



EMPLOYMENT TRIBUNALS

Claimant: Mr Cornell Bond

Respondent: Apple Retail UK LTD

Heard at: London South Employment Tribunal by video

On: 12 October 2022

Before: Employment Judge L Burge

Appearances

For the Claimant: In Person

For the Respondent: Mr B Randle, Counsel

OPEN PRELIMINARY HEARING JUDGMENT

It is the Judgment of the Tribunal that:

1. The Tribunal does not have jurisdiction to hear the Claimant's claims of race discrimination, harassment and some complaints of victimisation as they were brought outside of the applicable time limits and it is not just and equitable to extend time;
2. It is just and equitable to extend time in relation to three complaints of victimisation and so these complaints will continue; and
3. The Claimant's claim of disability discrimination also continues.

REASONS

The hearing

1. The Claimant had not produced a witness statement about time limits but gave oral evidence and was cross examined on it. The Respondent provided the witness statement of Deborah Otten (Employee Relations Partner at the Respondent) but she was not present at the hearing. Her witness statement was accepted in evidence by the Tribunal.
2. A bundle of 92 pages was provided by the Respondent.
3. A Preliminary Hearing had originally been listed to take place to consider the Respondent's application for strike out, or deposit, on the basis that the claims were brought outside of the three month limitation for bringing claims. This application was to be heard by EJ Self at a Preliminary Hearing on 15 August 2022. However, the entirety of that hearing was spent going through the issues which was a pre-requisite for considering the time limit issues. Having drafted a list of issues, EJ Self ordered the Claimant to provide the Further Particulars needed, which should then have been inserted into what would be a final list of issues. The time limit point could then be considered as originally ordered.
4. At the start of the hearing, the Issues for the current Tribunal to determine were agreed to be:
 - a. Were these claims presented within three months of the acts complained of in accordance with section 123(1) EqA (taking into account the EC period)?
 - b. If any act took place more than three months less one day of the date on which the claim was presented to the Tribunal, does it form part of conduct extending over a period within the meaning of section 123(3) EqA?;
 - c. If the Tribunal finds that any act complained of was not part of conduct extending over a period (and was brought outside the primary limitation period), is it just and equitable for the Tribunal to exercise its discretion and extend the time limit for submission of those claims, in accordance with section 123(1)(b) EqA?
5. EJ Self ordered that the Claimant and the Respondent should exchange witness statements and that the Claimant should provide Further Particulars of the List of issues in order to identify the date / time period of the alleged discriminatory act as precisely as possible and to indicate if the acts of direct discrimination were also to be pleaded as acts of harassment. However, the Claimant had not understood what witness evidence was required for this hearing and did not feel able to provide the missing information in the List of Issues as he was no longer legally represented and had not been able to find alternative representation. The Claimant provided the missing dates during the hearing.

6. The Claimant's claims of direct race discrimination and/or harassment, as set out in the Order of EJ Self, ran from 2009 until 2020. Most allegations from 2009 – 2018 involved the Claimant not being supported to prepare for or not being appointed to a new role and are levelled at different employees. There was only one allegation during 2019 and that was in relation to his appraisal grade in June/July 2019 when he was given "achieved expectation" rather than "exceeded expectation".
7. All allegations of race discrimination/harassment/victimisation for 2020 were alleged to flow from the Claimant's end of year review which took place in July 2020, where the Claimant alleges that he made a complaint about the lack of development of himself and others of African descent.
8. The Claimant alleged that the following were acts of direct discrimination (and/or harassment) from 2020:
 - a. in July: Instigating an issue (nit-picking and pulling rank) around relief of an operator (Dave Lewis);
 - b. in July: Provoking an issue/reprimanding him about using his phone before a meeting (Dave Lewis);
 - c. in July: Making slanderous comments about Claimant to staff - Ms Davison that staff should not speak to the claimant as it would not be good for them professionally and that the claimant was a trouble maker; and
 - d. in August: Passively bullying the Claimant out of his role as ESF secretary by taking away the claimant's access to documents and not allowing the Claimant to publish documents in store (Dave Lewis).
9. The Claimant withdrew an allegation about what happened when he asked not to wear a face covering.
10. The Claimant's complaints of victimisation were based on the following alleged protected act:
 - a. Did the Claimant make a protected act by expressing, to Mr Di Biase in or around July 2020 in his end of Year Review, discontent over behaviours he had witnessed whereby there had been a perpetual lack of development of himself and others of African descent into leadership roles as compared to the quick succession of white colleagues.
11. The Claimant said that he was subjected to the following detriments by Dave Lewis in 2020:
 - a. Stating that if his complaints (about race) were taken forward, it would adversely affect his career (July);
 - b. Asserting that the Claimant was wrong to question management decisions (July);

- c. Attempting to coerce the Claimant to leave the Respondent (July);
 - d. Bullying and belittling the Claimant in front of other staff members (July);
 - e. Instigating an issue (nit-picking and pulling rank) around relief of an operator (July);
 - f. Passively bullying the Claimant out of his role as ESF secretary by taking away the Claimant's access to documents and not allowing the Claimant to publish documents in store (August); and
 - g. Provoking an issue/reprimanding him about using his phone before a meeting (July).
12. The Claimant alleged a further act of victimisation took place in July 2020 when Ms Davison made slanderous comments about the Claimant to staff e.g., that staff should not speak to the Claimant as it would not be good for them professionally and that the claimant was a trouble maker.

Findings of fact

13. The Claimant has been employed, and remains employed, by the Respondent as a "Specialist" since September 2009 in the Product Zone of a shop, the most junior role in the sales team.
14. The Respondent has a document retention policy that provides that recruitment records for unsuccessful candidates who are not hired should be retained for a maximum of 6 months from completion of the vetting exercise. The witness statement of Ms Otten confirmed, and it is accepted by the Tribunal, that the Claimant's personnel file contained no copies of internal applications or associated interview notes and that at the time the claimant made the applications there was no central repository for storing interview notes or outcomes of interview processes. The Tribunal further accepts the statement of Ms Otten when she said that she was not able to identify 8 of the individuals mentioned by the Claimant, four were no longer employed by the Respondent and four worked overseas. One of the employees who no longer worked at the Respondent was Ms Davison.
15. The first time the Claimant raised a grievance about any of the allegations was in July 2020 when he contacted the Respondent's Business Conduct team via email with a complaint that related to his allegations of discrimination by Mr Lewis in 2020. The grievance included allegations that Mr Lewis:
- a. Stating that if his complaints (about race) were taken forward, it would adversely affect his career;
 - b. Asserting that the Claimant was wrong to question management decision; and

- c. Attempting to coerce the Claimant to leave the Respondent.
16. The Tribunal accepts the Claimant's evidence that prior to July 2020 he thought you had to "put up or shut up" when you were treated badly at work. The Claimant told the Tribunal that he took advice from legal chambers in July 2020 who told him to raise a grievance. He also told the Tribunal that he took advice from the same chambers again at the conclusion of the grievance process and they told him to put in his claim. They were not employment specialists and the Claimant was unhappy with the work they had done for him. They are no longer instructed. The Tribunal accepts the Claimant's evidence that he does not recall being told about time limits when he took legal advice in July 2020 nor when he put in his claim. The first time he heard about time limits was when he received the Respondent's response. The Tribunal further accepts the Claimant's evidence that he did not know about time limits, he knew that the Citizens Advice Bureau advised on other matters as he had obtained housing advice from them in his youth, however the Claimant did not know that they advised on employment law.
17. The grievance was not upheld and an appeal took place in January 2021. The appeal decision was communicated by letter dated 11 February 2021. The Claimant contacted ACAS on 18 February 2021 and the certificate was issued on 23 March 2021. The Claimant submitted his claim on 22 April 2021.

Relevant law

Time Limits for discrimination

18. Section 123 of the Equality Act 2010 ("EqA") provides that no complaint may be brought after the end of:
- (2) *(a) the period of three 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.*
- (3) *For the purposes of this section*
- (a) conduct extending over a period is to be treated as done at the end of that period*
 - (b) failure to do something is to be treated as occurring when the person in question decided on it".*
19. An act will be regarded as extending over a period if an employer an "ongoing situation" or a "continuing state of affairs" which can be contrasted with a "succession of unconnected or isolated specific acts": *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530 at [52]. When considering whether separate incidents form part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents" (*Aziz v FDA* 2010 EWCA Civ 304, CA).
20. s.140B EqA 2010 provides an extension of time to ensure that the period between the date when the prospective claimant contacts ACAS and the date when the prospective claimant receives or is treated as receiving the ACAS Early

Conciliation Certificate does not count towards the three-month primary limitation period.

21. If the claim is presented after the relevant three months, the tribunal may still have jurisdiction if, in all the circumstances, it is “just and equitable” to extend time. The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time (*Robertson v Bexley Community Centre* [2001] UKEAT 1516/00, [2003] IRLR 434).
22. There is a “very broad general discretion” conferred on tribunals to decide whether it is just and equitable to extend time *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 per Underhill LJ at [37]. The “best approach” is for the Tribunal to “assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular ... ‘the length of, and the reasons for, the delay’” (paragraph 37).
23. Mr Randle drew the Tribunal’s attention to *Bowden v Ministry of Justice* (Appeal No. UKEAT/0018/17) (unreported, 25 August 2017): Where a claimant alleges ignorance as the basis for not having pursued a claim, the same questions as are relevant to the ‘reasonable practicability’ test are to be considered. In particular the assertion of ignorance must be genuine and the ignorance, whether of the right to make a claim at all, the procedure for making it or the time within which it must be made, must be reasonable (see paragraphs 37 – 38).
24. In *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132, the EAT has held that, when considering whether it was just and equitable to extend the time limit for presenting discrimination complaints, or to grant an application to amend to add a further out of time discrimination complaint, the tribunal was entitled to weigh in the balance its assessment that the merits of the proposed complaints were weak.
25. In *Concentrix CVG Intelligent Contact Ltd v Obi* [2022] EAT 149 the Employment Appeal Tribunal rejected the respondent’s argument that the claimant’s failure to provide an explanation for the delay meant that the tribunal must reach the conclusion that time could not be extended. However, the tribunal had erred in only taking into account the forensic prejudice to the respondent in the one day that the claimant had delayed in bringing her claim rather than the whole period of eight months over which the conduct extending took place.

Decision

26. The Claimant contacted ACAS on 18 February 2021 and a certificate was issued on 23 March 2021. The Claimant lodged his claim on 22 April 2021. As every allegation of race discrimination/harassment and victimisation took place before 19 November 2020 they are outside the primary time limit. The question is then whether or not it is just and equitable to extend time for each allegation.
27. The Claimant did not know about time limits in employment tribunal claims until he received the Respondent’s response. Was this reasonable? He had received

advice from the Citizens Advice Bureau on housing in his youth, he did not know that they also advised on employment law. He thought you had to “put up or shut up” with bad treatment at work. Once the Claimant took legal advice in July 2020 it is reasonable that he knew about the ability to bring a claim, however he was not told about time limits and he remained ignorant of this fact until after he had submitted his claim. The Claimant did not have legal experience and worked as a “Specialist” since September 2009 in the Product Zone (sales) of a shop, the most junior role in the sales team. If you have not been told about time limits then why would you make enquiries about their existence? In the particular circumstances of this case and having heard and accepted the Claimant’s evidence, the Tribunal concludes that it was reasonable that the Claimant did not know that he had to bring his claims within 3 months (plus ACAS conciliation extension).

28. The first time the Claimant complained to the Respondent was in July 2020 when he contacted the Respondent’s Business Conduct team via email with a complaint that related to his allegations against Dave Lewis in 2020. The Claimant had not raised a grievance about the issues occurring prior to 2020. The Respondent has no copies of the Claimant’s applications for various posts and many of the employees involved no longer work for the Respondent.
29. The Tribunal has a very broad general discretion to decide whether it is just and equitable to extend time (*Adedeji*). Taking the pre-2020 allegations first. There is prejudice to the Claimant if he is not permitted to bring his claims. However, the delay is extremely long, ranging from 11 years to over a year. The Claimant did not know about time limits in the Tribunal and had not taken legal advice at the time but the Claimant did not even complain about these incidents to the Respondent and so they were not on notice that he was aggrieved about them. The Respondent does not have documentation relating to the Claimant’s job applications, and many of the employees involved are not identifiable or no longer work for the Respondent. Had the Claimant submitted his claim within the statutory time limit (plus ACAS early conciliation extension) they would have been able to speak to witnesses and review any documentation. The Tribunal concludes that there would be serious forensic prejudice to the Respondent if the 2009 – 2019 allegations were allowed to progress. Assessing all the factors, the Tribunal concludes that it is not just and equitable to extend time in relation to the 2009 – 2019 allegations.
30. The 2020 direct race discrimination/harassment and victimisation complaints took place between July and August 2020 and so were brought between 3 and 4 months late. The Claimant did take legal advice before raising his grievance but that advice was not from employment specialists and he does not recall being told about time limits. The reason why the Claimant delayed in bringing his claim was that he, reasonably, did not know about time limits. In his grievance, the Claimant included three allegations of what he now brings as victimisation detriments following his appraisal. The appeal decision in relation to his grievance was communicated on 11 February 2021 and the Claimant took legal advice and promptly contacted ACAS a week later, on 18 February 2021. The Respondent has suffered some prejudice in respect of the delay. In respect of the matters complained about that were not contained in the Claimant’s

grievance, the Respondent was not on notice that the Claimant had a complaint and so was not able to speak to witnesses and preserve evidence. Ms Davison has left the Respondent. While the Claimant would be prejudiced if time is not extended as he would not be able to pursue his complaints, the Tribunal concludes, assessing all the factors, that the forensic prejudice to the Respondent outweighs the prejudice to the Claimant and it is not just and equitable to extend time in respect of the 2020 complaints that were not contained in the Claimant's grievance.

31. The Tribunal concludes that it is, however, just and equitable for time to be extended in respect of the 2020 complaints of victimisation which the Claimant raised in his grievance. The reasons are those as set out above but the difference here is the fact that the Respondent was on notice of the Claimant's complaint from around July 2020 when he raised his grievance. The grievance was investigated by the Respondent through to the appeal stage to January 2021 and the appeal decision was made a week before the Claimant contacted ACAS. Assessing all the factors, the balance tips towards the Claimant as he would suffer greater prejudice if he was unable to bring these complaints which the Respondent was squarely on notice of and so does not suffer much prejudice from the delay.

EJ L Burge
18 October 2022

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