Case Number: 6000127/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mr N Narli**

Respondent: **Babcock Integrated Technology Ltd**

Heard at: **Bristol** **On:** **23 January 2024**

Before: **Employment Judge Livesey**

Representation:
Claimant: In person
Respondent: Mr Adjei, counsel

JUDGMENT

1. The Claimant's claim was issued out of time, but it was just and equitable to proceed to hear it within the meaning of s. 123 of the Equality Act.

2. The claim proceeds in accordance with the Case Management Order of even date.

REASONS

1. Background

1.1 By a claim form received by the tribunal on 19 January 2023, the Claimant brought complaints of discrimination on the grounds of race.

1.2 The Claimant had contacted ACAS on 12 December 2022 and been issued with his Certificate on 11 January 2023.

1.3 The Claimant had also brought the claim against JSA Group Limited t/a Workwell Solutions as a second respondent, but that claim was rejected by the tribunal on 20 February 2023 because he had not complied with the requirement pursuant to rule 10 (1)(c) of Employment Tribunals Rules of Procedure 2013 since the claim form did not contain an early conciliation number.

1.4 The Response to the claim was received on 20 March 2023. The Respondent deployed a number of arguments;

1.4.1 That the Claimant was not an employee or worker of the Respondent on or at the material times and was not, therefore, able to rely on the standard 'employment' provisions in the Equality Act 2010. It had made no admission as to whether or not he was a contract worker pursuant to section 41;

1.4.2 Whilst it was accepted before the Regional Employment Judge in August that the Respondent had terminated the arrangement, whatever it was, due to the Claimant's dual nationality and security issues (see paragraph 56.6), it contended that it did not contravene the Act since any purported treatment that was taken had been for the purpose of safeguarding national security and it therefore acted in accordance with s. 192 of the Act and proportionately for that purpose;

1.4.3 In the alternative, the Respondent further sought to rely on paragraph 1 of Schedule 23 of the Act which provided that there would have been no contravention of the Act if any action that was taken had been in order to comply with a requirement imposed by the Government by virtue of an enactment in pursuance of arrangements made by or with the approval of a Minister of the Crown or a condition imposed by such a Minister;

1.4.4 In the further alternative, the Respondent relied upon the occupational requirement defence within Schedule 9, paragraph 1.

1.5 The Respondent's contentions were that, under its contract, called 'UK Submarine', one of the key security requirements was the need to obtain prior authorisation if it proposed to employe or engage staff who were not UK nationals, including those with dual nationality, like the Claimant. It said that it was required to obtain prior approval from the Ministry of Defence and its customer for the employment/engagement of such individuals. The Respondent said that it rarely sought to obtain such authorisation as it was aware that it was only ever provided in exceptional circumstances. It was also a lengthy process.

1.6 As part of the Respondent's onboarding procedure, it had required the Claimant to complete its Baseline Personnel Security Standard ("BPSS"), which was the lowest level of security clearance required for all personnel working across the Babcock International Group and which provided confirmation of an individual's right to work. He was also required to obtain a DBS clearance and provide his employment record for the past 5 years and references. The Respondent's case was that a BPSS clearance would not have identified suitability for an individual's ability to work on a particular programme, nor would it have confirmed that an individual was or was not authorised and met the requirements of a programme.

1.7 The Respondent argued that it had asked Expleo, the recruiters it used, to only source individuals who met the criteria under the Contract. On commencement of the Claimant's assignment with the Respondent, it said that it believed that he had met all of the necessary criteria, including having the required security clearance and being a UK national.

1.8 On or around 10 August 2022, however, one of the Respondent's employees recognised the Claimant as they had worked together in previous employment for Rolls Royce. What that person said to Mr Kelley (Senior Mechanical Engineer), caused him to investigate the Claimant's background. In the first instance, he checked the Claimant's CV to confirm if he had previously worked for Rolls Royce. As part of those investigations, the Respondent's case was that it was then discovered that the Claimant had previously studied in Turkey which led to the discovery of dual nationality.

1.9 Accordingly, the Respondent said that, on or around 11 August 2022, it informed Expleo that the Claimant could not continue to be assigned to the Contract and his assignment was terminated with immediate effect.

1.10 A Case Management Preliminary Hearing took place before Regional Employment Judge Pirani on 31 August 2023 at which the issues were clarified, agreed and recorded and this Preliminary Hearing was listed to determine the sole issue of whether the claim had been issued in time and, if not, whether it was just and equitable for it to proceed.

2. Evidence and factual findings

2.1 The Claimant gave evidence. The Respondent called Mr Driscoll, Head of Engineering Discipline, and Mr Kelley, Engineering Lead, to give evidence.

2.2 A bundle of relevant documents was produced (R1), pages numbers to which have been referred to in square brackets below. Mr Adjei also produced a Skeleton Argument (R2), a Cast List and a Chronology (R3).

2.3 The Claimant said that he was engaged by the Respondent as a Design Engineer from 8 August 2022. He had been sourced and placed by Expleo Engineering Ltd, specialist recruiters of engineers for the sector. He was engaged through an 'umbrella' host organisation, JSA Group Ltd t/a Workwell.

