EMPLOYMENT TRIBUNALS

Claimant: Mr M R Kler

Respondent: Barclays Bank PLC

HELD AT: Manchester **ON:** 20 January 2020

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Mr P Keith Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that the claimant's claims of race, age and religion or belief discrimination were presented out of time , and it would not be just and equitable to extend time for their presentation. They are dismissed.

REASONS

1. By a claim form presented to (i.e accepted by) the tribunal on 26 February 2019 the claimant brought claims of race, age and religion or belief discrimination arising from his rejection from a potential employment opportunity with the respondent. The claims were originally presented to the Glasgow Employment Tribunal, and then transferred to the North West Region, but nothing turns upon that.

2. The respondent responded to the claims, and pleaded that the offer of employment was withdrawn on or about 10 October 2018. It was therefore contended that the claims had been presented outside the applicable 3 months time limit, and, as the claimant had not started the early conciliation process within the initial time limit, no extension of time under the early conciliation provisions would apply, and the claims were therefore time - barred.

3. The respondent sought further particulars of the claimant's claims. It was contended that the claims had no , or only little , reasonable prospects of success. A preliminary hearing was held on 24 October 2019 before Employment Judge Howard. She directed that a preliminary hearing be held to decide:

1.When the decision to withdraw the job offer of Java Developer was communicated to Mr Kler;

2. If Mr Kler's claim has been brought outside the relevant time limit whether the tribunal should use its discretion to allow his claims to proceed on the grounds that it would be just and equitable to do so.

3. Whether to order Mr Kler to pay a deposit as conditioned proceeding with any or all of his allegations arguments on the grounds that they have little reasonable prospects of success.

4. Whether to strike out any or all of Mr Kler's allegations arguments on the grounds that they have no reasonable prospects of success.

4. This hearing was therefore held to decide those issues and consider, firstly, in relation to the time limits, and secondly, if the claims could proceed, whether they should nonetheless be struck out, or deposit orders made.

5. The claimant appeared in person, and Mr Keith of counsel appeared for the respondent. The claimant prepared a witness statement, in effect responding to the response, but also setting out his evidence in support of his application, if necessary, for the tribunal to extend time for the presentation of his claims on the basis that it would be just and equitable to do so. Mr Keith prepared a Skeleton Argument , in which both applications , time bar and strikeout/deposit orders were addressed. A witness statement from Jennie Lee had been prepared by the respondent, and was considered, but she did not give live evidence. There was a bundle for use in the preliminary hearing, and references to page numbers are to that bundle.

The time bar issue.

6. The tribunal will start with the time bar issue, as this goes to its jurisdiction. The claimant in his evidence accepted that this claims were presented out of time. Initially that was on the basis that he was told, over the telephone that he had been unsuccessful, had not passing the vetting process, on or around 18 October 2018. He accepted that on that basis his claims would be out of time. In fact, during the hearing, that date was revised, and was accepted as more probably 17 October 2018, as an email in the bundle, at page 274 refers to a telephone call on that day , when the claimant learned he had been unsuccessful.

7. On that basis, the date by which the claimant should have presented the claim, or within which he should have started the ACAS early conciliation process was 16 January 2019. He did not initiate early conciliation until 5 February 2019, and having got an early conciliation certificate the next day, 6 February 2019, did not present the claims until 26 February 2019.

8. In terms of his evidence, the witness statement that he prepared for this hearing was rather sparse in details relating to the time limit issues. It unfortunately ranged over the whole of the claims and was lacking in focus and detail. Only in paras. 8 to 10 does he deal with the period between when he first discovered he had been rejected (which he does not put a date on) and the lodging of his ET1 form, which he does not in fact mention at all.

9. In explaining why he had not brought the claims within the time limit, or sooner than he did, he said this:

9.1 In para. 10 of his statement , he says that at first he did not suspect that there had been prejudice, but then he began to start thinking that there had been. He says that for 3 months he thought he could do nothing. He says , and said in his evidence, that the respondent had told him that he could do nothing. He says that he was aware of ACAS, but was under the impression that "there were costs at stake", and he was not in a position to afford costs if he lost.

9.2 In para. 11, however, he says after 2.5 months he finally contacted ACAS , who told him to contact the respondent, and to tell them that he had contacted ACAS for early conciliation. The respondent did not want to respond, and this added another two weeks to the obtaining of his early conciliation certificate. Again the claimant makes no reference to any dates in his statement, but the date of his notification for early conciliation on the certificate (page 1 of the bundle) was 5 February 2019, and the certificate was issued the next day. This does not support the claimant's contention that there was a two week delay in his getting his certificate.

