EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING BY VIDEO

Claimant: **Mr S Thompson**

Respondents: **Tesco Stores Limited**

Heard: **Remotely by video** **On:** **7 March 2021**

Before: **Employment Judge S A Shore**

REPRESENTATION:

Claimant: **Mr J Sheng, Lay Representative**
Respondent: **Ms L Whittington, Counsel**

JUDGMENT AND REASONS

The judgment of the Tribunal is that:

1. The claimant's claims of direct disability discrimination contrary to section 13 of the Equality Act 2010 and harassment relating to the protected characteristic of disability were not presented within the time limit set out in section 123 of the Equality Act 2010. It was not just and equitable to extend the time limit. The claims are struck out as the Tribunal does not have jurisdiction to hear them.

REASONS

Background and History of this Hearing

1. The claimant has been employed continuously by the respondent since 10 August 2012. The claimant is employed as a Checkout Customer Assistant. The claimant's claim relates to an incident on 23 August 2020 when he says that he was directly discriminated against because of the protected characteristic of disability and that

   the same acts by an employee of the respondent constituted harassment related to the protected characteristic of disability. The claimant began early conciliation with ACAS on 21 November 2020 and received an early conciliation certificate dated 21 December 2020. His ET1 was presented on 9 May 2021. The respondent's ET3 was presented on 8 June 2021. The respondent submitted that the claimant's claims were out of time.

2. A private preliminary hearing by telephone (TPH) was conducted by Employment Judge (EJ) Morgan QC on 28 September 2021. In his case management order (CMO) dated 28 September 2021, EJ Morgan QC listed this hearing to determine:

   2.1. Whether the claimant is a person with a disability on account of the condition of dyspraxia;

   2.2. Whether the claims of directs discrimination and/or harassment have been lodged in time; and

   2.3. To the extent that the claims were lodged out of time, whether it is just and equitable for the Tribunal to exercise its power to extend time under section 123 of the Equality Act 2010.

3. Both parties have copies of EJ Morgan QC's CMO, which was in the Bundle for this hearing [32-40]. The CMO also set out Orders that a bundle of documents be prepared and that witness statements be prepared and exchanged. The respondent prepared and sent the claimant a witness statement from Jan Brown. The claimant indicated that he did not wish to submit a witness statement. Paragraph 21 of EJ Morgan QC's CMO stated that "The claimant and the respondent must prepare witness statements for use at the hearing."

4. Mr Thompson was unrepresented until shortly before the hearing. He notified the Tribunal on 4 March that he would be represented by Mr Sheng, a lay representative at Leeds Free Legal Representation.

Housekeeping Matters

5. The parties produced a bundle of 58 pages which included the claimant's disability impact statement, letters from medical professionals, a schedule of loss and the pleadings to date. If I refer to any documents from the bundle, I will indicate the appropriate page numbers in square brackets (e.g. [23]).

6. The respondent sent a case management agenda to the claimant and the Tribunal. Mr Sheng submitted a document titled “Note for Preliminary Hearing”.

7. The hearing was conducted remotely by video with the agreement of the parties.

8. Ms Whittington raised the fact that the claimant had not produced a witness statement. She correctly pointed out that the onus is on the claimant to show that it would be just and equitable for the Tribunal to extend the time for presentation of the claims. Her point was that if the claimant did not give evidence, then he could not possibly expect to meet the onus on him.

9. Whilst I could see the merit in Ms Whittington’s submission, I reminded myself of the overriding objective in Rule 2, which is to produce a just and fair hearing. I accepted that if Mr Sheng had had time to produce a 7-page note of submissions, then he could have produced a witness statement in advance of the hearing. However, I felt that it would not meet the overriding objective to deny the claimant the opportunity to present his case. It was agreed that the claimant would be asked questions by me. Ms Whittington would then cross-examine and Mr Sheng would be given the opportunity to ask re-examination questions. The decision for me to ask the initial questions was made because that was the claimant’s preference.

10. I advised the parties that I would only deal with the time points in the first instance as if I struck out the claims, it would have been a waste of time and expense to have heard evidence about the question of disability.

11. After the claimant had given evidence, we then heard the evidence of Jan Brown, who adopted her witness statement dated 4 March 2022. Mr Sheng indicated that he had been instructed not to challenge Ms Brown’s evidence.

12. I then heard closing submissions from Ms Whittington, followed by closing submissions from Mr Sheng. At the end of the submissions, took a break to consider my decision, which I then delivered with reasons. Mr Sheng asked for the reasons to be put in writing.

13. As I struck out the claims for want of jurisdiction, I did not hear evience or make findings on the issue of whether the claimant met the definition of disability.

Relevant Law

14. I was mindful of the overriding objective to deal with cases justly and fairly in Rule 2 and the Tribunal’s wide case management powers under Rule 29.

15. Section 123 of the Equality Act 2010 states:

123. Time limits

(1) Subject to sections 140A and 140B proceedings on 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.

