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# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MORTON  
(sitting alone)

**BETWEEN:**

**Mr Gordon Sandifer** Claimant

AND

**HML Shaw Ltd** Respondent

**ON:** 1 February 2017

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** M Liang, Consultant

## **JUDGMENT**

The Judgment of the Tribunal is that the age discrimination claim in this instance should be allowed to proceed. Although the claim was submitted outside the statutory time limit set out in s 123(1)(a) Equality Act 2010 (Equality Act) it is just and equitable under s 123(1) (b) to extend time for presentation of the claim.

## **Reasons**

1. Mr Sandifer presented a claim form on 28 October 2016 having commenced early conciliation on 20 September 2016. His claims are of constructive unfair dismissal and age discrimination. In relation to the age discrimination claim he complained of not having been selected for a team leader role in December 2015 and alleges that the reason that he was not selected was wholly or partly his age. He therefore complains only of direct age discrimination under

- s 13 Equality Act. The Respondent contends that this part of his claim falls outside the Tribunal's jurisdiction because he should have commenced early conciliation in March 2015.
2. S123(1)(b) Equality Act allows the Tribunal to extend time for presentation of a claim of discrimination when it is just and equitable to do so. In deciding how to exercise my discretion where an extension of time is at issue the factors that I need to consider are, as far as they are relevant in any particular case, those set out in s.33 of the Limitation Act as confirmed in the case of **British Coal Board v Keeble [1997] IRLR 336**. Those factors are: the balance of prejudice to each party in the case taking into consideration all the factual circumstances including the length of the delay, the reasons for the delay, the extent to which the cogency of the evidence will suffer as a result of extending time and the steps taken by the Claimant to take proper advice once he knew of the cause of action.
  3. Considering the general circumstances, the length of the delay, six months, is significant. Mr Sandifer however gave two cogent reasons for the delay and I accept his evidence as truthful. The first reason is what seems to have been poor advice on the question of time limits from two separate sets of solicitors. The EAT has held that it is not just and equitable for a claimant to lose the opportunity to pursue a claim of unlawful discrimination claim because of inadequate legal advice (*Chohan v Derby Law Centre [2004] IRLR 685*). The second reason was Mr Sandifer's wish, also on advice, to allow the internal procedures that resulted from his raising a grievance about the issue, to take their course and reach their conclusion before he took formal legal action. He also thought it possible that the restructuring that resulted from the recruitment process might not be put into effect and did not want to 'jump the gun' before pursuing a legal claim. The same consideration applies to those reason – that it would not be just and equitable for Mr Sandifer to be deprived of the ability to pursue his claim because of inadequate advice.
  4. The third factor under s33, the cogency of the evidence, it seems to me will not be adversely affected by the delay. There is one set of facts at issue here which was a recruitment process for a new role of team leader in December 2015. So this is a process of which the Respondent would presumably still have the documentary evidence. What will be required to determine the discrimination claim is the evidence of one witness who is still employed by the Respondent. It will be necessary furthermore for the Respondent to give evidence on this issue in order to defend the constructive unfair dismissal claim. In light of these considerations, including necessity for the factual matters relied upon to be dealt with in any event in the course of the constructive dismissal claim, the Respondent will not in my view be prejudiced by the Claimant being permitted to bring his age discrimination claim out of time. Mr Sandifer on the other hand will suffer prejudice if his age discrimination claim is not adjudicated.
  5. Therefore in all the circumstances and weighing the length of the delay against the reasons for the delay and the fact that the cogency of the evidence will not suffer as a result of the extension of time, I conclude that the

relevant factors point in favour of allowing Mr Sandifer's direct age discrimination claim to continue.

## **CASE MANAGEMENT ORDERS**

### **The issues**

1. The issues in the case are set out in a draft list of issues prepared by the Respondent amended as set out below to incorporate my decision that the age discrimination claim should be permitted to proceed:

#### **2. Age Discrimination**

Was the Claimant treated less favourably by the Respondent because of his age by not being selected in December 2015 for one of the team leader roles, his comparators being the other candidates who were of a different age group and who were appointed but whose qualifications and experience were equal to or inferior to those of the Claimant?

#### **3. Unfair Constructive Dismissal Claim**

1. The Claimant asserts that the following acts by the Respondent cumulatively amounted to repudiatory breach of the implied contractual term of mutual trust and confidence thus entitling him to resign without notice by letter dated 20 September 2016:-
  - a. Refusal to distribute his work to other property managers to bring his work load down to manageable levels;
  - b. Direct discrimination against him because of age by failure to appoint him to a team leader role;
  - c. Refusing to help him manage his stress by allowing him more control over his working environment;
  - d. Delaying decisions on (a) his grievance and (b) his request for flexible working.
2. Did the Claimant resign because of the breaches set out at paragraphs (a) to (d) above?
3. Did the Claimant waive all or any of the breaches?
4. Did the Claimant contribute to the situation which led to his resignation?
5. If so should any award of compensation be reduced to account for contributory fault?
6. Has the Claimant made reasonable efforts to mitigate his loss?
7. Is it just and equitable to award compensation and or interest?
8. If so how much compensation and or interest is to be awarded?
9. Was there any failure by the Respondent or the Claimant to comply with the ACAS Code of Practice on disciplinary and grievance procedures?
10. If so is it just and equitable to uplift or reduce the compensatory award?

**Orders**

4. The case is listed for a full merits hearing for four days to include deliberations, judgment and remedy if required, from **14 to 17 November 2017** at the employment tribunal at **Croydon**.
5. I explained to the Claimant how to expand upon the draft schedule of loss set out in his ET1 in order to provide the information needed by the Tribunal including the need to set out gross and net figures and to explain the basis on which the basic award had been calculated. I explained that if his Age Discrimination claim was unsuccessful his award for unfair dismissal compensation would be capped at one year's salary. The Claimant is ordered to provide the Respondent and the Tribunal with a **revised Schedule of Loss** by **15 February 2017**.
6. The parties are by **15 August 2017** to disclose to each other by list the documents in their possession which are relevant to the issues in the case and each party is to provide to the other copies of any documents requested by **22 August 2017**.
7. The Respondent shall prepare and send to the Claimant a finalised indexed and paginated bundle of documents for use at the final hearing by **12 September 2017**. The Respondent will also be responsible for preparing a further five copies of the bundle for use at the full merits hearing.
8. The Respondent wishes to call five witnesses. The Claimant wishes to call a former colleague as a witness and I explained that he may if necessary apply to the Tribunal for a witness order. The parties shall exchange witness statements simultaneously on or before **24 October 2017**. Witness statements shall be set out in double spacing in numbered paragraphs and shall be cross-referenced to the documents in the agreed bundle.
9. The Respondent shall also prepare a structure chart, cast list and chronology for use at the full merits hearing.

**NOTES**

- 1 *This Order constitutes a notice of hearing under the Employment Tribunals Rules of Procedure 2013. At the Hearing all parties will have the opportunity to submit written representations and to advance oral argument. If a party wishes to submit written representations for consideration to the hearing s/he shall present them to the Employment Tribunal Office not less than 7 days before the Hearing and shall, at the same time send a copy to all other parties.*
- 2 *Failure to comply with an Order relating to the disclosure or inspection of documents may result on summary conviction in a fine of up to £1,000 being*

*imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.*

- 3 *The Tribunal may also make a further Order (an “Unless Order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be dismissed without further order.*
- 4 *An Order may be varied or revoked upon application by a person affected by the Order or by an Employment Judge on his or her own initiative.*
- 5 *This Order confirms orders made/directions given at a hearing on 1 February 2017.*
- 6 *No further notice of hearing will follow.*

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Employment Judge Morton

Date: 21 February 2017