



EMPLOYMENT TRIBUNALS

Claimant: Mr J Rowlands

Respondent: The Commissioners for His Majesty's Revenue and Customs

Heard at: Manchester **On:** 21 June 2024

Before: Employment Judge Slater
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr Richard McLean of Counsel

JUDGMENT

The application to strike out the claim on the grounds that, as a result of jurisdictional time limit issues, the claim has no reasonable prospect of success is refused.

REASONS

Introduction

1. This was a preliminary hearing listed to consider the following matters but, with the Judge's discretion, not to determine any of the issues if it appeared in accordance with the overriding objective not to do so. The issues listed in a letter to the parties in a letter dated 5 January 2024 are as follows:

- (1) Whether the claimant's complaints (or any of them) were presented in time;
- (2) If not, whether the complaints (or any of them) were made within such further period as the Tribunal thinks is just and equitable;
- (3) Whether any of the claimant's complaints should be struck out on the grounds that it has no reasonable prospect of success;

- (4) Whether the Tribunal considers that any specific allegation or argument has little reasonable prospects of success and therefore whether a deposit order should be made in relation to that allegation or argument.

2. After confirmation from the respondent that the application had been made on the basis of time limit jurisdiction issues only, I decided to consider a strike out application rather than approaching this as a decision on whether or not the complaint was presented in time, and if not whether it was just and equitable to consider it out of time. This meant that I did not have to hear witness evidence. I noted that the claimant had not prepared a witness statement.

3. I, therefore, had to consider whether there was no reasonable prospect of the claimant succeeding in his argument that the complaint of failure to make reasonable adjustments was presented in time, or, alternatively, that it was just and equitable to consider the complaint out of time. If I did not strike out the claim but considered the claim had little prospect of success because of the time limit issue, the respondent asked me to make a deposit order as a condition of continuing with the complaint.

Documents and Evidence

4. I considered relevant documents and had written submissions from the parties which I read before I heard oral submissions.

The Relevant Law

5. The relevant law I had to apply in relation to time limits was that a complaint of discrimination has to be presented in the period of three months beginning with the act of discrimination, adding on time spent in early conciliation where early conciliation has been started within the primary time limit. If the complaint is presented outside that time limit, the Tribunal can still consider it if it considers that it would be just and equitable in all the circumstances to do so.

6. A failure to make a reasonable adjustment, which is what this claim is about, is generally discrimination by omission. Section 123(3)(b) of the Equality Act 2010 provides that a failure to do something is to be treated as occurring when the person in question decided on it, so, if an employer positively decides not to make a reasonable adjustment, time will run from the date of that decision. However, if there is no clear moment in time where the employer consciously decides not to make the adjustment in question, section 123(4) applies, which specifies when a person is deemed to have decided to fail to do something. There are two possibilities:

- (1) when the person does an act inconsistent with making the adjustment;
or
- (2) at the end of the period in which the person might reasonably have been expected to make the adjustment.

7. A claim can be struck out where a Tribunal considers it has no reasonable prospect of success. Where there is a dispute of fact which would need to be determined at the final hearing, for the purposes of a strike out application the claimant's case is taken at its highest.

The Facts

8. The parties had agreed a chronology on which I rely. This is annexed to these reasons.

9. Other relevant documents I looked at were the record of the private preliminary hearing for case management purposes held on 25 October 2023, in particular the discussion of time limits on page 66. In that it was recorded that the claimant contended that the failure to make the adjustments was primarily in February 2021 but with additional dates in respect of one of the adjustments, being the receipt of feedback on previous examinations which he sat. The claimant was to add the dates to the List of Issues before confirming agreement to them.

10. The Employment Judge noted that the claim was not presented until 3 July 2023 and that the claimant said this was because he was going through the respondent's internal procedures, including the appeal procedure as required.

11. The Employment Judge explained to the claimant that, if the claim was found to have been presented out of time, he would need to seek an extension on the basis that it was just and equitable to do so. It appears that, although in the List of Issues it was anticipated that the claimant would add the dates, no specific order was made for him to do so. However, the claimant appears to have addressed this in two letters to the Tribunal dated 14 November and 30 November 2023. These appeared at pages 113 and 116 of the bundle before me.

