



EMPLOYMENT TRIBUNALS

Claimant: Mr G Evans

Respondent: Portable Foods Manufacturing Company Limited

Heard at: Cardiff **On:** 17 June 2024

Before: Employment Judge Martin

Representation:
Claimant: In person
Respondent: Ms L Amartey (Counsel)

JUDGMENT

1. This Tribunal does not have jurisdiction to hear the Claimant's complaints of disability discrimination. Accordingly, his claims of disability discrimination are hereby dismissed.
2. The Claimant's application for leave to amend his claim is not allowed and is hereby dismissed.

REASONS

1. The Tribunal was provided with a bundle of documents and some additional documents during the course of the hearing. The Tribunal heard evidence from the Claimant and then proceeded to hear oral submissions from both parties; having received written submissions from the respondent's representative.
2. The law which the Tribunal considered was as follows: -
3. Section 123 of the Equality Act 2010 states that claims of discrimination are to be brought within 3 months of the date of the act to which the

complaint relates or such other period as the Employment Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of that period.

4. The case of ***Miller and others -v- Ministry of Justice and others and another case*** [EAT/003/15] which held that the discretion to extend time is a wide one but that time limits are to be observed strictly in the Employment Tribunals. There is no presumption that time will be extended unless it can be justified. The exercise of discretion is the exception rather than the rule.
5. Section 33 of the Limitation Act 1980 sets out some of the factors which should be taken into account when considering whether time should be extended on just and equitable grounds which include:- the length of and reasons for any delay; whether advice was sought; whether a party acted promptly having received such advice, the merits of the case and any prejudice / hardship to the claimant and the respondent .
6. The case of ***Adedeji -v- University Hospital Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23 where the Court of Appeal held that it is helpful to review the checklist of factors in Section 33 of the Limitation Act 1980 but is not a requirement.
7. The case of ***Selkent Bus Company Limited -v- Moore*** [1996] ICR 836 which sets out the factors to consider on any application for leave to amend as follows: - the nature of the amendment; the timing and manner of that application; the applicability of time limits and then balancing the injustice and hardship to both the claimant and the respondent in allowing or not allowing the amendment.
8. The case of ***Gillett -v- Bridge 86 Limited*** [UK EAT/0051/17] which held that one of the factors to take into account when determining whether a new claim should be allowed is an assessment of the merits of that new claim. The Tribunal also noted the Presidential Guidance issued in England and Wales 2018 on the approach Tribunals should take to any applications for leave to amend.
9. The Tribunal was also referred to and took account of the case of ***Abercrombie and others -v- Aga Rangemaster Limited*** [2014] ICR 209 where the Court of Appeal held that the greater the difference between the factual and legal issues raised by the new claim and the old claim, then the less likely it will be for leave to be permitted.
10. The case of ***Newquest (Herald and Times) Limited -v- Keeping*** [UK EAT/0051/09] and ***Foxtons Limited -v- Ruwiel*** [UK EAT/0056/08] to which the Tribunal was referred to and considered which held that the

date of the application for leave to amend is the date the date from which to calculate time limits

The Issues

11. The two issues which the Tribunal had to consider were: -
12. Firstly, whether the Tribunal should exercise its discretion and extend time on just and equitable grounds to allow the Claimant's claims of disability discrimination to proceed and to also consider whether or not they were part of a continuing course of action. In that regard the Tribunal had to consider the length of and reasons for the delay; what advice, if any, had been provided to the Claimant; the steps the Claimant took to act on any such advice; what prevented the claimant from presenting the claims in time. The Tribunal also looked at the potential merits of the claim and also had to consider any injustice to the claimant or respondent in allowing the claims to proceed.
13. Secondly, the Tribunal had to consider whether the Claimant should be allowed to amend his claim to add claims of victimisation and protected interest disclosure related to allegations about not providing witness statements/notes from the grievance meeting and not issuing the Claimant with vouchers in November/December 2023. In relation to any application for leave to amend the Tribunal had to consider the nature of those amendments namely whether they were new claims, new allegations or new causes of action; the applicability of any relevant time limits; the timing and manner of the Claimant's application and any prejudice to either of the parties.

