



EMPLOYMENT TRIBUNALS

Claimant: Mr R Sutton

Respondent: Virtus Partners Ltd

JUDGMENT FOLLOWING A PRELIMINARY HEARING

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 7 July 2021

Before: Regional Employment Judge Taylor

Appearances

For the claimant: In person

For the respondent: Ms Katherine Eddy, Counsel
(Assisted by Lindsay Carter In-house Counsel)

JUDGMENT

The claimant's claims of unlawful discrimination have been presented outside of the primary time limit contained in section 123 of the Equality Act 2010; it is not just and equitable to extend time for bringing the complaints of age and sexual orientation discrimination. Accordingly, the Tribunal does not have jurisdiction to consider these claims and the claims are dismissed.

REASONS

1. This claim arises out of the claimant having made an unsuccessful job application to the respondent company in August 2019. He contacted ACAS about a potential claim and ACAS Early Conciliation started on 6 October 2020 and ended on the same day. The claim form was also presented on 6 October 2020. At part eight of the claim form the claimant ticked boxes to indicate he was claiming discrimination on the grounds of age and sexual orientation. He also stated that he was claiming 'other payments' and added 'that he was claiming age discrimination, sexual orientation discrimination and blacklisting because of previously asserted workplace rights'.

2. The claimant submitted that the background to this case is that he had worked in the finance industry for some years and during the years 2016 and 2017 he raised a number of grievances with his then employer, DB Group Services (UK) Ltd, which company is unconnected to this respondent. The claimant's employment with DB Group Services was terminated by redundancy, following a period during which he had raised a number of grievances which included, the claimant alleges, a public interest disclosure in 2013. The claimant has made a number of unsuccessful job applications for work in the finance industry. The claimant believes that 'off the record' and poor references were given to prospective employers about him by DB Services Group, as victimisation for having raised these grievances.
3. The claimant has also come to believe that he has been blacklisted by numerous financial companies to whom he has applied for paid employment. In pursuance of this belief, the claimant has presented several claims against various companies in the County Court and in the employment tribunal.
4. Having considered, the claim form the Tribunal is satisfied that it does not include any details capable of amounting to a claim of public interest disclosure or a claim for unlawful victimisation.
5. The respondent has made two preliminary applications in response to this claim. The first application is that the claim should be dismissed because it has been brought out of time. This applies insofar as the claim relates to alleged acts of discrimination. The second application is that pursuant to 37 of the Employment Tribunal Procedure 2013 the claims should be dismissed on the basis of having no prospect of success.
6. The preliminary hearing was listed to consider the respondent's applications. The Tribunal decided to consider the question of whether the claim had been brought out of time first. If the claims of age and sexual orientation discrimination are dismissed as being out of time the respondent's application to strike out the claims on other grounds fall away.

The applicable law

7. Section 123 Equality Act 2010 provides so far as relevant that:

"(1) ... proceedings on a complaint ... 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.
8. The Tribunal's discretion to extend time under the "just and equitable" test is a wide discretion. In *Abertawe Bro Morgannwg University Local Health Board v Morgan*, [2018] ICR 1194 it was held that:

'Unlike section 33 Limitation Act 1980, section 123(1) EQA 2010 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 section 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: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800 , paragraph 33.

There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the Claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal must have regard. If a Claimant gives no direct evidence about why [s/he] did not bring [their] claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended'.

9. Such decisions must be exercised judicially and factors which are almost always relevant to consider when exercising any discretion whether to extend time are:
 - (a) the length of, and reasons for, the delay
 - (b) whether the delay has prejudiced the respondent (for example, by preventing the respondent from investigating the claim while matters were fresh and the relevant documents are still available) and
 - (c) the exercise of the power to extend time is very much the exception (*Robertson v Bexley Community Centre* [2003] IRLR 434).

The agreed facts

10. The claimant claims to have sent a Data Subject Access Request ('DSAR') to the respondent earlier than 6 October 2020. He agrees that the DSAR was not delivered to the respondent because the particular addressee no longer worked for the company. Therefore, the parties agree that the time line of the events relevant to this case are as follows:
 - 10.1 The claimant applied for a role with the respondent in December 2018 for 'Data Analyst II Structure Finance' working in London.
 - 10.2 The respondent contacted the claimant about a different role on 19 December 2018, Director – Client Services, working in the United States. The claimant was not interested in working in the USA at that time.
 - 10.3 The claimant was interviewed for the post of Associate Director/Director – Client Services, London on 8 August 2019;
 - 10.4 On the respondent's case, on information available and on the claimant's case, following receipt of informal feed back (a "back door reference"), the Senior Director who interviewed the claimant considered him to be too senior for this role. (The same was said of a second candidate rejected for the same post at the time.)

- 10.5 The application for Associate Director/Director – Client Services role did not proceed.
- 10.6 10 October 2019 the respondent contacted the claimant to ask if he would be interested in a position in Texas, USA. The claimant declined a position in the USA, indicating that he was currently engaged in work in London.
- 10.7 On 28 June 2020 the claimant applied for a subject access request to a former employee of the respondent. The claimant received a standard email informing him that his message was undeliverable (Doc. 281). This employee had left the respondent's employment in November 2019 (Doc. 277 at 278 para 2.2(d)).
- 10.8 The claimant sent similar messages to the respondent on 10 and 11 August 2020 and received undeliverable messages (Doc.281)
- 10.9 On 20 August 2020 the respondent received a DSAR from the claimant.
- 10.10 The claimant received a substantive response to the DSAR on 15 September 2020 (at 277-279), with attachments.
- 10.11 The claimant obtained an Early Conciliation Certificate on 6 October 2020
- 10.12 The claim form (ET1) was presented 6 October 2020.

