



EMPLOYMENT TRIBUNALS

Claimant Respondent
Mr R Bennett v Places for People Group Limited

PRELIMINARY HEARING

Heard at: North Shields On: 2 March 2017

Before: Employment Judge Hunter

Appearance:

For the Claimant: Mr R Owen, Gateshead CAB

For the Respondent: Miss LA Amartey of Counsel

JUDGMENT

1. The disability discrimination claims have been brought out of time and it is not just and equitable to extend the time limit.
2. The disability discrimination claims are dismissed and the case shall proceed as an unfair dismissal claim to be heard by an Employment Judge sitting alone.

REASONS

1 The Law

1.1 Section 123 Equality Act 2010 provides

(1) 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.

1.2 Section 140B Equality Act 2010 provides:

(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

but it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 140A.

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

1.3 A failure to make a reasonable adjustment is an omission not an act. *Matuszowicz v Kingston Upon Hull City Council* [2009] IRLR 288 (CA). Time runs from when the respondent decided not to make the adjustment. Section 123 (4) applies.

1.4 In *Commissioner of the Metropolitan Police v Hendricks* [2003] ICR 530 it was established that when considering whether there is conduct extending over a period,

the focus should be on whether there was an ongoing situation or a continuing discriminatory state of affairs.

1.5 There is no presumption that a tribunal should exercise its discretion to extend a time limit. *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable. *Parthan v South London Islamic Centre* EAT 0312/13.

1.6 In considering whether a claim has been brought in a period which is just and equitable it was suggested in *British Coal v Keeble* [1997] IRLR 336 by the EAT that tribunals would be assisted by the factors mentioned in section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

- (a) the length of and reasons for the delay;
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued had cooperated with any requests for information;
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and
- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

2 The Disability discrimination claims

2.1 I clarified with the parties the nature of the discrimination claims. There are two.

2.2 First there is a claim under section 15 Equality Act 2010. In essence the claim is that the respondent treated the claimant unfavourably because of his inability to do tasks promptly and effectively in consequence of his disability (dyslexia). The unfavourable treatment is recorded at paragraphs c, e, g, j, k, n, p and v of the Claimant's Further Particulars. They include unfair criticism, placing him on a performance improvement plan, patronising behaviour towards him and unfairly reprimanding him. All of these incidents occurred on or before 29 April 2014, bar one. That is an incident occurring at an appeal meeting on 29 April 2016 when it is said that Mr Middleton aggressively pointed a pen at the claimant. The claimant is of the view that Mr Middleton's conduct was motivated by the claimant's inability to do tasks promptly and effectively.

2.3 Mr Owen argues that there was a continuing discriminatory state of affairs existing until the claimant's contract ended and that the section 15 claim is on time. The claimant, however, has not particularised any possible example of unfavourable treatment after 29 April 2016. Time, therefore, runs from that date. Applying section 140B, the new time limit for presenting the section 15 claim was 11 September 2016. The claim was presented on 21 September 2016, ten days out of time.

2.4 I consider whether I should exercise my discretion to extend the time limit on just and equitable grounds. I take into account that the claimant has given no reason

for the delay in presenting the claim. It may be that he took the view that the incident on 29 April 2016 was sufficiently proximate with his dismissal on 13 May 2016 that it was reasonable to bring the two claims at the same time. However, he did not advance that as his reason. I also take into account that the incident on 29 April 2016 could not realistically be regarded as evidence of a continuing discriminatory state of affairs, even if the claimant is able to show that the alleged treatment was motivated by the effects of his disability. The 2016 incident appears to be unconnected to the earlier complaints. In reality the examples of alleged unfavourable treatment took place as long ago as 2014 and no explanation has been forthcoming for the failure to bring proceedings in 2014. I take into account that the claimant was a member of a trade union with access to their help and that he was able to lodge grievances and appeals. I infer from this that his disability would not have prevented him from bringing proceedings in the tribunal timeously. I also take into account the obvious prejudice to the respondent in defending a claim that in essence is historic and the inevitable risk that the evidence will become less cogent as a result of the passage of time.

