



EMPLOYMENT TRIBUNALS

Claimant: Mr C Drake

Respondent: Credit Suisse Services AG

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

On: Monday 13 September 2021

Before: Employment Judge Russell

Representation

Claimant: Mr P Starcevic (Counsel)

Respondent: Mr C Stone (Counsel)

JUDGMENT

- (1) The claim was brought out of time.
- (2) It is not just and equitable to extend time, all claims are dismissed.

REASONS

1 The Claimant presented a claim in the Employment Tribunal on 29 January 2021 following a period of ACAS early conciliation which started on 16 November 2020. The claim form named the Respondent and a number of individuals as parties but only the claim against the employer was accepted. That decision has not been challenged. The Response averred that the claim was presented out of time and accordingly an Employment Judge decided that today should be a Preliminary Hearing to decide whether the Tribunal has jurisdiction.

2 The Claimant is employed as a Vice President with the Respondent, an international financial institution. The Claimant and a number of his colleagues were members of a WhatsApp group in which they exchanged chat messages. Over a period of approximately two years, the Claimant says that he was the recipient of a number of chats from his colleagues in which inappropriate comments or jokes were made about his perceived sexuality. In particular, he relies upon a number of chats between 6 February 2019 and 19 January 2020 in which he was likened to a British/Brazilian reality television personality called Ms Jessica Alves. Ms Alves was born male and has undergone a

number of plastic surgery operations to transition from male to female and to change her appearance generally. The Claimant's case is that comments made were offensive and related to sexual orientation. As this is a preliminary hearing to deal with time, I have not had to resolve whether or not the chats are harassment related to sexual orientation (which the Respondent denies). I have proceeded on the assumption that the Claimant will show that that the last of the chats on 19 January 2020 was an act of harassment and that ACAS Early Conciliation should have started by 18 April 2020.

3 The Claimant commenced a period of sickness absence on 24 February 2020 and has not yet returned to work.

4 The Claimant was seen by his GP on 7 February 2020. The notes of the consultation refer to workplace bullying and that the Claimant felt his colleagues were trying to push him out. The Claimant described a feeling of "coming down", saying that he no longer attends the gym regularly and at weekends he sometimes does not get dressed. He was prescribed Propanalol. He saw the GP again on 24 February 2020, presenting with depressed mood, stating that he is not much better in terms of anxiety and feels that he has no choice but to take time off work. The GP's view was that he had flat mood and reactive effect but was well groomed and had no thoughts of self-harm. The Claimant was prescribed with anti-depressant medication.

5 The Claimant was referred to the Respondent's Occupational Health provider. In a telephone consultation on 18 March 2020, the Claimant made no complaint of harassment or discrimination related to sexual orientation but described workplace stresses including pressure to perform tasks that he perceives to be irrelevant to the contractual role and experience involved and interacting with large audiences which was difficult due to the underlying anxiety. The Occupational Health physician noted that the Claimant's anxiety levels have been elevated and he remains concerned about the security of his role. Under the heading "current position", the Occupational Health report records the Claimant saying that he is feeling anxious, not sleeping particularly well, generally feeling lethargic and has found himself procrastinating. The Claimant is said to be clearly anxious, but he engaged effectively and provided a coherent account.

6 The Claimant was seen again by his GP on 24 March 2020 and again the problem is given as depressed mood. He reported on that occasion that his mood had been up and down, medication had helped, there was no suicidal ideation and that he had spoken to a mental health charity in the past with regard to difficult situations. The Claimant's dose of Citalopram was increased.

7 The next GP consultation was on 27 April 2020 and the Claimant said that he had been suffering what he described as bullying at work with regard to his sexuality and gender. He felt that he was not in a position to take legal advice but had spoken to HR the previous week. The Claimant was due to start counselling sessions. The GP advice was that both would be helpful and that it was important to discuss matters with HR as the comments about sexuality and gender are not appropriate or legal. The note records that the Claimant was aware of this but felt that he could not tackle it at this point.

8 The Claimant was seen again by Occupational Health on 28 April 2020. The Claimant said that on some days he still lacked the energy to do anything, was still quite flat and lethargic with a poor appetite. He remained anxious thinking and talking about work but was engaging with his GP and starting to open up to her and was also speaking

to a friend who was helping him to collect and compose his thoughts. The Occupational Health report said that during the appointment, the Claimant spoke quietly and appeared anxious at times and flat in mood.

9 A further Occupational Health assessment on 1 June 2020 recorded that therapy sessions had provided limited benefit and that the Claimant spoke about workplace stress and a systematic bullying campaign against his sexuality and gender. It records that he continued to suffer with heightened anxiety and his other symptoms had largely remained the same. The report refers to the Claimant having been asked to provide some documents for Legal & General and had required further advice and support before responding to some of the questions. In conclusion, the Claimant continued to experience symptoms of low mood and anxiety and would benefit from further therapy.