2.4 Within the body of the Claim Form, the Claimant explained that he was interviewed and security checked for the position of Contract Design Engineer and received clearance ahead of the job commencing on 8 August 2022.

2.5 In his witness statement, he said that his BPSS check, which had completed in July, had revealed that he was British and Turkish ([72] and [75-6]). The DBS document that was supplied to the Respondent had also revealed that he had been born in Turkey and held dual nationality ([84], [87], [90] and [92]).

2.6 He then said that, during his induction process on 10 August 2022, Mr Kelley approached him and questioned his nationality. He was asked whether he was British and was told to produce his passport for it to have been checked. He produced his British passport, which Mr Kelley seemed to think was okay. Mr Kelley raised the issue with Mr Driscoll, however, and further checks were made, which then revealed his dual nationality status. Mr Driscoll then gave the instruction to Mr Kelley that he ought not to work on the Contract further.

2.7 The Claimant said that he then received a telephone call on 11 August 2022 from Mr Paszkiewicz at Expleo saying that his role had been terminated. He also received an email from Mr Kelley informing him that there was nothing further that he could have done [105].

2.8 On that basis, it was clear that the Claimant was complaining of alleged acts of discrimination by the Respondent on 10 and/or 11 August 2022. But were there later acts that could have been relied upon?

2.9 In late August, he had asked Expleo for contacts at Expleo and Babcock so that he could have issued a grievance [119]. He was advised to contact his '*umbrella provider*' [118] and did so [149]. Workwell therefore dealt with the grievance and provided an outcome in October [125-6]. They also dealt with the appeal against [131]. The appeal outcome came on 8 February 2023.

2.10 Mr Driscoll and Mr Kelley both said in evidence that they had had no knowledge of the grievance and/or the grievance process. Mr Driscoll said that he caused enquiries to be made about whether anyone else within the Respondent had been contacted about the grievance. He checked with Mr Kelley and within HR, the Engineering Resourcing and Supply Chain Teams. He found no evidence that anyone else had been contacted.

2.11 Expleo's Director of Commercial Contracts had also confirmed in writing that Expleo had had "*no further contact with Babcock following the 11th August*" [132].

2.12 The Claimant believed that Babcock had failed to co-operate with the grievance investigation. In other words, that it had taken a positive decision *not* to help or provide information. On the basis of the evidence presented to me, however, I accepted that it was probably the case that the Respondent had had nothing to do with the grievance investigation, outcome and/or appeal. It had not supplied information to Workwell and did not appear to have known of the process at all.

2.13 The Claimant had spoken to his union representative in late August or early September, Mr Allen (paragraph 27 of his witness statement). He said that he had only discovered the possibility of bringing a claim of discrimination from Mr Allen then. He said that he was not then advised about the time limits for such claims and had not thought to ask. Why, he said, would have asked about something about which he had no knowledge?

2.14 He initially intended to see the grievance process out but, since it had gone on so long, he decided to issue his claim in January. He was not trying to meet any time deadline, he said. He still had not known of the limitation period. He only found out much later, well into the litigation process itself.

3. Relevant principles

3.1 Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision

covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

3.2 Should a claim have been brought outside the three month period, it was nevertheless possible for a claimant to pursue it if the tribunal considered that it was just and equitable to extend time (s. 123 (1)(b)). There was no presumption in favour of an extension. The onus remained on a claimant to prove that it was just and equitable to extend time and, if he/she advanced no case in support of an extension, he/she would not be entitled to one (*Rathakrishnan-v-Pizza Express* [2016] ICR 23 and *Moray Hamilton-v-Fife Council* UKEATS/0006/20/SS).

3.3 Time limits were not just targets, they were 'limits' and were generally enforced strictly. A good reason for an extension generally had to be demonstrated (*Robertson-v-Bexley College* [2003] IRLR 434, CA), albeit that the absence of one would not necessarily be determinative. A tribunal was not bound to refuse an extension in the absence of an explanation having been provided for the delay, but such an absence was undoubtedly a relevant consideration (*ABMU-v-Morgan* [2018] IRLR 1050 (CA), *Concentrix CVG Ltd-v-Obi* [2022] EAT 149 and *Owen-v-Network Rail* [2023] EAT 106). Nevertheless, there must be *some* material upon which a tribunal can exercise its discretion in favour of the Claimant (*Habinteg Housing Association-v-Holleron* EAT 0274/14 and *Edomobi-v-La Retraite RC Girls School* EAT 0180/16, per Laing J);

> *"In neither case, in my judgment, is there material on which the ET can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a Claimant from the consequences of any delay."*

3.4 Tribunals have been encouraged to consider the factors listed within s. 33 of the Limitation Act 1980 (the *Keeble* factors), although it was not necessary to use the section as a framework for the approach (*Adedeji-v-University Hospital Birmingham NHS Foundation Trust* [2021] EWCA Civ 23). I considered the length of and reasons for the delay, the extent to which the Claimant had sought professional help and the extent to which information, which he said that they needed, was not known by him until much later and the degree to which the Respondent should have been blamed for any late disclosure in that respect. We also had to consider whether the Claimant had dragged his feet once he knew all of the relevant information. It was thought that the touchstone, however, was the issue of prejudice; whether and to what extent the delay has caused prejudice to either side. Although certainly relevant, it was by means a determining factor (see Laing J in *Miller-v-Ministry of Justice* UKEAT/0003/15 at paragraph 13).

