Case Number: 2202088/2022
4104206/2022

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT

BETWEEN:

CD

Claimant

AND

Vigilant Security (Scotland) Ltd t/a Croma Vigilant

Respondent

ON: 24 May 2023
Appearances:
For the Claimant: In person
For the Respondent: Mr S Joshi, counsel

JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that claim 4104206/2022 is out of time and the tribunal has no jurisdiction to hear it.

REASONS

1. This decision was given orally on 24 May 2023. The respondent requested written reasons. The claimant also wished to have written reasons.

2. By a claim form presented on 25 April 2022 the claimant brought claims of constructive unfair dismissal, race discrimination, victimisation, disability discrimination, unlawful deductions from wages and race related harassment.

3. On 28 July 2022 the claimant presented a second claim in the Employment Tribunal in Glasgow under case number 4104206/2022. It was transferred to London Central on 25 August 2022.

This remote hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. All the attendees at the hearing were all known to the parties. The Anonymity Order and Restricted Reporting Order made in these proceedings were explained to them.

6. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

7. The participants were told that it was an offence to record the proceedings.

8. The tribunal was satisfied that each of the witnesses, who were in different locations, had access to the relevant written materials. I was also satisfied that the witnesses were not being coached or assisted in giving their evidence.

9. At the start of the hearing I informed to the claimant that he could take a break whenever he wished, to assist him with managing his condition and that he could ask for anything he had not understood, to be explained to him.

Relevant background

10. A first preliminary hearing took place in this case on 12 July 2022 before Employment Judge Professor Neal at which the broad heads of claim were identified. These were claims for:

    a. Constructive unfair dismissal based on the claimant's resignation on 6 April 2022. The claimant was ordered to set out particulars of the alleged breach or breaches of contract relied upon.
    b. Direct race discrimination. The claimant described himself as Black African and identified his comparators as senior white managers and named 6 individuals, Mr P Moakes, Mr D Keith, Mr M Arscott, Mr P Brady, Mr K Woodward and Mr G Binding. The claimant was ordered to set out the particulars of the acts of race discrimination relied upon.
    c. Disability discrimination. The claimant relies upon the condition of depression. At a hearing on 5 January 2023 Employment Judge Davidson decided that the claimant was not disabled in 2012 but he was disabled in 2021/2022. Orders were made for the claimant to set out particulars of the acts of disability discrimination he relied upon. From my reading of the ET1, I could see that the claimant

relied upon a failure to make reasonable adjustments for his condition. Any other type of claim for disability discrimination was not identified.

d. Unlawful deductions from wages. There is a claim for an alleged shortfall in wages of £1,100.
e. Victimisation for having done a protected act. Judge Neal's Order shows that there was a discussion at that hearing as to what was a protected act and the claimant was ordered to set out each protected act and the alleged acts of victimisation said to have taken place because he had done the protected act.
f. Race related harassment – the claimant was ordered to set out the particulars of this claim.

11. The claimant also wished to amend his claim to include new allegations of harassment as to new allegations of race related harassment and an allegation of sexual harassment.

12. Judge Neal declined to deal with the application to amend and ordered that the claimant serve full particulars of his new allegations of harassment and a fully completed draft ET1 setting out the details of the new allegations with an explanation of why they were being presented more than 10 years after the date of the alleged events.

13. A preliminary hearing was listed to take place on 22 September 2022 to consider:

    a. Whether the claimant was a disabled person at the material time of his allegations, within the meaning of section 6 Equality Act 2010.
    b. The application to amend.

14. On 28 July 2022 the claimant issued is claim in the Glasgow Employment Tribunal in which he raises the allegation about the alleged sexual assault at the Christmas party on 9 December 2011.

15. The preliminary hearing on 22 September 2022 took place before Employment Judge Snelson as a Case Management Hearing. The claimant was ordered to provide details of the dates between which he said he was subjected to disability discrimination, to provide a disability impact statement and any further medical documents upon which he wished to rely. The respondent was ordered to prepare a bundle.

