2023, the claimant submitted a "Response to Redundancy Outcome". That response concluded: "...my appeal highlights that my redundancy is not only unfair and unjust but I believe is discriminatory as well."
 23. None of the grievance documentation, although the claimant complains about the appointments of Ms Cannon and Mr Kakar, mentions discrimination.

24. The reasons the claimant has given for the delay in bringing the proceedings are:
- a. In respect of SDA1, that he feared for his role and was going through divorce proceedings at the time;
 - b. that he was not in a fit state to consider the wider issues going on, even when taking legal advice, and was too exhausted and ill to take legal action about the alleged discriminatory treatment in a timely way;
 - c. that his illness did not just end when his sick leave ended but continued to impact on him;
 - d. that he did not realise he could make a claim for discrimination as he did not consider himself, as a white male, to be a protected minority or class, until shortly before he submitted his claim;
 - e. that the respondent was “deliberately evasive” when asked for relevant documentation, which made it difficult for him to assess his position as regards both his unfair dismissal and discrimination claims; and
 - f. that he was unaware of time limits which applied to bringing his claims.

The Tribunal’s findings on the reasons put forward by the claimant are set out in the conclusions below.

25. The claimant started early conciliation on the basis of both unfair dismissal and sex and race discrimination on 10 December 2021 and submitted his claim on 11 January 2022.

Law

26. Section 123 of the Equality Act 2010 (EqA) provides as follows:

(1)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.

27. Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short 3-month period is not an isolated incident or a discrete act. Discrimination can spread over a period, sometimes a long period. A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a tribunal. It is not always reasonable to expect an employee to take his employer to a tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the 3-month period may be treated as the last day on which the continuing act occurred. There are instances in the authorities on discrimination law of a continuing act in the form of the application over a period of a discriminatory rule, practice scheme or policy. Behind the appearance of isolated, discrete acts the reality may be a common or connecting factor, the continuing application of which to the employee subjects him to ongoing or repeated acts of discrimination or detriment.
28. So, where there is a series of distinct acts, time begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed.
29. A link might be established by considering whether the acts had all been committed by fellow employees or, if not, what connection there was between the alleged perpetrators, or whether the acts were organised in any way. It would also be relevant to inquire why the perpetrators did what was alleged.
30. In the case of ***Pugh v The National Assembly of Wales (2006) UKEAT/0251/06***, HHJ Serota QC clarified that there is no need for an employee to establish the existence of a “policy rule or practice in accordance with which decisions are made from time to time” but rather a Tribunal should look at the allegations in the round and ask whether looking at matters in the round, the employer was responsible for a continuing state of affairs (see also ***Barclays Bank v Kapur*** (1991) IRLR 136).
31. When considering whether to extend time, there is no presumption in favour of extending time. In fact, Tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so.
32. The Tribunal’s discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980 (***British Coal Corporation v Keeble*** (1997) IRLR 336). Tribunals are therefore required to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including: the length of, and the reasons for, the delay and the extent to which the cogency of the evidence is likely to be affected.

Conclusions

Continuing act

Is SDA1 a continuing act with SDA2 and RDA?

33. The claimant referred in oral evidence to objectives set to his managers, in appraisals, to increase the representation of women and “People of Colour” in leadership year over year. The objectives were from the financial year 2019.
34. The claimant stated in evidence that, though these objectives are stated to be aspirational, he believed that they were more than that and that they were the basis for his alleged discriminatory treatment. He believed that, because there was no explanation given for the appointments made or explanation of the process followed, the objectives were more than aspirational in nature.
35. The reasons why the Tribunal finds that SDA1 is not a continuing act with SDA2 and RDA, are as follows.
36. These objectives are aspirational and not, in themselves, evidence that the respondent was promoting women and “people of colour” other than on merit. There is nothing unusual about these aspirational objectives.
37. Different individuals were involved in the acts alleged, as the individuals who made the decisions to appoint, and so the alleged discriminators are different in each case. The Tribunal is mindful that, in discrimination cases, the employee who did the act complained of must actually have been motivated by the protected characteristic: a third party's motivation cannot form the basis of a discriminatory act.
38. SDA1 was an isolated incident which occurred over two and a half years prior to SDA2/RDA. There was no continuous state of affairs.
39. The allegations of discrimination are not a continuing act which includes SDA1.

Is there a continuing act between the allegations of discrimination and dismissal?

40. The allegations of discrimination are not a continuing act with the dismissal and are therefore out of time.
41. The list of issues clearly identifies three acts of alleged discrimination and the claim of unfair dismissal, but there is no allegation contained in the list of issues that the dismissal was discriminatory, and no suggestion that the allegations of discrimination are linked to the dismissal. Further, that was not an argument advanced by the claimant at the preliminary hearing.
42. Although the claim form identifies that the claimant considers that his dismissal was “unfair, unjust and discriminatory”, and although the Tribunal is aware that it should be wary of treating the list of issues as a pleading, no argument was raised by the claimant at this preliminary hearing to explain why or how the alleged acts of discrimination could be linked with his dismissal or should be treated as a continuing act, nor does it appear that that was a contention put forward by the claimant at the

preliminary hearing before EJ Sudra when the list of issues was agreed.