9.3 Whilst these are the only matters referred to in his witness statement, in his evidence to the tribunal, he said this:

a) In trying to pin down the date upon which the claimant knew he had been rejected, he accepted that he clearly knew by 19 October 2018, because he set an email that day (page 217 of the bundle) questioning the decision. He had found out in a telephone call, which, he later accepted, must have been on 17 October 2018, because he sent an email that day (page 274 of the bundle) referring to the telephone call he had just received from a lady at Barclays.

b) In the following days in October 2018 the claimant followed up his questioning of the decision, in emails of 18, 19, and 22 October 2018. He tried to obtain more information about his qualifications and his CV, to show that he had not sought to give any misleading impression. He accepted that by 18 October 2018, in the final paragraph of his email that day (page 218 of the bundle, in which he referred to his experience of Indian students, and their "issues" with his British culture, he was making reference to what was the basis of his race and religion discrimination claims.

c) He was awaiting a hip operation, and as he was not now going to go to Glasgow (where the employment opportunity was) he underwent the operation. He was subject to a fit note, certifying him unfit for work from 8

October 2018 until 4 November 2018 (page 266 of the bundle) due to hip pain.

d) He then got a temporary job, working some 2 to 3 days per week. He was looking for other jobs, and had to undo the arrangements he had made to go to Glasgow, in terms of his accommodation both there and in Manchester.

e) On 14 November 2018 the claimant, it seems, did undergo a hip operation (page 265 of the bundle refers) , although this appears to have been as an outpatient appointment at 2.00 p.m. A further fit note, however, dated 7 November 2018 (page 269 of the bundle) does refer to the claimant being unfit for work because of "post op recovery".

f) Whatever the position the claimant was out of hospital, but in some pain during November 2018. No further medical evidence has been produced.

g) The claimant was aware of the three month time limit in which to bring a tribunal claim. Jack Webster whom he spoke to at Barclays told him there was nothing he could do. ACAS told him as he was not an employee of Barclays, he did not think there was anything he could do. He had gone online, probably after his operation, and had seen that he would not be liable for costs, though when this was was rather unclear.

10. That then, was his evidence in support of his application that the Tribunal extend time for the presentation of his claims.

11. For the respondent, Mr Keith argued that the tribunal should not grant the application. He took the tribunal through the relevant caselaw, and the principles to be applied. He submitted that the claimant had not adequately explained large parts of the period of delay, and had changed his reasons somewhat, only at the hearing adding in any medical issues to do with his operation on his hip

12. In approaching its decision the tribunal has in mind the principles set out in the caselaw, which is referred to below..

The just and equitable extension.

13. In deciding whether to exercise its discretion , the tribunal takes into account the guidance upon how it should approach this task set out in ***British Coal Corporation v.Keeble [1997] IRLR 336*** , In the event that the claims as presented, are, as conceded, out of time, the Tribunal has to consider whether to extend time , on the basis that it would be just and equitable to do so. This discretion, of course, is the same as conferred by several other discrimination statutes, and caselaw has evolved as to how a Tribunal should approach the exercise of its discretion. One of the leading cases is ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434*** ,a judgment of the Court of Appeal. Of particular note is the judgment of Auld L J, who made it clear that there was no presumption of extension, but rather the converse was the case, extension was the exception, not the rule, and

an out of time claimant had to convince a Tribunal why an extension should be granted. In terms of the principles upon which a Tribunal should approach the exercise of the discretion, the EAT in ***Chohan v. Derby Law Centre [2004] IRLR 685*** endorsed the approach taken in ***British Coal Corporation v. Keeble*** to the effect that Tribunals should consider the factors listed in s.33 of the Limitation Act 1980 , which applies to the exercise of discretion to extend time in personal injury claims before the civil courts. Those factors are:

The length of and reasons for the delay;

The extent to which the cogency of the evidence is likely to be affected by the delay;

The extent to which the party sued had co-operated with any requests for information;

The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;and

The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

14. Those factors, whilst useful, must not, however, be regarded as a checklist, or exhaustive. In ***London Borough of Southwark v. Afolabi [2003] ICR 800*** the Court of Appeal held that the s.33 factors were of utility, but that as long as no significant factor was left out of consideration, a failure to follow the express provisions of s.33 would not be a error of law. In that case, delay of 9 years was, exceptionally, not fatal to the application to extend time.

15. Turning to each factor, on the evidence before the tribunal, its conclusions are as follows.

a).The length of and reasons for the delay;

16. The length here is over a month, from 16 January 2019 to 26 February 2019. That is over a third of the period allowed in which to bring a claim. The claimant did not even contact ACAS until over two weeks after the time limit had expired.

17. Turning to the reasons for the delay, they have been somewhat inconsistent and hard to follow. The claimant has advanced different reasons at different stages. He was, he said, aware of the three month time limit. He was aware from 17 October 2018 that he had been rejected by the respondent. He did nothing, he accepts for the next few weeks. His hip operation was on 14 November 2018. The tribunal accepts, as is borne out by the fit note at page 2.. of the bundle that he was in some pain from 8 October 2018, but this is hardly likely in the tribunal's view to have been such as would stop him being able to contact ACAS or present his ET1. His explanation for this initial period of one month is not cogent.