16. A public preliminary hearing was listed to take place on 5 January 2023, to determine disability status.

17. The status of the second claim issued in the Glasgow Employment Tribunal was also to be considered at the hearing on 5 January 2023.

18. The third preliminary hearing took place on 5 January 2023 before Employment Judge Davidson who decided that the claimant was not a disabled person in 2012 but he was a disabled person in 2021/2022.

Judge Davidson identified the issues for today which included dealing with the matter of the second claim.

19. The claimant's application to amend in case number 2202088/2022 remains outstanding. There was insufficient time to deal with it today.

The issues for this hearing

20. At the hearing on 5 January 2023 Judge Davidson listed this hearing to consider:

    a. Whether to strike out the second claim no. 4104206/2022 as being out of time or in the alternative whether it should be struck out as having on time grounds, no reasonable prospect of success
    b. In the further alternative whether the tribunal should order a deposit as a condition of the claimant being permitted to continue to advance those allegations or arguments, as having little reasonable prospect of success.
    c. To consider the List of Issues for the full merits hearing and make orders for that hearing. There was insufficient time to deal with this today.

Documents and witnesses

21. The bundle for this hearing ran to 881 pages. .

22. There was a 15 page witness statement from the claimant and a 4 page witness statement from his colleague Ms P who has a separate claim against the respondent. I explained to the claimant that the question of whether the events in question happened in 2011/2012 was not for determination today. Ms P's evidence dealt with that.

23. There were three witness statements from the respondent. Mr Guy Rampe, Mr Valentin Ardeleanu and Mr Rej Rahman. The statements of Mr Ardeleanu and Mr Rahman dealt with the events of 9 December 2011.

24. In terms of the issues for determination at this hearing, I took the view that the evidence of Ms P, Mr Ardeleanu and Mr Rahman were not likely to assist the tribunal. Their evidence would be relevant if the issue of what happened at the Christmas party on 9 December 2011 fell to be determined and their evidence would need to be considered by a 3 person tribunal and not a Judge sitting alone. I therefore told those witnesses that the tribunal would not need to hear from them and they were welcome to remain in the public hearing if they wished.

25. Evidence was heard from the claimant and from Mr Rampe for the respondent. As the issues for today were narrow, I confirmed that just because the respondent did not cross-examine on all the matters contained in the claimant's witness statement, did not mean that those matters could not later be challenged.

26. I had a written submission from the respondent to which counsel spoke and oral submissions only from the claimant.

Findings

27. The claimant worked for the respondent as a security manager. He had continuous service going back to 20 March 2007. He was initially employed by a company known as Wilson James. He TUPE'd to the respondent on 4 May 2010. His case set out in his ET1 issued on 25 April 2022, was that this is when the racial discrimination and bullying started.

28. In his claim form in his first claim, the claimant relies on events going back to 2011.

The application to amend the first claim

29. On 15 June 2022 the claimant made an application to amend his claim (bundle pages 49-50) to rely on an alleged assault by a male work colleague at a work Christmas party on 9 December 2011. In the letter of 15 June the claimant said that he did not include this in his original ET1 because he was "*embarrassed and ashamed".* The primary time limit for the incident that allegedly took place on 9 December 2011 was 8 March 2012.

30. The respondent said that it opposed the application to amend and would deal with it at the preliminary hearing on 12 July 2022.

The second claim in the Glasgow ET

31. In a letter to the tribunal dated 12 August 2022 the claimant set out what had been ordered at the hearing on 12 July 2022. He said that in the light of what he had been ordered to do at that hearing, in terms of setting out full particulars of the harassment referred to in his letter of 15 June 2022, he submitted a new ET1 and submitted this to the Glasgow Employment Tribunal.

32. I understood why the claimant had sought to issue a new ET1 following the hearing on 12 July 2022 rather than just providing further particulars. He was ordered at paragraph 6 of the Case Management Order of 12 July 2022 to send to the respondent a fully completed draft Claim Form ET1 setting out the details of his new allegations with an explanation of why the allegations were being presented more than 10 years after the date of the alleged events.