12. In the letter of 14 November 2023, the claimant wrote that he believed the failure to implement reasonable adjustments started on 6 January 2020. He then referred to the nature of the PCP changing on 9 September 2020 and the formal teaching for Business Profits 2 starting on 18 March 2021 which he described as the latest conceivable date that the point set out at 3.5 in the List of Issues (i.e. the adjustments he sought) could have applied, but also the first date that he could be certain that they did.

13. In the letter of 30 November 2023, the claimant wrote that the email referencing 18 March 2021 was referring to the start dates of practices that he was asserting gave rise to a substantial disadvantage, and wrote that 18 March 2021 was the latest conceivable date that the adjustments could have been applied to remove the substantial disadvantage relating to the Business Profits 2 teaching which continued from that date. He wrote the failure to provide reasonable adjustments proceeded from that date, it did not end on that date. He said that steps could have been taken to avoid disadvantage prior to sitting the exam on 27 July 2021 through reasonable adjustments to the teaching and examination methods. He asserted that the disadvantage could also have been resolved retrospectively through the appeals processes undertaken up to January 2022 or the formal concern processes up to May 2023. He asserted that the claim was brought in time as he argued that discrimination ended on 22 May 2023. Alternatively, if the Tribunal determined that the claim was not brought in time, he asked for exceptional circumstances given the reason for the delay was the claimant entering into a process that the respondent explicitly stated was to address issues of discrimination on the advice of HMRC HR expert advice professionals and FDA union representatives.

14. The claimant has maintained the position that he set out in his letter of 30 November 2023 in his arguments today arguing, in the alternative, if the complaint was not presented in time and if the discrimination did not continue until May 2023, then it would be just and equitable to consider it out of time.

Conclusions

15. My conclusions, applying the law to these facts, are that there is no obvious date on the material I have seen when the respondent decided not to make the adjustments which the claimant argues they should have made. Time will therefore start to run either when the respondent did an act inconsistent with making the adjustment or at the end of the period in which the respondent might reasonably have been expected to make the adjustment. I have had no argument about the respondent doing an act inconsistent with making the adjustment, although it is possible one might be made at the final hearing if the claim is not struck out.

16. The most likely basis on which time will start to run therefore seems to be at the end of the period in which the respondent might reasonably have been expected to make the adjustment. There are a number of contenders for this date. The claimant says it is May 2023. I do not consider that he has any reasonable prospect of success in this argument. The claimant says he was seeking to be put back onto the TSP programme with further adjustments, although the respondent disputes that the formal concern process was going to deal with the adjustments point. I do not consider that this has any impact on when adjustments might reasonably have been expected to be made. They must reasonably have been expected to be made at a time when he was still on the programme, because the adjustments related to his studying and taking of exams when on that programme.

17. I do not need to decide today what was the relevant date for time starting to run, only that any reasonably possible date was one which meant the claim was presented out of time.

18. The respondent argues that the claimant identified 18 March 2021 as this date in his correspondence. The claimant's letter of 30 November 2023 refers also however to 27 July 2021 when the claimant sat his last exam. The claimant has said today that he continued studying up to January 2022 when he was taken off the programme.

19. It seems to me that 18 March or 27 July 2021 are the most likely contenders for when time started to run. However, even if it was January 2022, the claim was presented considerably out of time. The claimant began early conciliation on 22 May 2023, well beyond the primary time limit, so the time limit is not extended by the period spent in early conciliation. The claim was presented on 3 July 2023, more than a year out of time.

20. I conclude that the claimant has no reasonable prospect of success in his argument that his complaint was presented within the required time period. This does not mean, however, that the claim will be struck out, because the Tribunal can still have jurisdiction if it would be just and equitable to consider the complaint out of time, considering all relevant circumstances.

21. I am not deciding today whether it would be just and equitable to consider it out of time, but I am deciding whether the claimant has no reasonable prospect of success in this argument.

