



EMPLOYMENT TRIBUNALS

BETWEEN

MR R GODFREY

Claimant

- and -

MIZUHO INTERNATIONAL PLC

Respondent

Heard at: OPH, held London Central, by CVP

On: 8 September, 2021

Before: Employment Judge O Segal QC

Representations

For the Claimant: In person

For the Respondent: Ms S Tharoo, counsel.

JUDGMENT

This claim is dismissed as being presented out of time.

REASONS

1. The Claimant (“C”), by an ET1 presented on 14/11/20, brought complaints pursuant to ss 13 and 15 of the Equality Act 2010 (EqA), following the withdrawal by the Respondent (“R”) on 2 April 2013 of a job offer it had made to C on about 20 March 2013.
2. C suffers from an autistic spectrum disorder (“ASD”), which amongst other things has the effect that C can appear awkward, difficult, odd in social interactions, including at work.
3. This Preliminary Hearing was ordered to determine:-
 - a. Whether the claim brought, which was presented some 7 years out of time, should be dismissed on the grounds that the tribunal did not have jurisdiction to hear it, or whether time should be extended in respect of it.
 - b. Whether to strike out, alternatively to order a deposit be paid in respect of the claim, by reason of it having no or little reasonable prospect of success.
 - c. If the claim is not dismissed/struck out, whether C should be allowed to add further claims in respect of attempts to secure employment with R on occasions between (as most recently suggested by C) 2014 and 2018.
4. At the outset of the PH the Claimant sought an adjournment on the basis that he had not been able to procure NHS records of his treatment in 2020, which he said would explain in detail his condition as well as supporting his case that he was unaware of his condition and its severity prior to a time shortly before presenting his claim in November 2020.
5. I refused the application to adjourn for the following reasons:
 - a. For the purposes of the OPH today, I would assume that any fact relied on by C was accurate unless obviously wrong, including his understanding of his condition and when he became aware of it/its severity.
 - b. It seemed to me that those documents would not be relevant to the PH issues (other than in that one respect).

- c. The tribunal had in any event a report at [177], dated I was told about September 2019, from a Consultant Forensic Psychiatrist (“**the Expert Report**”) which summarised clearly C’s condition of ASD and its effect on his social interactions, commenting that C’s social difficulties “*often look like behavioural or attitude problems*”.
6. I decided that the tribunal would deal with the application to extend time first, and that if other matters remained to be determined I would do so after reaching a decision on that issue.

Facts

7. I had a bundle of 177 pages, including – though only provided by R about 24 hours before the hearing – contemporaneous notes of those who interviewed C in March 2013 and those to whom R spoke in seeking references/information about C at that time, together with letters and emails between the parties in March/April 2013.
8. I heard evidence from C. I say immediately that Mr Godfrey was attempting to assist the tribunal by giving truthful and candid evidence on all relevant matters.
9. C applied for employment with R in March 2013. He was interviewed and impressed those who interviewed him. They described him, as regards how he presented, according to the contemporaneous notes, as “*friendly and personable ... personable ... presents himself well ... measured and personable ... fitting in here*”.
10. Those with whom C had worked and who were approached by R for information about C at this time, spoke well of C. In respect of his personality and interactions with others, it is recorded that “*He comes over as nervous because socially he is and can be a little timid in social settings. ... immaturity ... nice guy ... didn’t understand the politics ... had a good rapport with [clients] ...*”.
11. C did not know at the time he might have a disability as defined by law and did not disclose one to R.
12. R made C a job offer with a 5-day period for acceptance, which period C told me – and I accept for the purposes of today’s PH – would in practice always be extended to allow negotiations etc. C sought to negotiate certain terms, including his notice

period in the coming days, on one occasion speaking by phone to HR who told him R would not change the notice period. That phone call apparently was ended abruptly by C.

13. On 25 March 2013, an AXA OH Physician certified C as fit to work as a trader.
14. On 27 March one of the decision makers at R, Graham Halliday (“GH”) informed C that his behaviour on the phone call to HR had caused a problem. It appears C and GH spoke about the position shortly afterwards. Within the next day or so, C had phoned the relevant HR officer to apologise.
15. On 2 April 2013, R wrote to C: *“Further to your conversation with Graham Halliday, I can confirm that our Offer Letter dated 21st March 2013 has now expired and we will not be extending the deadline for the reasons discussed.”*. I consider it a fairly safe inference that the ‘reasons discussed’ related solely or mainly to the telephone interaction between C and HR referred to above.
16. C says that, at trial, he would be able to show in addition that:
 - a. There was a division of opinion at R whether to extend the offer of employment.
 - b. It was well known within a relatively small overall ‘market’ that C sometimes behaved oddly.
 - c. Those who knew C best, including some of those whom R had approached in March 2013, were concerned by C’s behaviour and that it might be due to a mental health issue.
17. Finally, and this is significant, C says that the above evidence would enable him to show at trial that the narrative to be inferred from the contemporaneous documents referred to above is at best incomplete and perhaps materially inaccurate; that the decision makers at R did have sufficient information/understanding of C’s behaviour in social situations/at work to constitute constructive knowledge of a disability and that this is why the job offer was withdrawn, even though (he accepted) on the face of those documents no such case could be made out.