10 The Claimant saw his GP again on 22 June 2020, again reporting depressed mood. The note says that he was finding it difficult to confide in friends as it was embarrassing but had been speaking to Occupational Health and HR about whether or not he was well enough for HR to investigate his allegations of bullying and the chats about gender and sexuality. Medication was said to be helpful.

11 The next relevant GP record is for 22 September 2020. The Claimant is recorded as feeling more anxious and his Citalopram was increased. This note says that the Claimant was seeking legal advice and reaching out to friends and family for support.

12 The Claimant saw his GP on a number of further occasions through to the end of December 2020 but there is nothing material for the purposes of this preliminary issue on time, other than a reference in the entry for 21 December 2020 stating that the Claimant had now obtained legal advice and was considering an Employment Tribunal.

13 The Claimant provided a witness statement for today's hearing and confirmed its contents on oath. In essence, the Claimant's case is that when subjected to the inappropriate WhatsApp group chat messages, he felt upset and offended. He says that he asked the perpetrators individually to stop the abuse and told them that he found the comments deeply upsetting but this only seemed to fuel the bullying, so he did not do so again. The Claimant summarised his attendances at the GP as set out above.

14 In addition, the Claimant's evidence was that the effect upon his mental health was exacerbated by the Covid-19 Pandemic, with an increased feeling of isolation as he lived alone throughout the lock down period. The Claimant says that the increase in the dose of anti-depressants on 22 September 2020 was due to the stress of the potential work investigation and the added stress of taking legal advice which had been made possible by the counselling sessions. The Claimant's evidence is that he suffered significant side effects from his prescribed medication including memory loss, feelings of uselessness, migraines, disrupted sleep due to nightmares and was generally incapacitated by his spiralling depression. He said that in the period up to June 2020, he felt so incapacitated by reason of mental health that he spent the majority of his days essentially unable to get out of bed. From the summer of 2020, this happened on approximately three or four days a week.

15 The Claimant confirmed in oral evidence that he had obtained some legal advice from a Direct Access Barrister, Mr Frew, in or around June or July 2020. This is consistent with the GP records and the apparent improvement in his health at that point

such that he was able to begin to address the workplace issues which he believes had caused his ill-health. He had begun to search for solicitors on Google but was put into contact directly with Mr Frew by a mutual friend. He did not contact the Citizens Advice Bureau although he knew that the organisation existed and were able to give legal advice.

16 The Claimant did not start ACAS Early Conciliation until 16 November 2020. The conciliation period ended on 30 December 2020. The ET1 was presented on 29 January 2021.

17 I accept the Claimant's evidence that he experienced poor mental health throughout 2020 and that this affected his ability to deal with the issues at work. However, poor mental health does not necessarily prevent the presentation of a claim to the Tribunal. The Claimant relies upon the side effects of his medication including memory loss, listlessness, migraines and disrupted sleep. However, the contemporaneous medical evidence does not support his evidence that these were as severe as suggested today. I do not find credible or plausible the Claimant's evidence that in the period up to June 2020, he felt so incapacitated by reason of mental health that he spent the majority of his days essentially unable to get out of bed.

18 The Claimant remained at work until 24 February 2020 (a period of just over a month after the last chat complained about). The contemporaneous notes by the GP and the Occupational Health physician in February, March and April 2020 refer to lethargy and difficulty sleeping, lacking energy to do anything. There is no reference to being unable to get out of bed, far less that this was happened most days. The contemporaneous medical evidence does not support the Claimant's evidence that he was so unwell that he could not deal with his affairs and presented a claim especially as in March 2020 his mood was up and down and medication was helping.

Law

19 There is no dispute that as the last act alleged occurred on 19 January 2020, the claim is out of time. I was taken in great detail by both Counsel to a number of authorities dealing with extensions of time.

20 Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

21 If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended but nor is there any magic to that phrase and it should not be applied too vigorously as an additional threshold or barrier.

- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;
- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues. This will involve an assessment of two types of prejudice as referred to in the authorities. The first is the general prejudice that inherently follows from being required to respond to a claim which is presented out of time (the prejudice of meeting the claim). The second is the effect upon the evidence of the delay (sometimes referred to as forensic prejudice).
- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble** (length and reason for delay, effect on cogency of evidence, cooperation, steps taken once knew of the possibility of action).

22 The best approach for a Tribunal considering the exercise of its discretion to extend time is to assess all the factors in the particular case. These will include the public interest in the enforcement of time limits and the undesirability in principle of investigating stale issues, **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

Conclusions

23 The Respondent does not rely upon any specific prejudice caused by the passage of time, such as witnesses no longer available, but does rely on the passage of time between the chat messages (latest 19 January 2019) and the final hearing of the claim (listed for December 2022). The claim was presented 9 months late and the allegations will be stale by the date of the final hearing. Moreover, the Respondent submits that the Claimant's reasons for the delay are not so compelling as to render it just and equitable to extend time, not least as he was able to seek and obtain legal advice as early as June 2020.