2.5 I also take into account that the claimant has an unfair dismissal claim which has been brought in time.

2.6 My conclusion is that the respondent will suffer greater prejudice if I extend the time limit than the claimant will suffer if I do not do so. It is for that reason that I dismiss the claim brought under section 15 Equality Act 2010.

2.7 The essence of the section 20 claims is that the respondents imposed two working practices that put the claimant at a disadvantage compared with those who did not have dyslexia, namely the requirement to carry out the full job role and the requirement to work under Allison Ross. In the first instance the disadvantage is alleged to have arisen because the claimant was unable to undertake the full work load without adequate support, which he says was not made available to him and in the second instance the disadvantage was that Allison Ross had bullied him for reasons connected with his dyslexia.

2.8 The further particulars give examples of the alleged failure to make adjustments at paragraphs a, b, d, f, and s. All of these alleged failures are historic. They arose in 2011 to 2015.

2.9 The claimant makes a further complaint at u, that in late February 2016 the respondent failed to give him an assurance that he would not be managed by Allison Ross in the future. (The respondent had agreed in December 2014 that Allison Ross would cease to be his line manager).

2.10 On the assumption that the incident at u occurred on 29 February 2016, applying section 140B, the time limit for bringing a claim under section 20 was 30 July 2016. The claim was, therefore, presented 53 days out of time.

2.11 I take into account that the principle in *Hendricks* does not apply to a section 20 claim. *Hendricks* is concerned with time limits where sections 123 (1) to (3) apply. Section 20 claims are governed by section 123(4) as *Matuszowicz* makes clear. The failure to make an adjustment is a continuing omission, not an act.

2.12 In deciding whether it would be just and equitable to extend the time limit, I take into account that that the further particulars relate essentially to historic matters which were addressed by the respondent and to the extent that the respondent's adjustments were regarded as inadequate (for example the alleged deficient attempt to arrange conciliation between the claimant and Allison Ross) the time for bringing the claims expired in 2015. The allegation at paragraph u is anticipatory in nature and cannot sensibly be regarded as an example of a disadvantage caused by either of the pleaded working practices. I take into account the other matters to which I have referred when considering the section 15 claim, namely the ability of the claimant to take advice and pursue grievances and appeals and the effect of delay on the cogency of the evidence and the lack of explanation for the delay in presentation of the claim. I conclude that the respondent will suffer greater prejudice if I extend time than the claimant will by my refusing to do so and accordingly dismiss the section 20 claim.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within three days. It has been listed at 2nd Floor, Kings Court, Earl Grey Way, Royal Quays, North Shields, Tyne & Wear NE29 6AR on **24, 25 and 26 May 2017** to start at 10am or so soon thereafter as possible. The parties are to attend by 9.30 am. Please note: The Tribunal may transfer your case at short notice to be heard at another hearing centre within the region.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Disclosure of documents

- 1.1. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **31 March 2017**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 1.2. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.
- 1.3. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

- 1.4. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

2. Statement of remedy/schedule of loss

- 2.1. The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive on or before **31 March 2017** a properly itemised statement of the remedy sought (also called a schedule of loss).
- 2.2. The claimant is ordered to include information relevant to the receipt of any state benefits.
- 2.3. The respondent is ordered to provide to the claimant and the tribunal a counter schedule by no later than **13 April 2017**.

3. Bundle of documents

- 3.1. The parties shall agree and the respondent shall prepare the trial bundle by no later than **24 April 2017**. The respondent shall arrange to deposit two copies of the bundle with the tribunal before 9.30 a.m. on 24 May 2017.

4. Witness statements

- 4.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 4.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 4.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 4.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 4.5. It is ordered that witness statements are exchanged so as to arrive on or before **8 May 2017**.

5. Other matters

- 5.1. The respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.
- 5.2. The claimant is ordered to prepare a short, neutral chronology for use at the hearing.
- 5.3. These documents should be agreed if possible.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Hunter

2 March 2017

Sent to the parties on:

6 March 2017

For the Tribunal:

M Richardson