33. I could see that the claimant was likely to have been confused by this. The order was for a "draft" Claim Form setting out the allegations, rather than an Order that he issue a new claim. There is no criticism of the claimant whatsoever for taking the action that he did. I am clear that he

was taking steps to comply with the Order of 12 July 2022 in providing the necessary particulars.

34. One of the issues for consideration at this hearing was whether to strike out the claim issued in Glasgow as being out of time or in the alternative whether it should be struck out as having no reasonable prospect of success or that there be a deposit order.

35. The date of the presentation of the claim in the Glasgow ET was 28 July 2022. Early Conciliation took place from 13 July 2022 to 15 July 2022 (Certificate at page 217 and ET1 at page 219). The claimant did not complete box 2.4 in the second claim which he did with his first claim, showing that his place of work was in London W1. The registered office of the respondent is in Dumfries which explained why that claim went to the tribunal in Glasgow.

Findings on the time point

36. On 10 November 2021 the claimant raised a detailed grievance about his treatment at work. It was a four page document with attachments. The claimant accepted in evidence that he did not raise within this grievance the alleged sexual assault on 9 December 2011 and I find that he did not raise it within that grievance.

37. The claimant sent a 4-page resignation letter on 6 April 2022 (pages 677-680) setting out the reasons for his resignation. He did not mention within that letter anything to do with any allegation of sexual assault. This was at a time when he was bringing his employment to an end, so I find that he would have had no concerns about how he might thereafter be treated within his employment.

38. With his ET1 in case number 2202088/2022 the claimant attached his Grounds of Complaint which was detailed and ran to 86 paragraphs – bundle pages 68-80. He said that he brought claims for disability discrimination, race discrimination, bullying, harassment, victimisation, constructive dismissal and unlawful deductions from wages. He made no mention of sexual harassment. The claimant dealt with events going back to June 2011, but did not mention this alleged incident from the Christmas party on 9 December 2011.

39. I find as a fact on the unchallenged evidence of Mr Rampe, that the alleged perpetrator of the sexual assault, Mr X, left the respondent's employment 7 years ago.

40. In his witness statement for this hearing, the claimant said that he could not challenge his superiors because he feared for his job and position (statement paragraph 27). I have found above that when he wrote his resignation letter on 6 April 2022, giving the reasons for his resignation, he no longer had any reason to fear the treatment he might encounter at work.

Relevant law

41. Section 123 of the Equality Act 2010 provides that:

> *(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.*
>
> *(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.*

42. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend time and the tribunal has a wide discretion. There is no presumption that the tribunal should exercise that discretion in favour of the claimant - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

43. In ***Chief Constable of Lincolnshire Police v Caston 2010 IRLR 327*** the Court of Appeal said (paragraph 26) "*Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour)".*

44. This was confirmed in ***Miller v Ministry of Justice EAT/0003/15*** at paragraph 10(ii): *"Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule,"* (Laing J).

45. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050, CA*** Leggatt LJ summarised at paragraph 18 the approach to be taken by the ET on the issue of a just and equitable extension:

> *"First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made*

it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account…"

46. At paragraph 19 Leggatt LJ went on to say in relation extending time:

> *"factors which are almost certainly relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)"*

47. In ***Miller*** (cited above) two types of prejudice were identified (EAT decision paragraph 12). These were *"the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses".*

48. In ***Adedeji v University Hospitals Birmingham NHS Foundation 2021 ICR D5*** the Court of Appeal repeated the caution against tribunals relying on the checklist of factors found in section 33 Limitation Act 1980. The Court of Appeal (Underhill LJ) said that the best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) was to assess all the factors in the particular case which it considered relevant to whether it was just and equitable to extend time, including in particular the length of and the reasons for the delay.

Conclusions

49. The claim in relation to the act of sexual harassment which is alleged to have taken place on 9 December 2011. The primary time limit expired on 8 March 2012. It is therefore 10 years, 1 month and 17 days out of time. In round terms the claim is just over 10 years out of time. The length of the delay is very substantial.

50. The claimant says that one of the reasons he did not present this claim within time was because the incident pushed him into a severe depression.

