



EMPLOYMENT TRIBUNAL

Claimant: Mr. D. Leonard-Elmaz
Respondent: Ocado Central Services Ltd.
Hearing: Public Preliminary Hearing
Heard at: Watford ET (via video/CVP)
On: 9 October 2023
Before: Employment Judge Tinnion
Appearances: For Claimant: In person
For Respondent: Ms. J. Shepherd, Counsel

REASONS

Introduction

1. By a Judgment signed on 9 October 2023, for the reasons given orally at the hearing held on 9 October 2023, the Tribunal:
 - a. dismissed the Claimant's oral application for EJ Tinnion to recuse himself on grounds of appearance of bias;
 - b. held the Claimant's claim under s.15(1) of the Equality Act 2010 concerning the Claimant's start date and the Respondent's recruitment process was presented out of time in circumstances where it was not just and equitable to extend time, and struck out that claim under Rule 37(1)(a) (no prospect of success given lack of jurisdiction);
 - c. held that during the relevant period (6 April 2022 – 5 August 2022) the Claimant was not disabled under s.6 of the Equality Act 2010 because of depression, and dismissed the Claimant's claim against the Respondent under s.15(1) of the Equality Act 2010 relating to his dismissal based on the disability of depression.

2. On 10 October 2023, the Claimant requested written reasons. On 22 November 2023, EJ Tinnion was informed of that request. Those reasons are provided below.

Pleadings

3. By an ET1 presented on 26 September 2022 [2-13], the Claimant presented the following claims against the Respondent: first, a claim of unfair dismissal; second, a claim for disability discrimination (no specific statutory causes of action were pleaded); third, a holiday pay claim; and fourth, a wages claim.
4. By its ET3 [14-21] and Response [22-26], the Respondent denied the claims. It denied the Tribunal had jurisdiction to consider the Claimant's claims relating to his recruitment/start date, and contended that since he had started employment on 14 February 2022 any claims relating to the recruitment process had to be presented by 13 May 2022 to be in time. The Respondent denied the Claimant was disabled because of depression, and also denied actual or constructive knowledge of same.
5. At a hearing on 27 March 2023, the Tribunal identified the disability discrimination claim as unfavourable treatment under s.15(1) of the Equality Act 2010 (**EQA 2010**). A list of issues was drawn up [32-34]. The Respondent's solicitors subsequently provided an updated draft list of issues [37-40] which clarified that the Claimant's discrimination claim relating to his dismissal relied upon the disability of depression.

Public Preliminary Hearing

6. On 3 July 2023 [67-72], the Tribunal listed a Public Preliminary Hearing (**PPH**) to consider the preliminary issues identified in the Respondent's draft List of Issues, namely:
 - a. whether the Claimant's claim of unfavourable treatment relating to his start date/recruitment should be struck out because it was not presented in time;
 - b. whether the Claimant was disabled by reason of depression during his period of sickness absence between 6 April 2022 to the date of his dismissal.
7. The PPH was held on 9 October 2023 (via video/CVP). The Claimant represented himself. The Respondent was represented by counsel. The parties relied upon a bundle of 336 pages (references to which are made in square brackets). The Claimant relied upon a witness statement [64-66], a disability impact statement [49], and was cross-examined. The Respondent did not call any witnesses. The Tribunal was satisfied the Claimant sought to give his best, honest recollection of events.