22. From what the claimant has written in his submissions, the letter dated 30 November 2023, and said in his oral submissions today, it appears the claimant will rely on the following arguments:

- (1) The delay was due to the claimant using the internal formal concerns process which took more than a year to complete;
- (2) The respondent's policies required him to bring his discrimination complaints through the respondent's internal processes. (I note the respondent disputes this);
- (3) The claimant thought he was doing the right thing by using the internal processes rather than going down the Employment Tribunal route immediately. The claimant referred to using the cheapest and least intrusive process;
- (4) Although the claimant was aware of Employment Tribunals, he did not know about time limits;
- (5) The claimant had advice from the respondent's internal HR expert advice professionals and his FDA union representative in relation to the formal concerns process, but he does not recall having had any advice from them or discussion with them about Employment Tribunals and time limits.

23. Tribunals have a broad discretion in deciding whether it is just and equitable to consider a discrimination complaint out of time. I note the claimant acted promptly to contact ACAS and then present his Tribunal claim once he received the outcome of the formal concerns appeal. I am unable to say (on the basis of the assessment I am able to do at this hearing) that the claimant has no reasonable prospect of success in an argument that it was just and equitable to consider his complaint out of time. I do not, therefore, strike out the claim as having no reasonable prospect of success.

24. I have considered whether in principle (and subject to any information about the claimant's financial means) to order the claimant to pay a deposit as a condition of continuing with his argument that the time limit to bring a discrimination complaint did not start to run until May 2023, the date of the outcome of the formal concern appeal (which I will refer to as the "start date argument").

25. For the reasons above, I consider this argument has no reasonable prospect of success, and therefore by definition has little reasonable prospect of success. It would be possible therefore for me to make such an order. I do not consider, however, that making such a deposit order would have any real value in this case. Preventing the claimant relying on the start date argument if he failed to pay the deposit would not end any complaint. He would still be able to run the argument that it was just and equitable to consider the complaint of failure to make reasonable adjustments out of time. I consider it is likely that little time would be saved at the final hearing by the claimant not pursuing the start date argument.

26. However, if the claimant continues to run the start date argument and it does not succeed – as I think it will not – and, contrary to what I anticipate, it does add substantially to the time in preparation for his case or at the hearing, the respondent could make an application for costs at the end of the final hearing in respect of costs incurred because of unreasonable conduct of proceedings.

Employment Judge Slater

Date: 10 July 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 July 2024

FOR THE TRIBUNAL OFFICE

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

Annex Joint Chronology

DATE	EVENT	PAGE
05.09.2019	C commenced employment with R as a Tax Specialist Programme ("TSP") Trainee	129-143
28.10.2019	C informed R that he printed his own learning manuals	144
28.10.2019	C disclosed to R that he has dyslexia and enquired about reasonable adjustments on the TSP	145-146
02.12.2019	R provided C with a dyslexia assessment booking form	153-178
09.12.2019	C provided R with completed dyslexia assessment booking form	179
09.12.2019	C provided R with dyslexia checklist	179-181
19.12.2019	R granted C 25% extra times for examinations	188
15.03.2020	C provided R with a diagnostic assessment and report for dyslexia	189-194 195-221
20.03.2020	C made an application for reasonable adjustments	225-226
23.03.2020	C confirmed to R that he will print learning manuals himself	227
17.08.2020	C confirmed to R that he will print learning manuals himself	240
25.05.2021	C sat first BP2 examination	519
08.06.2021	C found out he failed first BP2 examination	398-399
27.07.2021	C sat second BP2 examination	519
06.08.2021	C found out he failed second BP2 examination	441-442
02.08.2021	C made tier 1 appeal for failing BP2 examination	435-440
16.09.2021	R informed C that his tier 1 appeal was not upheld	479
25.10.2021	C submitted tier 2 appeal for failing the BP2 examination	550-563
19.11.2021	C's tier 2 appeal not upheld	627-628
07.12.2021	R informed C that R was making a Non-Retention Business Case to remove him from TSP	665-674
13.01.2022	C submits appeal against Non-Retention Business Case	698
19.01.2022	R informed C his appeal against the Non-Retention Business Case was unsuccessful and R removed C from TSP	699
17.03.2022	C submitted grievance to R	703-724
20.03.2023	R informed C with grievance outcome decision – not upheld	1189-1191
21.03.2023	C appealed against grievance outcome	1194-1199
19.05.2023	R informed C of appeal grievance decision outcome – not upheld	1201-1213
22.05.2023	C contacted ACAS	1
06.06.2023	C received Early Conciliation Certificate	1
03.07.2023	C submitted ET1	2-21