51. Judge Davidson decided at the preliminary hearing on 5 January 2023 that the claimant was not a disabled person in 2012 but he was a disabled person in 2021/2022. Although the claimant disagreed with this finding and submitted to the tribunal today that he was disabled in 2012, the findings of Judge Davidson stand and I cannot interfere with this.

52. This leads me to conclude that following the events in question in December 2011, the claimant was not prevented by disability from presenting a claim for sexual harassment.

53. The claimant also relies upon the embarrassment and shame of raising the matter and I sympathise with him on this point. Unfortunately allegations of sexual assault and sexual harassment are inherently embarrassing. If they are to be addressed by the courts or tribunals, then the claims have to be raised.

54. The claimant submitted that the respondent knew about his complaint of sexual assault and did nothing about it. The issue for this hearing was not whether the respondent knew about the complaint or should have done something about it, but whether the second claim was out of time and whether time should be extended.

55. The issue of continuing act was not raised by either party. I noted that in the ET1 in the second claim, there was a large gap between the events of 2011/2012 to November 2021 when the claimant dealt with the effects of his health condition (paragraphs 18-21). The claimant then dealt with issues of race discrimination which are the subject of the first claim and his assertion that the handling of the complaint of sexual harassment was an act of race discrimination. This deals with matters at the latest in 2015 (paragraph 29).

56. I find that there is no allegation of sexual assault or sexual harassment that is within time in the second claim nor is any claim of race discrimination related to it, within time.

57. The question of whether it is just and equitable to extend time is a matter of discretion for the tribunal. The tribunal must be persuaded that it is just and equitable to extend time and the burden is on the claimant to show this. In weighing up these matters, the tribunal has to take account the balance of prejudice to the parties. The exercise of the discretion is the exception, not the rule.

58. There is always a prejudice to one party if the application is granted or refused. If it is refused, the claimant has the prejudice of not being able to pursue the claim. If it is granted the respondent has the prejudice of having to defend the claim. It is necessary to look further than this.

59. I have found above that the claimant was well enough in November 2021 to raise a detailed grievance. I have taken into account that Judge Davidson found that he was not a disabled person until 2021. I find that prior to 2021 he was not prevented by disability from presenting a claim.

60. As I have found above, the claimant made no mention of the sexual assault when he sent his resignation letter on 6 April 2022. This was at a time, on my finding, that he needed no longer have any fear about how he would be treated at work if he raised the matter. On his own case, he had already raised the matter with Mr Rampe on 1 February 2012, although I make no finding of fact about this.

61. The claimant issued proceedings on 25 April 2022 with an 86 paragraph Grounds of Complaint in which the sexual assault was not mentioned.

62. The first time the matter of the sexual assault was raised in these proceedings was in the application to amend dated 15 June 2022. The second claim was not issued until over a month later on 28 July 2022. The claimant was well enough to begin Early Conciliation for his first claim on 21 February 2022.

63. I accept that there is a prejudice to the claimant if time is not extended in that he will not be in a position to pursue that claim. I have to weigh against this the prejudice to the respondent.

64. There is a substantial forensic prejudice to the respondent in that the alleged perpetrator of the sexual assault left their employment 7 years ago and he is no longer available as a witness. They are not in a position to investigate the claim for the purposes of these proceedings, while matters are fresh.

65. One of the reasons for the 3 month time limit in Employment Tribunal proceedings is a recognition that witness memory fades over time. I agree with the respondent that this is in effect a 'stale claim' where their ability to prepare the evidence is hugely compromised. Although the claimant says that others who were present on 9 December 2011 are still within the respondent's employment, the key witness is not available. I find that the respondent is severely prejudiced by the absence of the alleged perpetrator and that any other witness to the alleged incident will also have the difficulty of seeking to recall events that took place about 12 years earlier, by the time this case comes to trial. This on my finding is likely to adversely affect the cogency of the evidence.

66. For these reasons I find that it is not just and equitable to extend time. The second claim, number 4104206/2022, is out of time and as such the tribunal has no jurisdiction to hear it.

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Employment Judge Elliott
Date: 24 May 2023

Judgment sent to the parties and entered in the Register on: 25/05/2023

________________________________ for the Tribunal