43. The claimant has not disagreed with the list of issues despite having been given the opportunity to do so.
44. The Tribunal therefore concludes that the alleged acts of discrimination are a not continuing act with the dismissal.

Just and equitable extension

Length of the delay

45. As there is no continuing act, SDA1 is out of time by over 33 months.
46. In relation to SDA2 and RRA, the Tribunal does not have the benefit of a precise date. However, in his statement, the claimant stated that the second and third allegations of discrimination “occurred in June 2021 with the latter only coming to light in August 2021”. The claimant did not explain how the facts of SDA2 had only come to light in August 2022.
47. The claimant’s claim was lodged on 11 January 2022 and early conciliation took place between 10 December 2021 and 22 December 2021. Therefore, any allegation which took place prior to 11 September 2021 is out of time.

Reasons for delay

SDA1

48. The claimant says that the reasons he did not take any action in relation to SDA1 are that he was fearful for his job, having been spoken to by HR about an alternative role or a redundancy payment and that he was unaware of his rights.
49. The claimant being fearful about his future prospects in the role is not a factor which excuses a 33 month delay in bringing a claim. He did not raise a grievance at that time either.
50. There is legislation in place to prevent victimisation, in circumstances where an employee has raised a complaint of discrimination.

SDA2 and RDA

51. The first reason the claimant has given for the delay in bringing the proceedings, in respect of RDA and SDA2, are that he was not in a fit state to consider the wider issues going on, even when taking legal advice, and was too exhausted and ill to take legal action about the alleged discriminatory treatment in a timely way.
52. The Tribunal does not accept that the claimant was too ill to consider the wider issues going on. The claimant was able, on 3 August 2021, to submit a lengthy and detailed grievance, despite being on sick leave. He

had also, during that period, sought legal advice.

53. The claimant mentions that two appointments of Ms Cannon and Mr Kakar in that grievance, so being ill did not prevent him having a sense of grievance about those matters. The fact that they were raised in the grievance meant that they were on his mind as part of the fact pattern during the period over which he was seeking legal advice also.
54. The claimant goes on to state that his illness did not just end when his sick leave ended but continued to impact on him. Again, that maybe the case, but it is clear that his illness did not prevent him from raising a detailed grievance or submitting his unfair dismissal claim in time. What the claimant has been unable to do is explain how his health permitted him to submit his complaint to ACAS on 10 December 2021, but had not permitted him to contact ACAS to start early conciliation in respect of his discrimination claim in time. No medical evidence was available save for fit notes.
55. The claimant also stated that he did not realise he could make a claim for discrimination as he did not consider himself, as a white male, to be a protected minority or class (or to have a protected characteristic), until shortly before he submitted his claim. However, the claimant accepted in cross examination that he did think, in 2019, that a man could be discriminated against compared to a woman.
56. The claimant says he didn't know he could bring a discrimination claim until after Christmas when he attended a dinner party. However, he started early conciliation, in respect of his unfair dismissal and his discrimination claims, on 10 December 2021. This explanation is not therefore credible.
57. The Tribunal must be satisfied, where a claimant says that he is ignorant of the fact that he can bring a claim, whether that ignorance is reasonable. In this case, the Tribunal finds that it is not. The claimant was on the respondent's leadership team and had been an accountant for blue chip companies for over 20 years. Whilst he was not an HR professional, or lawyer, the claimant is an educated man. It is not reasonable to be ignorant of discrimination rights, especially when such rights have existed for such a long time and are widely known and discussed in the national press. It is further relevant that the claimant had sought legal advice prior to bringing his claim, even if, as the claimant says, that was only in relation to the redundancy process. The point is that he was able to access legal advice and had access to it.
58. The claimant's argument that he was unaware of the time limits which applied for bringing his claim also lacks credibility as the claimant was able to bring his unfair dismissal claim in time and was in receipt of legal advice.
59. The claimant also states that the respondent was "deliberately evasive" when asked for relevant documentation, which made it difficult for him to assess his position as regards both his unfair dismissal and discrimination. However, the claimant did not explain why he was still able to bring his

unfair dismissal claim in time, but not his discrimination claims.

60. The Tribunal has also considered that prejudice that will be suffered by either party in granting or not granting the extension of time. Although the claimant will be unable to pursue the allegations of discrimination if the extension of time is not granted, it is likely that the two roles mentioned in SDA2 and RDA will be discussed and relevant in relation to the general fairness of the claimant's dismissal, as these were, he alleges, redeployment opportunities which he was denied.
61. As regards the respondent, it would have to face allegations which are likely to involve three additional witnesses, one of whom left the respondent around 2020, being those who made the allegedly discriminatory decisions to appoint.
62. Mindful that there is no presumption in favour of extending time, and that, in fact, Tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so, the Tribunal has concluded that the claimant's race and sex discrimination claims are out of time.

Employment Judge **Rice-Birchall**

Date 9 October 2023

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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