24 The Claimant's case is that the potential forensic prejudice is minimal as the chats exist and speak for themselves, irrespective of the delay. To some extent, that is true however the Respondent resists the claim in part on the basis that the Claimant was a willing participant in the group chats, actively posting similar what is described as "banter" type of comments. In other words that it would not be reasonable for him to have been offended or for the conduct in question to have had the prescribed effect. In his witness statement, the Claimant says that he orally asked each participant in the chat to stop as he was upset by their comments. These are matters which will all need to be considered and will rely upon oral evidence sometime after the event. For those reasons, I do not accept that there is minimal prejudice caused to the Respondent by the lengthy delay caused by late presentation of the claim. There is significant forensic prejudice as well as

the additional prejudice to the Respondent of being required to meet the claim against it at all.

25 Insofar as Mr Starcevic relied upon the internal grievance procedure as an answer to the prejudice of the evidence being stale, it is important to note that no detailed investigation was possible. HR were notified of the Claimant's complaints by the content of the June 2020 Occupational Health Report. HR sought proactively to investigate what were clearly serious allegations and contacted the Claimant. The Claimant did not feel ready to participate in the investigation, he did provide the chats but it was not until November 2020 that he gave permission for HR to use them in any internal investigation. In other words, there had been no substantive investigation nor could there be prior to November 2020. As a result, I do not accept that there was a contemporaneous internal investigation of the claims now brought which would address the prejudice of evidence becoming stale by reason of the delay.

26 As for the length of the delay more generally, there is no table or guideline as to what length of delay is excusable and what is not. It will depend upon the facts of the particular case overall. Undoubtedly, a nine month delay in presenting the claim is lengthy. Even after ACAS Early Conciliation eventually started in November 2020, the claim was not presented for a further two months.

27 The Claimant's health during the period of the primary time limit and subsequently is plainly relevant to whether it is just and equitable to extend time. As set out above, the Claimant was able to attend work until 24 February 2020 and, by inference, able to deal competently with administrative and day to day matters, such as researching the steps to bring a Tribunal claim. Being signed unfit for work is not of itself sufficient evidence of an inability justly and equitably to deal with and bring a claim in the Employment Tribunal nor is being depressed. There are many Claimants who suffer with mental health problems, take medication and have counselling and are nevertheless able to deal with their legal affairs. The lockdown period was undoubtedly difficult and I accept that the Claimant would have felt more isolated and that it was difficult to take legal advice. However, as set out above, I have not accepted that the Claimant was as incapacitated as he stated in evidence today. Even if difficult for him, he was able to take steps to enforce his employment rights by taking legal advice by June or July 2020 at a time when he was only two or three months outside of the primary time limit.

28 By June 2020, the Claimant had benefitted even if only to a limited extent from counselling and his medication was helping. With support, he had been able to submit documents to an insurance company. He had been able to discuss with his GP and the Occupational Health physician the allegations of bullying because of sexual orientation and to speak to HR about possible further internal investigation. He had the support of a good friend and had taken legal advice. I conclude that at the very latest by July 2020, the Claimant should have been looking to present his claim without additional delay. There is no adequate explanation for why he failed to do so, particularly with the support of a direct access barrister.

29 The Claimant's health deteriorated around September 2020 but even the GP note for 22 September 2020 refers to him seeking legal advice and reaching out to friends and family. There is no medical evidence to explain the further delay to November 2020 when the ACAS Early Conciliation process was initiated. Whilst the Tribunal is not entitled to know the content of advice from a legal professional, the Claimant obtained advice from a

barrister and it is a fair inference that he either was or should have been aware in June or July 2020 that as the primary time limit had already expired it was incumbent upon him to act with particular haste to submit his claim. Yet, nothing was done until November 2020.

30 There is no adequate medical explanation for the delay between November 2020 and the actual presentation of the claim on 29 January 2021. The only GP reference in this time being to an intention to bring Tribunal proceedings but the Claimant waited another month before doing so.

31 Looking at the prejudice to the Claimant, I accept that as there are no other complaints brought in time, a decision not to extend time will cause him significant prejudice as all of his current claims are struck out. This will deprive him of the opportunity to have an adjudication of his claims on their merits. However, that has to be balanced against the significant prejudice to the Respondent caused by such a lengthy delay and its effect upon the cogency of the evidence.

32 I have not gone through each of the **Keeble** factors as a rigid checklist but have considered them as part of the overall assessment of justice and equity. Having regard to fairness, justice and equity to both parties and in particular the ability to have a fair trial, I am not satisfied that it is just and equitable to extend time in this case.

33 For these reasons, the claims are dismissed in their entirety.

Employment Judge Russell

5 January 2022