Findings of fact

8. The Tribunal makes the following findings of fact, including any findings contained in the other sections of this document, on the balance of probabilities.
9. The Respondent is part of the Ocado online grocery business, and provides logistics, engineering and technical services. One of the services it provides is drivers (called **CSTMs**) who assist Ocado in delivering groceries from its 'customer fulfilment centres' (**CFCs**) and regional distribution centres to customers.
10. On 18 November 2021, the Claimant applied for a CSTM post. His application stated he had autism – it did not mention depression. The Respondent referred the Claimant to its Occupational Health advisers (**OH Advisers**), who on 30 November certified the Claimant as fit for a driving post with no adjustments required [74].
11. The Respondent offered the Claimant a CSTM role with a start date of 8 December. The Claimant was offered a roster which included morning and evening shifts. The Claimant responded he could only work morning shifts.
12. By email on 2 December 2021, the Claimant told the Respondent his inability to work evening shifts was because of his autism.
13. On 6 December 2021, the Claimant says he lodged a grievance explaining that he was being put at an unfair disadvantage. The Claimant alleges he submitted two further grievances, one on 25 January 2022, the second on 3 February 2022. According to the Claimant, those grievances were ignored and never resolved.
14. On 28 January 2022, the OH Advisers cleared the Claimant for a CSTM role, and noted it would be beneficial if he was only allocated shifts that allowed a finish by later than 4pm [73].
15. At some point between 3-14 February 2022, the Claimant submitted a pre-job questionnaire [75-89] in which he confirmed he was not suffering, and had not suffered, from depression [84]. The Claimant understood the question.
16. The Claimant also completed a 'New Starter Medical Questionnaire' [90-91]. In response to the question "*Do you or have you ever suffered from a mental illness including stress, anxiety or depression?*", he again answered no [90].
17. The Claimant was sent an employment contract which the Respondent signed on 12 February 2022 [303-312], para. 1 of which stated the Claimant would be a CSTM expected to deliver goods to customers in a timely, safe and courteous manner.

18. On 14 February 2022, the Claimant commenced employment as a CSTM at the Enfield CFC, and began driving delivering groceries to Ocado customers.
19. On 6 April 2022, the Claimant commenced a period of absence from work [93], and remained off work until 4 May 2022, when he was dismissed in a telephone call. According to his ET1, the Claimant's absence was due to severe depression.
20. On 4 May 2022, the Claimant lodged a grievance against his dismissal and the treatment he claimed he had been given before joining the Respondent.
21. On 29 June 2022, the Claimant was invited to attend a meeting to discuss his dismissal. On 4 August 2022, the Claimant attended a meeting where he was offered his job back. The Claimant accepted that offer. The next day, however, the Claimant resigned.
22. On 28 July 2022, the Claimant contacted ACAS. On 6 September 2022, ACAS issued its EC certificate [1]. On 26 September 2022, the Claimant presented his ET1.

Medical evidence

23. A substantial volume of medical evidence was included in the bundle [95-302].
24. The Claimant accepted there was no mention in his medical records of depression prior to December 2021. The Claimant saw a consultant in September 2019 who had referred to low mood but who did not diagnose the Claimant with depression.
25. The Claimant accepted his GP records for December 2021 – January 2022 did not mention depression, or refer to medication for depression.
26. The Claimant accepted the first mention of depression in his GP records occurred on 13 April 2022 [251]. The Claimant was subsequently prescribed anti-depressant medication, but accepted he took it for only 1 day because it made him "*feel funny*".

Time limits: relevant law

27. The general rule under s 123(1)(a) of EQA 2010 is that a claim concerning work-related discrimination (other than equal pay) must be presented within the 3 month period beginning with the date of the act complained of. For this purpose, conduct extending over a period is to be treated as done at the end of that period (s.123(3)(a)); failure to do something is to be treated as done when the person in question decided on it (s.123(3)(b)); in the absence of evidence to the contrary, a person is taken to decide not to do something either when the person does an act inconsistent with deciding to do something or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it (s.123(4)).

28. The primary time limit is subject to the extensions of time permitted by the ACAS Early Conciliation provisions by virtue of s.140B of EQA 2010. The early conciliation period does not extend time where the time limit has already expired.
29. If a claim is not brought within the time limit, the Tribunal has a discretion under s.123(1)(b) of EQA 2010 to extend time if it considers it just and equitable to do so. The burden is on the claimant to convince the Tribunal it is just and equitable to extend time. Robertson v Bexley Community Centre [2003] EWCA Civ 576 at para. 24. The discretion to extend time is a broad one, to be exercised taking account of all relevant circumstances, in particular the length of and reasons for the delay, and balancing the hardship, justice or injustice to each of the parties. Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ. 23. In that case, Underhill LJ deprecated the practice that had developed following the EAT's judgment in British Coal Corporation v Keeble [1997] IRLR 336 of referring to the checklist in s.33 of the Limitation Act 1980, holding that while it would not be an error of law for a Tribunal to consider those factors, "*I would not recommend taking it as the framework for its thinking*" when considering the exercise of its discretion under s.123(1)(b).
30. Although the length and reasons for the delay will be relevant, there is no rule of law that time cannot be extended where there is no explanation for the delay. Concentrix CVG Intelligent Contact Ltd v Obi [2022] EAT 149 at para. 50.
31. In an appropriate case, the merits of the claim may be relevant, provided the Tribunal is properly in a position to make an assessment of them. Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 at para. 63.
32. The fact an internal appeal is ongoing is not ordinarily sufficient of itself for time to be extended, but it is a factor to be taken into account. Apelogun-Gabriels v Lambeth [2001] EWCA Civ 1853 at para. 16.
33. When considering whether time should be extended to hear a complaint about a series of acts constituting a course of conduct, the Tribunal should consider the prejudice suffered by the respondent if it has to deal with the early allegations as well as the most recent ones, and may reach different conclusions in respect of different parts of the same case as to whether time should be extended. Concentrix at paras.. 68-72.