3.5 The fact that a claimant is unaware of his or her bring a tribunal complaint is more likely to save an out of time discrimination claim than if it was an unfair dismissal claim. Although the discretion was wide, it will generally apply only where the claimant's ignorance was reasonable (*Perth and Kinross Council v Townsley* EATS 0010/1*0*). Similarly, whereas incorrect advice by a solicitor or other adviser which brings about an understandable misconception of the law is unlikely to save a late tribunal claim in an unfair dismissal case, the same is not necessarily true when the claim is one of discrimination (*Hawkins v Ball and anor* [1996] IRLR 258, EA*T*). In *Wright v*

Wolverhampton City Council EAT 0117/0*8*, for example, the EAT held that incorrect advice received from a trade union official before and after the claimant had submitted discrimination claims late should not be ascribed to the claimant and that an extension of time should be granted.

3.6 I was conscious of the fact that it was rare for a claim of discrimination to be struck out on a time point at this stage of a claim. Discrimination claims are in fact sensitive and, without hearing the facts, it was said to be difficult for a tribunal to determine whether or not a claim was or was not in time unless there was '*a succinct, and knockout point which is capable of being decided after only a relatively short hearing*' (*SCA Packaging-v-Boyle* [2009] UKHL 37).

4. Discussion and conclusions

4.1 According to the Respondent, the Claimant issued his claim after the expiry of the normal time limit for presenting his complaint. The time limit in respect of the last matter about which he complained (11 August 2022), lapsed on 10 November 2022, before he had contacted ACAS. He therefore did not get the benefit of the extension of time that he would have been afforded under the early conciliation provisions and he issued the claim on 19 January 2023, over two months after time had expired. If the Respondent was right, there was therefore a succinct, knockout point on time which was capable of being determined at this stage.

4.2 The Claimant, however, considered that the Respondent had influenced or brought about Workwell's dismissal of his grievance and/or grievance appeal either by influencing it or by its positive inaction and/or failure to co-operate (paragraphs 44 and 55 of Regional Employment Judge Pirani's Case Summary).

4.3 I concluded that the Respondent had had no involvement in that process. Mr Driscoll and Mr Kelley had had no knowledge of the grievance and were not asked to contribute to it. Mr Driscoll found no evidence of anyone else within the Respondent having been contacted.

4.4 Accordingly, the last act that the Respondent took against the Claimant had been in 10 or 11 of August when it required Expleo to terminate the Claimant's engagement which was, of course, the decision at the heart of the case. The claim was therefore issued out of time for the reasons set out in paragraph 4.1 above.

4.5 Was it just and equitable to extend time to allow it to continue despite the delay?

4.6 The following factors were relevant;

4.6.1 The period of delay; the delay was not excessive. It was less than 10 weeks;

4.6.2 The Claimant had not just sat on his hands. He had challenged the decision with his employer, Workwell, by pursuing a grievance. He had tried to have the Respondent deal with it, but had not been supplied with a contact. He had been directed to

Workwell instead. It was difficult to blame him for his actions in those circumstances. In other words, by pursuing the grievance to its end against Workwell when that had been the only avenue offered to him. He had not, however, waited for its conclusion before issuing;

4.6.3 The Claimant had sought help from Mr Allen at the Union. Whilst it was surprising that he had not been given advice about the relevant limitation period, there was no reason to doubt what the Claimant had said in that respect;

4.6.4 It was true that the Claimant had delayed further even after the ACAS Certificate had been received, but that was consistent with his evidence that, even then, he had known of the limitation date. He is an intelligent man and there is plenty of widely available information which would have helped him in relation to the limitation date, but he had taken advice from his union and that was a reasonable thing to have done in the circumstances;

4.6.5 The evidence did not appear to have been materially affected by the delay; Mr Driscoll, Mr Kelley and the Claimant seemed able to recall the material events and the documentation appeared to have been preserved. Mr Adjei had candidly accepted that the Respondent had not suffered any forensic prejudice by the delay (paragraph 25.1, R2);

4.6.6 The claim was cogent; the prejudice to a claimant was always going to have been regarded as greater in a situation in which the treatment complained of was conceded to have been influenced by a protected characteristic. The real issues here appeared to focus upon whether the Respondent could establish any one of its defences, the strengths of which also did not appear to have been materially affected by the passage of time.

4.7 For all of those reasons, but particularly the last two, it was just and equitable to extend time to hear the substantive claim against the Respondent and the matter will proceed to a final hearing in accordance with the Case Management Order of even date.

Employment Judge Livesey
Date 23 January 2024

Judgment & Reasons sent to the Parties: 5 February 2024

FOR THE TRIBUNAL OFFICE