Findings of Fact

14. The Claimant issued these proceedings in June 2023. He subsequently provided some further information about his claims of disability discrimination stating that he was claiming regarding incidents which occurred in 2014 and 2015 and further incidents in January 2022. The incidents in 2014 relate to his return to work. He also complains about changes to his shift and the impact on him and his mental health and the Respondents failure to find alternative duties. The incidents in 2015 relate to having to return to work because he was being put on half pay and having to see Occupational Health. In January 2022 he complains about his return to work.
15. In January 2022 the Claimant starts a personal injury claim against the Respondent and contacts a solicitor with regard to the same.

16. In July 2022 he raises an issue directly with ACAS with regard to holidays during sick leave.
17. In September/October 2022 the Claimant contacts a solicitor, whom he accepted in evidence specialised in employment law. He contacts that solicitor about a potential protected interest disclosure claim. On 23 October 2022 the Claimant sends an email to the respondent raising what he now alleges to be a protected interest disclosure.
18. On 28 October 2022 the Claimant raises a grievance complaining about issues dating back to January 2014/2015 and issues around January through to July 2022.
19. In October 2022 the Claimant goes on long term sick leave. He remains on sick leave until his dismissal in October 2023.
20. The Claimant's grievance is heard and dismissed in January 2023. The Claimant appeals against that grievance in January 2023. He is represented by his Trade Union Representative. The Appeal Hearing takes place in April 2023 where he is represented by his Trade Union. He is given the outcome of the Appeal Hearing in June 2023.
21. In April 2023 he asks the respondent about the notes/witness statements from the Appeal Hearing which was heard in October 2022.
22. He issues proceedings in this Tribunal for disability discrimination in June 2023. Two Preliminary Hearings take place in this case in October 2023 and then on 3 November 2023. A further Preliminary Hearing takes place in April 2024 arranging this public Preliminary Hearing.
23. The Claimant raised concerns about not receiving his vouchers in November/December 2023 and was told that they would be sent to him in January 2024. There appears to have been a delay in sending them to him from early January to mid-January. He received them in mid-January 2024.
24. In February 2024 the Claimant raised a grievance in regard to the failure to provide notes/witness statements from the October grievance hearing of October 2022 and the failure to provide his vouchers. He does not mention those matters at the Preliminary Hearings in October or November 2023.
25. In April 2024 the Claimant raises these new claims in these tribunal proceedings, namely with regard to the failure to provide the witness statements/notes of the grievance hearing back in October 2022 and the issue with regard to the November/December 2023 vouchers. He

- suggests these matters relate to allegations of victimisation and public interest disclosures. In discussing the matter today, it appears that he relies on the email he sent on 23 October 2022 as a protected act for a protected disclosure claim disclosure. Those matters were not raised until after the case had been fixed for a public Preliminary Hearing to consider whether the Tribunal had jurisdiction to hear his claims.
26. In his evidence today, he candidly admitted that he had brought these claims to try and ensure that all his claims were effectively viewed as part of a continuing act and that he had in effect added these claims to bring his previous proceedings in time.
 27. The Claimant has been off sick from October 2022 until his dismissal in October 2023. He said that his mental health issues prevented him from bringing the claims earlier.
 28. From the further information provided by the claimant of his claims of discrimination it seems that his last claim was in January 2022 which related to a failure to make reasonable adjustments and the other claims appear to all relate to 2014/2015. He struggled to recall dates of what he described as various telephone discussions during 2014/2015. The Claimant indicated that he was on medication from 2015 up to 2016, although he was unclear exactly when he came off that medication. He said in evidence that the medication had a substantial effect on his mental health. He said that it effectively made him like a zombie and that he was unable to think clearly or do anything, including about any of the matters that concerned him back in 2014 and 2015 because he was in no fit state; due to the medication he was on to be able to do anything about it. He was unable to explain however why he did not take any action with regard to those matters after he came off the medication in 2016. His only explanation was that by then things seemed to have settled down at work and that he was concerned about retribution. He said in evidence that he just wanted to be left alone at that stage and he did not want to upset things further, so he just left things and did not raise these matters until much later. He said that then similar problems arose in January 2022 with regard to his return to work which is why he then raised the matters which occurred in 2014/2015.
 29. The claimant admitted that he had been receiving advice from his Trade Union solicitors and indeed had separate Trade Union solicitors to assist him with his personal injury claim against the respondent. He could not explain why he had not asked about nor received, it appears, any advice about time limits for bringing Tribunal claims.
 30. In evidence the Claimant admitted that he had also been receiving separate advice from an employment solicitor by October 2022. He is

