



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

GW

v PC

Heard at: London Central

On: 8 April 2021

Before: Employment Judge Glennie

Representation:

Claimant: In person, assisted by his wife

Respondent: Mr M Green (Counsel)

JUDGMENT ON PRELIMINARY HEARING

1. The complaints under the Equality Act 2010 were presented out of time and the Tribunal does not have jurisdiction to hear them. Those complaints are therefore struck out.
2. A further Preliminary Hearing for case management will take place by telephone before Employment Judge Glennie at 10 am on 21 May 2021, with a time estimate of 2 hours.

REASONS

1. By his claim form presented on 20 May 2020 the Claimant has brought complaints of unfair dismissal, discrimination on grounds of age and disability, breach of contract (notice pay) and for other payments. The Respondent resists those complaints.
2. At a Preliminary Hearing on 26 November 2020 I ordered the provision of further information about the complaints and an amended response, to be followed by the present Preliminary Hearing. This was held in public and, with the agreement of the parties, by way of video link (CVP). The issues to be determined were identified as: whether the Claimant was disabled at the material time; any issue as to time limits; and any other matters of case management.

3. In the event, I have approached the issues in the following order:
 - 3.1 Whether the complaints under the Equality Act were presented out of time and, if so, whether it would be just and equitable to hear them in any event.
 - 3.2 Whether the Claimant should have permission to amend the claim so as to incorporate matters raised in his further information but not previously raised in the claim form.
 - 3.3 Whether the Claimant was disabled at the material time.
4. There was an agreed bundle of documents, and page numbers given in these reasons refer to that bundle. The Claimant gave evidence by reference to his impact statement regarding disability at page 67, his chronology of events regarding age discrimination at page 70, and his chronology of events regarding disability discrimination at page 73. He answered questions from Mr Green and from me.

Time limits

5. The Claimant's employment with the Respondent began in September 2007. His last day of service was 21 February 2020, and he presented his claim on 20 May 2020. His complaints of unfair dismissal and breach of contract were therefore presented within time.
6. The complaints under the Equality Act are governed by section 123, which includes the following provisions about time limits:
 - (1) *Proceedings.....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)
 - (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.*
7. The following was evident about the Equality Act complaints from the claim form and the further information:
 - 7.1 Age discrimination: the complaints about the system known as "Gateway" cover the period May 2015 to July 2017. The complaints

about the grievance arising from those matters have as their latest date January 2019.

- 7.2 Disability discrimination: the complaints mainly arise from events in 2017 and 2018. The exception is the use of the word “inefficiency” in connection with the proposal to dismiss the Claimant. This occurred in November 2019.
 - 7.3 Amendment: to the extent that there are new complaints in the further information (Mr Green identified allegation (d) in respect of disability and allegations 1, 6 and 7 in respect of age), these would fall within the time span of the existing complaints. They would not therefore be capable of bringing the complaints within time by virtue of the provision about conduct extending over a period (section 123(3)(a)).
 - 7.4 All of the Equality Act complaints were therefore presented out of time. The issue to be determined is whether it would be just and equitable to allow them to proceed nonetheless.
8. I considered that the question of amendment should be addressed once I had determined the position on time limits in relation to the existing complaints.
 9. The approach to be taken to the just and equitable test was considered by the Court of Appeal in **Adedeji v University College Hospital Birmingham NHS Trust [2021] EWCA Civ23**. Underhill LJ, with whom the other members of the Court agreed, said this at paragraph 38 of his judgment:

“The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including.....the length of, and the reasons for, the delay.”
 10. I also reminded myself that in **Robertson v Bexley Community Centre [2003] IRLR 434** the Court of Appeal stated that it is for the claimant seeking an extension of time to persuade the Tribunal that this should be granted.
 11. So far as the length of the delay is concerned, when measured against the applicable 3-month time limit, this was on any view considerable. This was not a case of the time limit being exceeded by a few days. As I have indicated, the latest date at which any conduct extending over a period can have ended in relation to the age discrimination complaint was January 2019. The delay in respect of that complaint was therefore over one year. For the complaint of disability discrimination the latest date at which any conduct extending over a period can have ended was in November 2019. The delay in respect of that complaint was therefore around 3 months.

12. The Claimant explained the reasons for the delay in his evidence, making a number of points, as follows:
 - 12.1 The Claimant said that he did not know about the 3-month time limit. In answer to a question from me, he said that he only became aware of it after he had been dismissed. He had earlier stated that he had brought the claim within 3 months of his dismissal, and that by May 2020 he had no choice but to bring a claim. The Claimant accepted that he had been assisted by his Union in 2017 and by solicitors in 2018. The latter had written a letter to the Respondents referring to age and disability discrimination.
 - 12.2 The Claimant said that he did not like to complain, and that his background and temperament were such that his strong preference was to get on with things.
 - 12.3 He had hoped to retain his job and reach a resolution using internal procedures; and his solicitors had encouraged him to do so.
 - 12.4 The Claimant also referred to his health. His evidence was that he suffered mental health problems from 2015 onwards, and that these were particularly acute around January 2019, when he received the grievance outcome, and during the remainder of that year. He said, "I was not capable of bringing a claim in January 2019. I was locked away in a little room". The Claimant continued that the dismissal process was a further blow, and in answer to Mr Green said that his health did not improve after February 2020. It was in this context that he stated that he had no choice but to commence proceedings in May 2020.
13. My findings on these points are as follows:
 - 13.1 I find it unlikely that the solicitors, if not any Union adviser, failed to refer at all to the 3-month time limit. It is something that a solicitor would more or less automatically draw to a client's attention. I accept the Claimant's evidence about not knowing as truthful, and I find that, probably, anything he was told about the time limit did not register with him, or that he quickly forgot what he had been told. Lack of knowledge of the time limit is not, in itself, the entirety of the matter. The Tribunal also has to consider whether any lack of knowledge was reasonable. I find that it was not. First, as I have said, I find it probable that the solicitors made some reference to the time limit. Secondly, information about time limits is readily available, not least on the internet. The Claimant, or perhaps his wife, was able to find that information in time to present the claim just before expiry of the period of 3 months from the last day of service. I find that the Claimant, or anyone assisting him, should have realised that, at least, there might be a time limit, and should have investigated that.