Issues

16. The issues (questions that I had to find the answers to in order to make a decision) were as follows – I have only included the issues in the time points, as I heard no evidence and made no findings on the disability point:

1.1 Given the date the claim form was presented and the dates of early conciliation, the claim may not have been brought in time.

1.2 Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

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

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

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

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

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

Findings of Fact

17. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided in favour of one of the parties. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the documents and evidence produced to the Tribunal. I make the following findings.

5. The claimant has been employed continuously by the respondent since 10 August 2012. The claimant is employed as a Checkout Customer Assistant. The claimant's claim relates to an incident on 23 August 2020 when he says that he was directly discriminated against because of the protected characteristic of disability and that the same acts by an employee of the respondent constituted harassment related to the protected characteristic of disability. The claimant began early conciliation with ACAS on 21 November 2020 and received an early conciliation certificate dated 21 December 2020. His ET1 was presented on 9 May 2021. The respondent's ET3 was presented on 8 June 2021.

6. The claimant says that he meets the definition of 'disabled person' in section 6 of the Equality Act 2010 because of dyspraxia. The respondent disputed that the claimant met the definition.

7. I find that because the incident that is the basis of both claims happened on 23 August 2020 and that the claimant started ACAS early conciliation on 21 November 2020 and obtained a conciliation certificate on 21 December 2020, the last date for him to have presented his ET in time would have been 21 January 2021. He accepted that his ET1 had been presented after the expiry of the time limit in section 123 of the Equality Act as extended by the early conciliation period.

8. I find that it would not be just and equitable to extend the time for presentation of the claimant's claims of direct discrimination and harassment. I make that decision because:

8.1. I considered the claimant's evidence carefully;

8.2. I read the medical letters and documents that the claimant submitted carefully.;

8.3. I read the letter from Dr Tony Pegrum dated 20 October 2021 [42] carefully. This was the only evidence from a medical expert that addressed the question of the ability of the claimant to present the claim on time. Dr Pegrum states that the claimant consulted the practice on 22 December 2020 and discussed symptoms of anxiety, stress and depression. Dr Pegrum says that no medication or other treatment was prescribed and that the practice next heard from Mr Thompson in June 2021. Mr Thompson was certified unfit for work from 8 June 2021 to 7 September 2021;

8.4. Dr Pegrum then draws the conclusion from the above chronology that there could be "no doubt on a review of this gentleman's records that he has been profoundly affected by the dispute with Tesco and if it is possible an exception can be made to allow an employment tribunal to go ahead, I think this would be appropriate.";

8.5. The issue I have with Dr Pegrum's report is that it does not address the central question in the case – why was the claimant unable to submit his ET1 on time? The report tells me that the claimant was affected by the events at work, but does not mention or give any support to the claimant's case that he was too stressed to submit his ET1. I therefore give Dr Pegrum's report relatively little weight;

8.6. I find it was a unchallenged evidence that the claimant was able to raise the incident on 23 August 2020 with a line manager the following day, because he accepted that he had done so;

8.7. I find that it was a unchallenged evidence that the claimant had one day of ill health absence on 27 December 2020 and a period of absence from 2 January to 21 January 2021 to look after his father, who was self-isolating before an operation;

8.8. I find that it was a unchallenged evidence that the claimant used a mix of annual leave and unpaid leave to look after his father between 18 January 2021 and 16 February 2021 to look after his father;

8.9. I find that it was unchallenged evidence that the claimant had two days off for adverse reactions to Covid-19 vaccine injections on 7 and 8 March 2021 and 23 and 24 May 2021;

8.10. The claimant accepted that the only day he had off for anxiety was 27 December 2020;

8.11. I find that other than the periods set out above, it was Jan Brown's unchallenged evidence that the claimant attended all his shifts between November 2020 and May 2021;

8.12. The principles on extensions of time on a just and equitable basis are best set out in Robertson v Bexley Community Centre [2003] EWCA Civ 576. In that judgment, Auld LJ (§25) stated that:

> "It is also of importance to know that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.";

8.13. The burden of persuading the Tribunal to exercise its discretion to extend time is on the claimant;

8.14. In the case of Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13, it was noted that a litigant can

> hardly hope to satisfy the burden on him to show that time should be extended unless he provides an answer to two questions (§52):
>
> > "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was.";

8.15. There is no requirement on me to hear the full merits of the case before determining whether the Tribunal has jurisdiction to hear it;

8.16. I am mindful of the guidance contained in the case of Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 about the tests to be used in assessing whether it is just and equitable to extend the time for bringing a claim of discrimination under section 123 of the Equality Act 2010. In that case, Underhill LJ approved the words in Leggatt LJ's judgment (§§18-19) in Abertawe Bro Morgannwg University Local Health Board v Morgan that emphasised the discretion of the Tribunal in determining applications to extend time on the just and equitable basis and affirmed the authority of the case of British Coal Corporation v Keeble [1997] UKEAT 496/98;

8.17. The discretion to grant an extension of time under the "just and equitable formula" does therefore not require me to go through the list of issues to be considered by section 33 of the Limitation Act 1980, but to consider all the relevant issues, such as the length of and reasons for the delay and whether the delay has prejudiced the respondent from investigating the claim whilst the matters were fresh. The only requirement on me appears to be that I do not leave a significant factor out of account (per London Borough of Southwark v Afolabi [2003] EWCA Civ 15);

8.18. I find that the claimant was well aware of his potential claims for discrimination because he admitted as much. He admitted he was aware of the relevant time limit for bringing a claim. His case was that he could not face the increased stress of starting Employment Tribunal proceedings until May 2021;

8.19. When considering whether to grant an extension of time under the 'just and equitable' principles, the fault of the claimant is a relevant factor to be taken into account. I find that the claimant was at fault for failing to present his claim in time.