relying on the email he sent to the respondent, following receipt of that advice, in his new claim for a protected interest disclosure. He also acknowledged he raised the grievance in October 2022 after receipt of that advice. In evidence the claimant suggested that he was not aware of nor was there any discussion about time limits with this employment law specialist back in October 2022; the latter who appeared to be advising on the same matters.

31. The Claimant's further explanation for the delays appeared to be that he believed that he was going to succeed in relation to his grievance. He also appeared to believe that, although his grievance had failed, he would be successful in relation to his appeal.
32. The claimant admitted in his evidence that he had brought these new claims in April 2024 to argue all the claims were in time as part of a continuing course of action. He said in both his evidence and submissions that he was focusing on those later claims and that he thought that should mean that they were part of a continuing course of action and that would mean that his claims were effectively in time.
33. He was unable to explain why he did not bring at least one of new claims in his original ETI or raise it at any of the Preliminary Hearings in Autumn 2023.
34. The respondent's representative acknowledged that one of the new claims was in time, but that, although there had been a short delay in providing the vouchers to the claimant and others on long-term sick leave, they were provided within a few weeks. She submitted that the short delay in January 2024 for the vouchers to be delivered related to postal issues.

Conclusions

35. This Tribunal is not minded to exercise its discretion to extend time to permit the Claimant to bring his claims of disability discrimination.
36. Most of his claims relate to issues dating back to 2014/2015 almost 10 years ago. The only allegation that relates to issues in 2022 is also over a year out of date and will be substantially further out of date by the time the case is heard.
37. The Tribunal accepts that, during the period 2014/2015 the Claimant was on medication for his mental health impairment of PTSD which may have prevented him bringing the claims then. However, he has provided no evidence to explain why he could not raise these matters earlier, from 2016 onwards, after he came off that medication.

38. Since 2022 the Claimant has been off on long term sickness with a mental health condition. However, that did not prevent the Claimant from, during that period when he was off sick, raising a protected interest disclosure or raising a grievance in October 2022 after when he went off on long term sickness.
39. Furthermore, over this period the Claimant has been in contact with ACAS back in July 2022. He has also been receiving advice from his Trade Union and solicitors instructed by his Trade Union, the latter who have been advising him in relation to the personal injury claim. Furthermore, he then received advice in the autumn of 2022 from an employment law specialist solicitor.
40. The Tribunal acknowledges that the Claimant is acting in person. However, he was clearly receiving legal advice about employment issues which must surely have included advice about time limits bearing in mind he raised the same issues in his grievance back in October 2022 shortly after he had sought that advice. The Tribunal note that, despite having received advice from various different organisations, including an employment law solicitor, ACAS and his Union over the years, he still did not issue proceedings until at least a year after he had received that advice and in many cases in excess of a year after he had received that advice.
41. The Tribunal also note from the Claimant's own evidence that he considers that his claims of disability discrimination must now be in time because he has now sought to bring new claims which he is suggesting are in time which he asserts in his evidence would then mean that the other claims were effectively in time. This Tribunal considers that those matters are entirely different to his claims of disability discrimination in these proceedings.
42. This Tribunal considers that there would be an impact on any evidence which could be given in these proceedings. The claimant himself struggled to recall dates. The Tribunal considers there would be prejudice to the Respondent in allowing the Claimant to bring claims about matters that principally occurred almost 10 years ago, most of which relate to verbal telephone conversations.
43. The Tribunal considers that there would be less prejudice to the Claimant because he is looking to bring claims, most of which are substantially out of time and which he chose not to raise in 2016 or immediately after his grievance was dismissed in January 2023 even having had legal advice on those claims.