18. The hip operation, however, is not the only factor that the claimant relies upon, and it is remarkable that it was not mentioned at all in his witness statement. He relies additionally upon a number of factors, namely:

i)Believing that he should not claim because he could be liable in costs;

ii)Believing he could not claim because he was not an employee of the respondent;

iii)Being told by the respondent that "there was nothing he could do";

iv)Believing that ACAS were volunteers who helped parties discuss disputes;

19. The claimant accepted that these were mistakes on his part, in that (i) and (ii) were not correct, and he found at some stage, precisely when is unclear, that these were not impediments to his claiming. In particular, the claimant seems to rely upon his incorrect assumption either that he would have to pay fees, or would be liable for costs if he lost. It was unclear which he was concerned about. If it was the former, as at October 2018, 15 months after the very well – publicised decision of the Supreme Court in ***R (on the application of Unison) v. The Lord Chancellor [2017] UKSC 51*** , was an easily dispelled misconception that 5 minutes research online would have revealed. The second , if that was his fear, again is wrong, as unless a claimant acts unreasonably, costs are a rare event. Even if , however, that was the risk he was concerned about, he then took a conscious decision not to take it. He then changed his mind, but too late.

20. As to (iii), assuming in his favour that it was said, the claimant can hardly reasonably have taken that as any form of legal advice, as opposed to a statement of the position with the respondent, as to, for example, any right of appeal. Further, even if it was, taking legal advice from one's proposed opponent is not sensible.

21. It is hard not to observe that the claimant's evidence has been highly unsatisfactory. He has added points that are not in his witness statement. He has apparently been online, but cannot give dates. Indeed, most of his evidence as to dates and timing has been shown to be unreliable. His account of the ACAS early conciliation process, for example, is not borne out by the certificate, there was no two week delay, once he had contacted ACAS. The delay was in him doing so.

b).The extent to which the cogency of the evidence is likely to be affected by the delay;

22. The tribunal accepts that this is not a relevant feature here. As can be seen by the evidence that the respondent has already adduced , from Ms Lee, the delay is hardly likely to affect the cogency of the evidence, much of which, as can be seen from the bundle, is well documented. The tribunal does not accept para. 13.3 of Mr Keith's submissions. Whilst it is true that the respondent will, if these claims proceed, have to call witnesses from overseas to give evidence, the relevant period to consider is the delay in presenting the claims, not the time at which this application is being considered. As at 26 February 2019, as opposed to 16 January 2019, the tribunal cannot imaging that this additional period was likely to have had any great effect upon the cogency of the evidence, wherever it was coming from.

c).The extent to which the party sued had co-operated with any requests for information;

23. Again, not really relevant, the claimant does not say that he was waiting for anything from the respondent to enable him to present his claims, or to give him information necessary for him to bring them.

d).The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;

24. This factor does not assist the claimant . He knew, he says about the possibility of taking action, knew that he had been subjected to racial or religious prejudice, from mid October 2018. Other than to ask the respondent, the claimant took no steps to obtain advice or even carry out any online research. He is not an unintelligent man, he has many qualifications. He may not be a lawyer, but he is very familiar with computers, and the internet.

e).The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

25. Again the claimant did very little until it was too late to obtain appropriate advice, the same considerations apply as to the previous factor.

26. On those factors, the tribunal considers the scales tip against the claimant . His reasons for his delay have been shifting, and lack cogency. He has been vague on crucial dates, and has omitted material evidence from his witness statement. In short, the delay is significant, and the reasons for it have not been adequately explained. It is appreciated that there may be little prejudice to the respondent, but as has been made clear (see ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434)*** absence of prejudice to the respondent is not enough.

Decision.

27. The tribunal's conclusion is that the claimant has not persuaded it to exercise its discretion in his favour. He has presented inconsistent reasons for his failure to take the relevant steps in time, steps that are easy to take, as he found when he took them. He is an intelligent man, with a number of qualifications. The bringing of these claims within a time limit of which he admits he was aware, was something which he could and should have done, and the tribunal will not extend time for the presentation of his claims. They are dismissed.

The remaining applications.

28. In the circumstances the tribunal does not need to determine the application by the respondent for strike or deposit orders. For completeness , but briefly, the tribunal was persuaded that the claims had little reasonable prospects of success for the reasons advanced in Mr Keith's arguments. The claimant would in the tribunal's view have been highly likely to struggle to point to a "something more" than the alleged difference in treatment and his protected characteristics so as to reverse the burden of proof as required by cases such as ***Madarrasy v Nomura International Ltd [2007] ICR 867.*** Even if he did, from the material before the tribunal, it seemed highly that the respondent would be able to explain its , or its agents', decision by

non – discriminatory factors. Deposit orders, though doubtess modest ones in the light of the information provided about the claimant's means after the hearing, would have been made.

Employment Judge Holmes

Date: 28 February 2020

RESERVED JUDGMENT SENT TO THE PARTIES ON
3 March 2020

FOR THE TRIBUNAL OFFICE