The law

18. It was common ground (and I therefore do not set out the relevant provisions and authorities) that:
- a. The decision whether to extend time was on the basis whether it would be just and equitable to do so.
 - b. That allowed tribunals a wide discretion.
 - c. However, that discretion had to be exercised in accordance with case law which identifies the primary matters to be considered, namely:
 - i. The length of and reasons for the delay.
 - ii. The respective prejudice to the parties in granting/refusing the application.
 - iii. The underlying merits of the claim (though no ‘mini-trial’ is to be undertaken).

Discussion

19. The delay of over 7 years is exceptionally long.
20. I accept C’s explanation for that delay, namely that it was only in 2019 that he was diagnosed with ASD and only late in 2020 that he realised the full significance of that as regards the effects on his behaviour and the potential causative link between his ASD and the revocation of R’s job offer in 2013.
21. I accept that C would be significantly prejudiced if his claim were not allowed to proceed. He has lost in full/partial earnings significant sums of money by not being employed by R and, he asserts, has been deprived in effect of pursuing his precise chosen career by reason of the ‘public’ rejection by R in 2013.
22. However, I also accept that R would be significantly prejudiced if the claim were permitted to proceed, in particular in circumstances where there are contemporaneous documents which would seem to undermine the claim, and where C would therefore need to cross-examine R’s witnesses (some 9 years after the event; the earliest hearing would be in the spring of 2022) on the basis of their personal recollection of

precisely what they knew about C and when, relative to the material date of 2 April 2013. It may also be, as Ms Tharoo suggested, that other relevant documents have now been lost. I also note that only one of the four decision-makers is still employed by R (though another has, C told me, only recently left R).

23. As to the merits of the claim, I am prepared to assume for the purposes of this application (though I do not decide the point) that the job offer was withdrawn because of C's behaviour during the phone call to HR and that this behaviour was something 'arising from' his ASD. I am also prepared to assume (again without deciding the point) that C's ASD was and is a disability within the meaning of the 2010 Act.
24. Even on those assumptions, however, there is a fundamental difficulty for C in establishing that R had in April 2013 the relevant constructive knowledge. The contemporaneous documents suggest otherwise: that R believed to be personable and well liked, if sometimes somewhat awkward in social situations; and that C's rudeness (as it had been perceived) on the phone to HR, had surprised them – leading to them reversing the decision to offer C the job.
25. Moreover, there is something counter-intuitive in saying that on the one hand (as I do), that it was not unreasonable for C not to understand that material aspects of his behaviour in 2013 were due to a disability – even after that disability had been labelled and to some extent explained to him – in the September 2019 Report; yet on the other hand, for C to propose that R either did make, or at least ought to have been able to make, the requisite inferences and causative links in April 2013.
26. In short, and despite accepting C's explanation for the delay in presenting his claim and accepting that he would be caused significant prejudice if the claim is struck out, I am clear that it would not be just and equitable for me to extend time for this claim to be heard, given:
 - a. The very long delay in its presentation.
 - b. The significant prejudice caused in the circumstances described above to R in terms of the reliability of the non-documentary evidence available to it.

- c. The considerable difficulty C would face in establishing R's constructive knowledge of a disability in April 2013 in light of the contemporaneous documents, making his claim a weak claim.

Costs application

27. R applied for its costs on the basis that the claim was misconceived, that R had explained to C why he was bound to fail in having time extended, and had expressly put him on notice of a potential costs application in without prejudice correspondence.

28. I rejected that application for the following reasons:

- a. The extent of the extension of time sought was unusually long. However, given the substantial prejudice to C if time were not extended and given that I accepted the reason why C did not bring the claim earlier, I would have given consideration to extending time had it not been for the contemporaneous documentation, which strongly supported the proposition that R did not have the requisite constructive knowledge of any disability.
- b. That contemporaneous documentation was not discovered by R in its initial attempts to locate relevant documents, but was identified and provided to C only shortly before today's hearing.
- c. It is only in light of that documentation that I was able to decide confidently that there was no proper basis for me to exercise my discretion to extend time.

Oliver Segal QC
Employment Judge

Date: 8 September, 2021

JUDGMENT & REASONS SENT TO
THE PARTIES ON: 09/09/2021

FOR THE TRIBUNAL OFFICE