44. The Tribunal reminded itself that the burden of proof to show that time should be extended on just and equitable grounds lies with the Claimant and this Tribunal does not consider that this Claimant has met that burden of proof.
45. The Tribunal does not find that there is a continuing course of action. These are separate allegations; most of which date back almost 10 years. In any event all the claims are out of time. Furthermore, this Tribunal does not consider that it would be just and equitable in this case to extend time. Although the Claimant may have been suffering from a mental health impairment during his absence on sick leave, he was able to seek advice, act on that advice to the extent that he raised what he considered to be a protected interest disclosure and also raised a grievance about the same matters about which he complains to this Tribunal. He was receiving advice throughout this period and at no stage considered nor indeed appears to have been advised about, the time limits for bringing claims despite the fact that he was effectively seeking advice and being advised by both the Union representing him at various periods throughout this time and by an employment law solicitor.
46. Accordingly, this Tribunal does not have the jurisdiction to hear the Claimant's claims of disability discrimination which are all hereby dismissed.
47. The Tribunal went on to consider the Claimant's application for leave to amend. As the Tribunal does not consider it has jurisdiction to hear any of the Claimant's claims, then in effect the Claimant's application for leave to amend is obsolete, because there is no existing claim which he could now seek leave to amend. However, the Tribunal, having heard submissions on both matters, went on to consider the application for leave to amend.
48. This Tribunal considers that the new claims are new causes of action and raise new factual issues. The two claims are not particularly well articulated even at this stage. They appear to be a claim for a failure to provide witness statements/notes from the grievance hearing in October 2022, which were not requested until April 2023 which it is understood is an allegation of victimisation / protected interest disclosure. That claim is substantially outside the time limit for the bringing of any such proceedings. The other claim relates to a claim for vouchers provided to other employees in December 2023. However, it appears that those vouchers were in fact subsequently provided to the Claimant a few weeks later in January 2024. The claimant appears to be arguing that the delay in providing those vouchers, which the respondent says, was minimal and due to postal issues was an act of victimisation and/or a detriment for raising a protected interest disclosure with the protected interest disclosures being those made by way of an email on 23 October 2022.

49. This Tribunal notes that the latter claim is in time. Therefore, the Claimant could in fact bring that claim before the Tribunal. However, this Tribunal considers the claim has little merit as the respondents can provide another explanation for the delay in providing those vouchers. They suggest that the Claimant and others on long-term sick were to be provided with those vouchers, but there was just a delay in doing so.
50. Most significantly, it is clear from the Claimant's evidence and his submissions that these claims are merely attempts and a tactic to prevent his other claims being dismissed as he has sought throughout his evidence and submissions to argue that these claims are part of a continuing course of action and which he suggests would mean all claims are in time. He focused his submissions and evidence on that assertion.
51. It is not clear why those matters, particularly the first matter, were not brought in these proceedings, nor raised at either of the earlier Preliminary Hearings in autumn 2023. No explanation has been given as to why it took the Claimant 6 to 7 months to originally ask for the documents in the first place. At least one of those claims is out of time. Although the other claim could be in time, this Tribunal considers that claim has little or no merit and would almost certainly be met by an application to strike out based on no reasonable prospect of success.
52. Therefore, this Tribunal considers that there would be greater prejudice to the respondent in having to defend another claim which is also substantially out of time and one which has little reasonable prospect of success, whereas the prejudice to the Claimant is minimal, bearing in mind that he could have chosen, but did not do so, to raise these claims, particularly the first one, earlier but decided not to do so. He appears to have only done so when he was faced with an application to strike out the current proceedings based on jurisdiction on time.
53. Accordingly, this Tribunal considers that any application for leave to amend would not have been allowed in any event, even if the Claimant had been able to persuade the Tribunal that it should exercise its discretion to extend time for the presentation of his earlier claims.

Employment Judge M Martin

Dated: 8 July 2024

JUDGMENT SENT TO THE PARTIES ON 8 July 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche