EMPLOYMENT TRIBUNALS

Claimant: Ms L Muhumza

Respondent: Royal Hospital Chelsea

Heard at: London Central **On:** 4 May 2023

Before: Employment Judge Joffe

Appearances
For the claimant: Mr T Akinsanmi, friend
For the respondent: Mr M Curtis, counsel

JUDGMENT

1. The respondent withdrew the job offer it had previously made to the claimant on 1 February 2022.

2. The claimant's claims were presented outside the time limit in section 123 Equality Act 2010.

3. It would not be just and equitable to extend time for the claims to be heard.

4. The claimant's claims under these case numbers are dismissed.

REASONS

Issues

5. This was an open preliminary hearing to determine two issues identified by Employment Judge N Walker at a case management preliminary hearing on 17 February 2023:
    a. What was the date on which the respondent committed the alleged act of discrimination – was it 1 February 2022 as alleged by the respondent or 16 May 2022 as argued by the claimant?

b. If it was 1 February 2022, so that the claimant's claims are out of time, would it be just and equitable to extend time so that the claim is in time?

6. The single act of alleged discrimination identified by Employment Judge Walker was the withdrawal of a job offer made by the respondent to the claimant.

The hearing

7. Employment Judge Walker had given directions for a bundle and witness statements to be prepared for this hearing. The date for the bundle to be provided to the claimant by the respondent had been varied to 11 April 2023. I saw documentary evidence that a bundle had been emailed to the claimant and Mr Akinsanmi on that date although Mr Akinsanmi had told me that the bundle was only provided about a week before this hearing.

8. Prior to the hearing, the claimant had applied for a postponement on the basis that a hard copy of the bundle had not been provided. Mr Akinsanmi is blind and it was said that this was why he required a hard copy bundle. There was no provision in Employment Judge Walker's orders that the bundle be provided in a particular format.

9. I discussed the matter with Mr Akinsanmi at the outset of the hearing. He was not applying for a postponement as such, but he was applying for specific disclosure of some documents, which order might then have necessitated a postponement. Employment Judge Walker's orders provided for general disclosure to take place in the claims after the date of this open preliminary hearing. No disclosure was ordered to take place before that date.

10. The documents Mr Akinsanmi was seeking were:

    a. Advice the respondent had received from the Home Office about the claimant;
    b. Correspondence about the claimant's DBS check;
    c. Measurements taken by the respondent to obtain a uniform for the claimant.

11. Mr Akinsanmi told me that at the case management preliminary hearing, Mr Curtis had undertaken on behalf of the respondent to disclose these documents.

12. Mr Curtis consulted his notes of that hearing and said that his recollection was that Mr Akinsanmi had been keen to get hold of the DBS correspondence and that Mr Curtis had said those documents could be provided but the assumption was that that would be as part of disclosure for the main hearing. He had no recollection or note of the other documents being requested.

13. It seemed to me that if there had been a discussion about documents being voluntarily disclosed for the purposes of the open preliminary hearing, the likelihood is that this would have been recorded in the case management summary and it was not.

14. More importantly, nothing Mr Akinsanmi said persuaded me that the documents would cast any light on the question of when the job offer had been withdrawn and whether it would be just and equitable to extend time. He said that these documents would show how the respondent had misled the claimant into believing she had the job. All of that alleged misleading related to the period before the job offer was withdrawn and did not cast light on when the withdrawal took place. He said that he could have developed his arguments better with the whole correspondence and chronology but he did not explain to me how these documents would have any bearing on the two issues I had to decide. I accordingly did not make an order for specific disclosure and decided that the open preliminary hearing should proceed.

15. The claimant had not produced a witness statement and, when I asked Mr Akinsanmi, he said that she was not proposing to give any evidence.

16. The materials I had therefore were a hearing bundle of 94 pages, largely comprising pleadings and orders but also including a small amount of correspondence between the parties and skeleton arguments from Mr Curtis and Mr Akinsanmi, which they supplemented with oral submissions.

Findings

17. My findings are based on documentary evidence and uncontroversial facts.

18. The claimant was offered a job as a care assistant by the respondent on 22 November 2021, subject, amongst other things, to references, a DBS check and proof of right to work in the UK.

19. Various things took place after that date preparatory to the claimant starting work and in furtherance of those conditions to her employment being met.

20. On 1 February 2022, Ms Sweetland. HR advisor for the respondent, wrote to the claimant:

    I am sorry I have not been available to answer your calls.
    As your Indefinite Leave to Remain visa is in an expired passport I had to seek further advice. The Government website (Transfer your visa from your passport - GOV. UK(www.qov.uk)) states that unfortunately I cannot accept a valid visa in an expired passport as proof of your right to work in the UK. Should you wish to change jobs you must replace your visa with a biometric residence permit and details on how to do this can be found at this link [link provided]

    Unfortunately as I am unable to prove your right to work in the UK I must withdraw the offer of employment made to you. However, please do get in contact once you have received your Biometrics Residence Permit.

21. The claimant replied:
    Dear Emma thank you please I can bring new passport tomorrow please

22. Ms Sweetland then sent the following email:
I have a copy of your new passport. The problem is your visa is in an expired passport and cannot be accepted as proof of your right to work in the UK. Once you have a Biometric Residence Permit please let me know.

23. Nothing further happened on either party's account until May 2022.

24. On 16 May 2022, the claimant emailed Ms Sweetland:
I hope you are doing well This is information from home office

25. She attached an email telling her that she could re-take her 'Life in the UK' test (part of her application for citizenship) which went on to say:

if, as discussed in our recent telephone conversation, you need to prove your current immigration status to a potential employer, you can find details on how to apply for No Time Limit on our website.

26. Ms Sweetland replied to that email to say that it was lovely to hear from the claimant and that, once her citizenship was approved, she should contact Ms Sweetland, who would let her know if there were any vacancies.

27. On 12 August 2022, the claimant contacted Acas to start Early Conciliation. On 15 August 2022, Early Conciliation ended.

28. 17 August 2022 is the date of presentations of the claimant's first claim form. Her further claim form raising the same complaint but with an attachment setting out the chronology of events was presented on 22 August 2022.

29. In that document the claimant described the 16 May 2022 communication as 'further communication stating that the job offer has been withdrawn'. However in the timeline attached, she said this about the 1 February 2022 email from Ms Sweetland: 'The final paragraph states that the offer of employment has been withdrawn but I can get in contact once I have received a biometric residence permit.'

Law

30. The starting point is section 123 Equality Act 2010 which provides that there is a three month time limit for applications to the Tribunal (subject to an extension by the Early Conciliation period, period as appropriate). Time can be for an otherwise out of time complaint extended if it is just and equitable to do so.

31. The discretion to extend time is a wide one. In British Coal Corporation v Keeble and ors 1997 IRLR 336, the EAT confirmed that it is relevant to look at factors in section 33 of the Limitation Act 1980, which requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: 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 has cooperated with any requests for information; the promptness with which

the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. In Southwark London Borough Council v Afolabi 2003 ICR 800, the Court of Appeal confirmed that, while the checklist in section 33 provides a useful guide for tribunals, it need not be adhered to slavishly.

32. It is for the claimant to persuade the Tribunal that the discretion should be exercised in her favour: Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327.

33. The merits of the claim may be a relevant factor when deciding whether to extend time: Lupetti v Wrens Old House Ltd [1984 ICR] 348, EAT.

34. Lack of a good reason or any reason for the delay does not mean that the discretion will inevitably be exercised against the claimant: Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA.

Conclusions

First issue: when was the job offer withdrawn?

35. Although Mr Akinsanmi argued that there was ambiguity in the email of 1 February 2022 – in that Ms Sweetland said she *must withdraw* the offer but not that *she was withdrawing* it, I did not conclude that that was a reasonable interpretation of the emails. I accepted that the effect of the emails was to withdraw the offer and that was consistent with the respondent not attempting to contact the claimant thereafter.

36. However I go on consider in due course, as part of the discretion to extend time, whether the claimant might have misunderstood when the offer was withdrawn and that could have been the reason for the delay in presenting the claim.

37. Once a conclusion is reached that 1 February 2022 was the date of the only alleged act of discrimination, the claim form was clearly out of time. Early Conciliation was not started until after the expiry of the primary limitation period and so there is no extension of that period. The claim form should have been submitted by 30 April 2022 and was instead submitted over three months later.

Second issue: Is it just and equitable to extend time?

38. I considered carefully what material there was on the basis of which I could exercise my discretion to extend time.

39. Although he suggested that there were delays in the world in general because of the pandemic and that the Tribunal system was itself experiencing a backlog, Mr Akinsanmi did not identify any connection between Tribunal delays and the claimant's delay in submitting her claim. This was not therefore a relevant

factor. He also referred to some uncertainty as to whether the claim form should be presented at London South or London Central, but any such uncertainty did not explain the delay in commencing Early Conciliation.

40. Ultimately it appeared that the reason put forward for the delay was that the claimant understood that the job offer had been withdrawn in May 2022 rather than by the earlier date.

41. In the absence of oral evidence given by the claimant to that effect, I am unable to reach a conclusion as to whether the claimant was genuinely mistaken but it seems to me unlikely that I would have been persuaded that was the case, looking at the documentary evidence.

42. It seemed to me that it was just about possible that someone could understand Ms Sweetland's correspondence of 1 February 2022 as indicating that the role might still be open to the claimant if she received a biometric residence permit. However, it also seemed to me that if the claimant had believed that was the case, there would likely have been further contact with the respondent between February and May 2022 – with the claimant updating the respondent as to how she was getting on and probably checking how long the role might remain open to her as weeks and then months went by.

43. What seems more likely is that she believed what it appears Ms Sweetland intended which is that she could be considered for future vacancies once she had evidence of her right to work. I also bear in mind the wording of her claim form which appears to confirm that she knew that the offer had been withdrawn on 1 February 2022.

44. I did not hear any submissions as to the effect of delay on the cogency of the evidence or any specific prejudice to the respondent.

45. The main factors I can take into account are that there has been a significant delay with no credible explanation and the fact that in respect of the single allegation, EJ Walker made a deposit order, because she found that that claim had little reasonable prospect of success.

46. Looking at the balance of prejudice, I concluded that there is little prejudice to the claimant in being deprived of a claim with little reasonable prospect of success and substantial prejudice to the respondent in having to defend such a claim. Taking that factor together with the lack of explanation for the delay. I concluded that it would not be just and equitable to extend time for the claims.

47. It follows that the Tribunal has no jurisdiction to hear the claimant's claims and they are dismissed.

Employment Judge Joffe
05/05/2023

Sent to the parties on:
05/05/2023