Time limits: Discussion / Conclusion

34. For the reasons set out below, the Tribunal was satisfied that the Claimant's claim of unfavourable treatment under s.15(1) of the Equality Act 2010 regarding his 'recruitment' by the Respondent which resulted in him starting employment as a CSTM driver on 14 February 2022 was not presented in time.
35. First, the recruitment process ended on 14 February 2022, as that was the date on which the Claimant started working for the Respondent. The Claimant made no complaint that he should have started working for the Respondent at a later date – his complaint is that his employment should have started sooner, ie, earlier than 14 February 2022.
36. Second, there was no 'continuing act' – the recruitment process which led to the Claimant's employment by the Respondent ceased on 14 February 2022 when the Claimant started the first day of his new job.
37. Third, applying ordinary time limits, the Claimant had 3 months (minus a day) from 14 February 2022 – ie, until 13 May 2022 - to present a timely ET1 raising a complaint that he had been subject to disability discrimination in the recruitment process which took place between November 2021 and 14 February 2022. It is not in dispute that he did not do so, nor did he contact ACAS during this period, the effect of which – had he done so – would possibly have been to extend time to present an ET1.
38. For the following reasons, the Tribunal concluded it was not just and equitable to extend time in respect of the Claimant's discrimination claim regarding the Respondent's recruitment process which resulted in his 14 February 2022 start date.
39. First, although acting in person, the Claimant is an experienced litigant in ET proceedings, having presented two earlier ET claims (one in 2021 for non-payment of wages, a second in 2021 which also brought claims of disability discrimination).
40. Second, the Tribunal was satisfied that by 14 February 2022 the Claimant knew of the need to contact ACAS before presenting an ET1, and likely knew of the 3 month time limit for presenting an ET1 (it formed no part of the Claimant's case that he was unaware).
41. Third, the Tribunal was satisfied that by no later than 4 May 2022 (ie, within the primary limitation period) the Claimant had formed a settled intention to bring an ET claim against the Respondent if he was not paid compensation for what he considered to have been discrimination during the recruitment process – see [316].

42. Fourth, while the Tribunal accepts the Claimant was not in good health after 6 April 2022, the Tribunal was not satisfied his ill-health explained, caused or contributed to his omission to present a timely ET1. In response to a question from the Tribunal, the Claimant stated his health did not improve after 6 April 2022. In those circumstances, in broadly the same state of health, the Claimant was still able to contact ACAS on 28 July 2022 and was still able to present an ET1 on 26 September 2022. If the Claimant was fit and well enough to do so then, the Tribunal could not identify any reason why the Claimant would not also have been fit and well enough to do so in May 2022 as well.
43. Fifth, the Tribunal was not satisfied that there was any material overlap between the Claimant's complaints about the Respondent's recruitment process in November 2021 – 14 February 2022, and his complaint about his dismissal.
44. Sixth, the Tribunal was not satisfied the Claimant acted reasonably in awaiting the outcome of the grievance he lodged on 4 May 2022. The Claimant's case is that he lodged grievances in December 2021 and January 2022, and received no satisfactory response. In those circumstances, it is not clear why the Claimant would have expected a satisfactory response to his 4 May 2022 grievance either.
45. Seventh, the burden rests on a claimant alleging disability discrimination to establish that it is just and equitable to extend time for a discrimination claim presented out of time. Ultimately the Tribunal was not satisfied the Claimant discharged that burden.

Disability: relevant law

46. Under s.6 of EQA 2010, a person has a disability if they have a mental or physical impairment and that impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.
47. Under para. 2 of Schedule 1, Part 1 to the EQA 2010, the effect of an impairment is long-term if (a) it has lasted for at least 12 months (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected. The term "*likely to last for at least 12 months*" means "*it could well happen*", not that it is more likely than not to happen. SAC Packaging v Boyle [2009] UKHL 37 at para. 35.

Depression as disability: Discussion / Conclusion

48. For the reasons set out below, the Tribunal was not satisfied that during the period 6 April – 5 August 2022 the Claimant's depression constituted a disability under s.6 of EQA 2010.

49. First, the Tribunal was satisfied that the Claimant had experienced intermittent periods of poor mental health before April 2022, caused by numerous factors, including but not limited to unhappiness at school.
50. Second, the Tribunal was not satisfied that the Claimant had experienced the mental impairment of depression prior to April 2022. The Tribunal was taken in detail through the Claimant's GP records – no entries in those records before April 2022 diagnosed or referred to depression. While the Tribunal accepts there is no need for a clinical diagnosis of an impairment for that impairment to constitute a disability, what was striking about the Claimant's GP records was the absence of records indicating that the Claimant was visiting his GP before April 2022 (either at his own behest or at the request/instigation of his mother) for mental-health related issues. A GP entry for 27 November 2018 [102] noted the Claimant was "*not overtly depressed*". On 17 September 2019 [136], a Consultant letter noted the Claimant's mother's concern that her son was suffering from depression, but the Consultant's finding was limited to stating that the Claimant "*at time[s] feels low*".
51. Third, the Tribunal was satisfied that the Claimant did have the mental impairment of depression by no later than 13 April 2022.
52. Fourth, the Tribunal was satisfied (on the balance of probabilities) that the Claimant's depression from that date on likely did have some non-trivial effect on his ability to carry out normal day to day work activities (for example, his ability to attend work to do work).
53. Fifth, the Tribunal was not satisfied, however, that the substantial adverse effect the Claimant's depression had on his ability to carry out normal day-to-day activities had in fact lasted for 12 months at any point during the period 13 April - 5 August 2022.
54. Sixth, the Tribunal was not satisfied that the substantial adverse effect which the Claimant's depression was having on him on/after 13 April 2022 was likely to last at least 12 months. There was no medical evidence before the Tribunal to that effect, or to the effect that the effect of the Claimant's depression on his ability to carry out normal day-to-day activities was likely to be long term, or likely to reoccur or keep reoccurring. Such medical evidence as there was appeared to link the Claimant's depression to other life events, including in particular gambling, for which there was no associated diagnosis or prognosis.

Recusal application: Discussion / Conclusion

55. At the outset of the hearing, EJ Tinnion disclosed to the Claimant the fact that he and Ms. Shepherd, the Respondent's counsel, both sit as Fee-Paid Employment Judges in Scotland, know each other in that capacity, and attend judicial training events in Scotland. EJ Tinnion stated he is not a member of Ms. Shepherd's barristers chambers nor she of his, and further stated he had never previously met Ms. Shepherd outside of their judicial capacity in Scotland.

56. After being given time to consider that disclosure, the Claimant applied for EJ Tinnion to recuse himself on grounds of appearance of bias. The Respondent's counsel opposed that application, noted it is not uncommon for judges (and barristers) to know one another in a professional capacity, and stated that there was nothing in the information disclosed which would give rise to an appearance of bias under the test the Court of Appeal set out in Jones v DAS Legal Expense Insurance Co. Ltd. [2004] IRLR 218, namely whether a fair-minded observer would consider that there was a real danger of bias.

57. Having considered the matter, for the reasons set out below the Tribunal dismissed the Claimant's recusal application.

58. First, EJ Tinnion was not a party to the case.

59. Second, EJ Tinnion had no interest in the case's outcome (and the Claimant did not suggest that he did).

60. Third, it is common for judges to know other judges and attend judicial training events where they will meet other judges.

61. Fourth, the only capacity in which EJ Tinnion and Ms. Shepherd know each other is in their capacity as Fee-Paid Employment Judges sitting in Scotland.

62. Fifth, nothing in these facts would lead a fair-minded observer to consider that there was a real danger that EJ Tinnion would be biased either in favour of the Respondent or biased against the Claimant.

Signed (electronically):

Employment Judge Tinnion

Date of signature: 29 November 2023

Date sent to parties: 1 December 2023

For the Tribunal:

NOTE

1. Judgments and Reasons are published online after they are sent to the parties.