- 13.2 It is easy to sympathise with the Claimant's inclination to try to get on with things rather than resorting to litigation. Ultimately, however, that was a matter of choice for him.
- 13.3 Much the same applies to the approach of trying to resolve matters internally. Furthermore, the Claimant had the grievance outcome in January 2019. So far as matters covered by the grievance are concerned, he must have realised that they either had been resolved (so far as the Respondent was concerned) or, presumably, were not going to be resolved internally (so far as he was concerned).
- 13.4 I accept that the Claimant's health was a factor that made it more difficult to bring proceedings than would otherwise have been the case. However, I accept Mr Green's point that the Claimant's health did not improve following his dismissal, yet he was at that stage able to bring proceedings – his account being that by that time, he had no choice, as he knew a time limit was about to expire. The Claimant's health was as much of a barrier in early 2020 as it was in early 2019; but in early 2020 the situation self-evidently was not that he was incapable of presenting a claim.
14. I therefore find that the Claimant's reasons for the delay are, in their different ways, understandable, but that they do not individually or collectively present a compelling case for extending time.
15. I have also considered how the parties would be prejudiced by the exercise of the discretion one way or the other. Clearly, if I do not extend time, the Claimant will be unable to proceed with his discrimination complaints. There has, however, been an element of choice on his part in terms of trying to resolve matters other than by way of litigation. Also, a decision not to extend time would not leave him without any complaints before the Tribunal: he would remain able to pursue the complaints of unfair dismissal and breach of contract.
16. On the Respondent's side, there has been no suggestion that evidence has been lost, or that witnesses have specific difficulty recalling matters, because of the passage of time. I find that there would, however, be prejudice to the Respondent in having to deal with complaints that are substantially out of time and which involve events which, in some cases, occurred 3 – 5 years before the claim was presented.
17. I therefore find that it would not be just and equitable to extend time and that the Tribunal does not therefore have jurisdiction to hear the complaints under the Equality Act.
18. I have, so far, dealt with the complaints as a whole. I have considered whether I should treat the complaint of disability discrimination arising from the use of the word "inefficiency" in November 2019 differently, essentially on the grounds that it is connected with the dismissal, which will be in issue in any event.

19. I have concluded that I should not treat that complaint any differently. Even when taken alone, it is still substantially out of time. It is also difficult to see how the complaint could succeed. Mr Green submitted that the term is in common use within the organisation and elsewhere, and does not have any pejorative connotation. I have not heard any evidence on the point and am not able to make any decision as to whether or not that is the case. However, for a complaint of harassment to succeed, the Tribunal would have to find that the use of the term was related to disability, and for a complaint of direct discrimination to succeed, that its use was because of disability. Nothing that I have read or heard in this case has suggested to me that this may be so. The Claimant is (perhaps understandably) displeased at having the term applied to him; but it seems unlikely to me that its use had any connection with disability.
20. It is also the case that, if there are good grounds for complaint about the decision to terminate the Claimant's employment, the likelihood is that they can be canvassed in the complaints unfair dismissal and breach of contract. The Claimant will not therefore be deprived of a remedy in that regard.

Amendment

21. To the extent that any amendment to the claim is required in the terms identified by Mr Green, this application fails for essentially the reasons given in relation to the time limits issue. The amendments all involve complaints that were out of time when the claim was presented, and were further out of time when the further information was given.
22. It is possible to allow an application to amend while preserving a respondent's ability to rely on time limits. I find that there would be no reason to take that approach in the present case, where I have decided the very points that would be in issue. There is no prospect of these allegations being brought within time by virtue of forming part of conduct over a period. For the reasons that I have given in relation to the existing complaints, it would not be just and equitable to extend time in respect of these allegations.

Disability

23. The question of disability does not need to be decided, given my determination of the time limits issue, meaning that the complaints of disability discrimination cannot proceed.

- 24. Should it be necessary, however, I have noted that Mr Green made no submission about the years 2018 and 2019, which I took as meaning that the Respondent accepted that the Claimant was disabled during those years.
- 25. I did not, in the event, consider that it was necessary or proportionate to make any determination of the point as regards 2017 and earlier years.

Further conduct of the case

- 26. As agreed at the hearing, a further Preliminary Hearing for case management will take place before me in private on 21 May 2021. The parties should be ready to deal with all necessary case management issues, including defining the issues, listing the full hearing and giving consideration to whether judicial mediation may be appropriate.

Employment Judge Glennie

Employment Judge Glennie

Dated: ... 30 April 2021.....

Judgment sent to the parties on:

30/04/21..

.....
For the Tribunal Office