8.20. It is necessary for me, when exercising my discretion, to identify the cause of the claimant's failure to bring the claim in time. In Accurist Watches Ltd v Wadher UKEAT/0102/09/MAA, Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was

> not an absolute requirement of the rules that evidence should be adduced in this form.

8.21. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents (§16). What a tribunal is not entitled to do, however, is to make assumptions in the claimant's favour on contentious factual matters that are relevant to the exercise of the discretion; as the burden is on the claimant to show that it would be just and equitable to extend time, where a contentious matter is relied on there must be some evidential basis for it. In this case, the claimant's only stated reason for delay was that she was confusion about the identity of her employer.

8.22. When balancing the factors for and against the exercise of my discretion in the claimant's favour, I find:

8.23. The length of delay in making the application was unreasonable and the reason for delay was not reasonable, because the claimant has not adequately explained it.

8.24. I am mindful of the requirement to ensure a just and fair hearing. I am conscious that the claimant would suffer the prejudice of not being able to continue with the proposed amended claims, but I find the prejudice caused to the respondent in defending claims that could have been brought in time, but were not tips the balance in favour of the proposed respondents' favour.

8.25. I find that the claimant's challenge to his line manager on the day after the events of 23 August 2020 and his subsequent filing of a grievance and his participation in that process undermines his assertion that he was too stressed to file an ET1. His evidence explaining why he was unable to lodge the application on time carried little logic or internal consistency;

8.26. I find that the claimant's ability to raise, discuss and argue his claims with the respondent in a grievance procedure is evidence that it was possible for him to have presented her claim for indirect sex discrimination in time. I also make that finding because the claimant remained at work, apart for absences to look after his father and bad reactions to Covid-19 vaccines;

8.27. I find that the ET1 was presented outside the time limit set out in section 123 of the Equality Act 2010;

8.28. The claimant lodged his claim after the extension of time because of ACAS early conciliation had expired;

8.29. As we discussed at the hearing, there are many authorities on what a Tribunal should consider when deciding whether to exercise its jurisdiction to extend time on a just and equitable basis. In this case, I have decided to consider:

8.29.1. The length of and reasons for the delay;

8.29.2. The extent to which the cogency of the evidence is likely to be affected by the delay;

8.29.3. The extent to which the party sued had co-operated with any requests for information;

8.29.4. The promptness with which the Claimant acted once he knew of the facts giving rise to the action;

8.29.5. The steps taken by the Claimant to obtain advice once he knew of the possibility of taking action;

8.29.6. The merits of the claim; and

8.29.7. The balance of prejudice between the parties;

8.30. The length of the delay is considerable – more than 4 months;

8.31. I do not find that the clamant has shown on the balance of probabilities that he was unable to lodge the claim on time. He knew he had a claim. He knew what the claim was and he knew that there was a strict time limit and what date that time limit expired. I do not accept

that he has shown on the balance of probabilities that he was so anxious that he was unable to lodge the claim in time;

8.32. I do not find that the cogency of the evidence is adversely affected in any great sense. One of the respondent's witnesses may have moved employers, but as Tribunals in other regions are listing cases for hearings in 2024, I cannot see how the delay in the claimant's submission of this case has made a just and fair hearing impossible;

8.33. The respondent had provided the claimant with the information he needed to make this claim as part of the grievance procedure. No fault lies with the respondent for the claimant's failure to present his claim in time;

8.34. I find that the claimant did not act promptly once he knew of the facts giving rise to the action for the reasons I have set out above;

8.35. I find that the claimant knew, or ought to have known, that he had a cause of action in August 2020. He took the steps in the internal procedures that I have set out above. He spoke to ACAS and engaged in early conciliation;

8.36. I cannot make a finding on the strength of the claimant's case on the evidence and documents that I heard and saw; and

8.37. I understand that the claimant will be prejudiced by being denied the opportunity to proceed with this claim, but I find that prejudice is, on balance, less than the prejudice caused to the respondent of having to defend a claim that was brought months out of time. Time limits are limits, not targets.

9. I find that the claimant has not shown on the balance of probabilities that it would be just and equitable to extend time to allow his claims of direct disability discrimination and harassment related to disability to proceed. The claimant's claim of direct disability discrimination and harassment related to disability are struck out because the Tribunal does not have jurisdiction to hear them.

Employment Judge S A Shore

Date 9 March 2021