The submissions

11. The claimant submitted that it is difficult for him as a job applicant to understand when time begins to run from for the making of an application. He considers that an impermissible conclusion was made about his suitability for a job by the respondent on or after 8 August 2019 and a decision was taken to blacklist him because his former employer was contacted by the respondent. This case was linked with other similar claims and should not be dismissed.
12. The respondent submitted that the claim is concerned with an unsuccessful job application made on 8 August 2019 and the very latest date the claimant could reasonably say he was unaware of the outcome was 26 September 2019, when he received an email informing him that the position was filled (Doc. 273). The claimant received automated messages when he contacted the respondent in an attempt to make his first Data Subject Access Request in 2020. The claimant is a litigant who has presented other similar claims and is well aware of statutory time limits. Following the decision complained of the respondent contacted the claimant about another role in the USA. It is relevant to the merits of the claim that the same comments were said of another candidate's suitability for the same role. Claims of race discrimination (because he is as an American), public interest disclosure and victimisation have not been pleaded in the claim form and are not claims currently before the tribunal, moreover, the claimant has not had or been granted leave to amend his claim. Allegations that the claimant was blacklisted or victimised are completely unfounded and unsupported. The respondent would be prejudiced if time was extended because the recruitment system that was in use at the time of the claimant's applications no longer exists and any recruitment files held cannot be traced and are therefore no longer available. The claim was presented out of time and should be dismissed.

The Tribunal's conclusions

13. The first consideration for extending time in discrimination cases is whether the claimant can satisfy the Tribunal that there was a reason for the delay leading to the complaint being presented after the end of the three-month primary time limit. If the claimant can satisfy that first test, he must also show that the time which elapsed after the three-month time limit expired, before the claim was presented, was a 'reasonable' period.
14. The claimant agreed that he first knew that the interview had been unsuccessful in September 2019. The Tribunal considers that time started to run from that date. The claimant believed the respondent placed reliance of a personal source of information as part of a pattern of what the claimant refers to as "back door" or informal references. The claimant asserts that that pattern became apparent in 2020, but there was no information suggesting this, in particular the claimant's assertion of the respondent not wanting to employ him is not credible given that in October 2019 the respondent contacted the claimant on its own initiative to ask if he would be interested in a position in Texas, USA. There is nothing in the conduct of the respondent to suggest age or sexual orientation or any other protected characteristic were factors in the respondent's decision making. The claimant submitted he began making enquiries of the respondent in June 2020 but he did not receive an undeliverable email notification message until 20 August 2020 and therefore did not know that the employee dealing with recruitment had left. The claimant submitted that these delays were not evidence of casual delay or a non-caring attitude to pursuing this claim on his part. However, the Tribunal was satisfied that there was no late discovery of any new fact that could justify the Tribunal extending time. The claimant said he was aggrieved at not being appointed in August 2019 and he could have started making enquiries soon after the rejection if he believed he was being discriminated against. The Tribunal bears in mind that the last act complained of was well over a year before the claim was presented.
15. The primary time limitation period for discrimination claims is 3 months and the Tribunal is satisfied that the claimant has not provided any satisfactory reason for the length of the delay. The Tribunal accepted that the delay in this instance would prejudice the respondent, preventing the respondent from investigating the claim because relevant documents had been destroyed. The exercise of the power to extend time is very much the exception (*Robertson v Bexley Community Centre* [2003] IRLR 434) and having considered all of the circumstances the Tribunal has decided not to grant an extension of time.
16. Accordingly, the Tribunal finds that the claimant's claims of unlawful discrimination have been presented outside the primary time limit contained in section 123 of the Equality Act 2010; it is not just and equitable to extend time for bringing the complaints of age and sexual orientation discrimination.
17. The claimant suggests that the claim includes one of detriment for making a public interest disclosure. The Tribunal was satisfied that the claim form was not capable of being interpreted in that way. However, the Tribunal considered that even if it was, a complaint brought under section 48 of the Employment Act

Rights Act 1996 must be presented within three months beginning with the act complained of or within such further period as the Tribunal considers reasonable. The act complained of was at the latest occurred in September 2019. The claimant would need to show that it was not reasonably practicable for the claim to have been presented in time. The claimant alleges that ignorance of a fact caused him to delay presenting his claim. The Tribunal was satisfied that the claimant provided no reason or adequate reason for his delay in making further enquiries or of such a fact. Waiting for the reply of a delayed data subject access request did not provide evidence of any such fact that might support his assertion. It was reasonably practicable for the claim to be made to the Tribunal within the time limit. Therefore, the Tribunal would be satisfied that it would have been reasonably practicable for any claim for public interest disclosure detriment to have been presented within the applicable time limit.

18. The hearing listed for 30 September and 1 October 2021 is vacated and the claims are dismissed.

**Regional Employment Judge Taylor
Date: 30 July 2021**