



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 10/12/2021

Claimant: Dr C Mallon
Respondent: Markel Consultancy Services Ltd

Before: Employment Judge Mr J S Burns

Representation
Claimant: In person
Respondent: Mr S Way (Counsel)

JUDGMENT

The claim is struck out.

REASONS

1. I was referred to a bundle of documents of 188 pages including a Claimant's witness statement and to a Respondent's skeleton argument. I was sent a 5 page "Longman tax recruitment" CV. I heard evidence from the Claimant on oath. In addition, after cross-examination and before final submissions I allowed the Claimant an hour to search his personal email folders during which he sent me various emails and other documents all of which I considered before making my decision.
2. The Claimant has claimed direct disability discrimination arising out of unsuccessful job interview he attended with the Respondent on 27/1/21.
3. The Claimant claims that he was disabled at the relevant time by autism and dyspraxia. For purposes of today's hearing I have assumed that he was so disabled.
4. The matter was listed today as an OPH to consider "*whether any of the claims should be struck out on the grounds that they are scandalous, vexatious or have no reasonable prospects of success; Whether any of the claims should be dismissed because the Tribunal does not have jurisdiction to consider them because they were not presented in time and it would not be just and equitable to extend time; or A deposit order should be made in respect of any of the claims.*"
5. The act about which the Claimant complains was the decision not to progress his application for a job with the Respondent. This act occurred on 27 January 2021 (being the operative date rather than the date on which the decision was communicated to the claimant, per *Virdi v Commissioner of Police of the Metropolis* UKEAT/0373/06/RN at 25). The period therefore begins on 27 January 2021 and the last day for the Claimant to bring his claim would ordinarily have been 26 April 2021.
6. In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. Day A is when the Claimant applied to ACAS and Day B is the day on which the Claimant received the certificate.

7. The Claimant applied for early conciliation on 1/2/21 and the certificate was issued on 11/2/21. The Respondent received a copy of the EC certificate by email from the ACAS EC officer on 11/2/21.
8. The Claimant subsequently suggested that he might not have received the EC certificate from ACAS on 11/2/21. His suggestion is based solely on the fact that at some point later he subsequently could not find it in his gmail inbox. It is clear that in the first week of May 21 shortly before 9/5/21, (when he presented this and a number of other similar ET1s against other Respondents, - two of which other ET1s were before me today during the same OPH) the Claimant complained to ACAS that he had not received a number of EC certificates including the EC certificate in the instant matter, and that subsequently, in August 21, long after he had issued the instant claim, he was sent a collection of copies of numerous previous EC certificates which he was by then complaining he had not originally received,
9. The Claimant agreed in cross-examination that he was in touch with ACAS during the EC conciliation period, that ACAS had his correct email address, and that he was aware on or about 11/2/21 that the EC period had come to an end.
10. The certificate is dated 11/2/21 and was received by the Respondent by email that day. It is unlikely that the ACAS officer would send it to one party but not to the other.
11. The Claimant's oral evidence about the whole subject of his receipt of ACAS certificates was very unclear and inconsistent.
12. It is clear that his management of his emails is poor and disorganized. The fact that the Claimant cannot find an email in his inbox is not good evidence that it was not sent to him. This was graphically illustrated during my consideration today of a separate but very similar claim which the Claimant presented also on 7/5/21 against another Respondent under case number 2202105 2021. In that case I was sent during the hearing today a copy of an email dated 22/1/21 which was sent by the CEO of that Respondent to the Claimant. The Claimant at first quibbled about whether or not he had received it and said he could not find it in his gmail inbox, but finally agreed that he had in fact received and read it at the time but did not reply to it because he had "lost trust" in the author.
13. It is not just the EC certificate in the instant matter (2202104 2021) which the Claimant was unable to find in his gmail inbox and hence suggested had not been sent to him. In the two other cases before me today the EC certificates were issued by different ACAS officers on separate different dates, yet the Claimant afterwards evidently could not find those either in his gmail inbox. As the Claimant accepted in final submissions, he is thus suggesting not that a single ACAS officer on a single day in relation to a single claim (this one) made an error by not sending the EC certificate to him, but he is suggesting, at least insofar as the three cases before me are concerned, that three different ACAS officers each independently made the same error in relation to different EC certificates on different days. I have no hesitation in rejecting this as wildly implausible.
14. The obvious explanation is that the Claimant having received the ACAS certificate in this matter on the same day it was emailed to the Respondent, subsequently deleted it, misfiled it or forgot about it. Given the fact that he has on his own admission issued dozens if not hundreds of similar ET claims against different Respondents over the last 2 years in ETs all over the UK, he has perhaps had difficulty of keeping track of them all.
15. For these reasons I find on a balance of probabilities that the Claimant did receive from ACAS by email the EC certificate in this matter on 11/2/21.

16. A period of 10 days starting on 2 February 2021 and 11 February 2021 is therefore not counted. The last day on which the Claimant could have brought his claim in time was therefore 6 May 2021. The claimant brought his claim on 9 May 2021.
17. Accordingly, the claim is out of time.
18. Per Adeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the burden is on the Claimant to establish that the Tribunal should exercise its discretion to extend time, which is the exception not the rule.
19. I do not regard the fact that the Claimant mislaid, deleted or forgot about the original EC certificate as making it just and equitable to extend time.
20. I have made allowance for the fact that the Claimant's mishandling/loss of the certificate may have been contributed to by his disability, but nevertheless he is clearly an intelligent person with considerable knowledge of disability law, and abundant recent experience of ET litigation. He agrees that he was aware of the time limits. He co-habits with a partner who has written him a detailed supporting statement and who it is not suggested suffers from any impairment.
21. Setting aside any question whether or not it is vexatious or abusive for the Claimant to issue repeated claims arising from job applications, nevertheless, if he was able to submit numerous applications and bring multiple ET claims then in my judgment it is an inadequate excuse that he then fails as a result of the multiplicity or otherwise to deal efficiently with the time limits and administration necessary for the bringing of timely proceedings.
22. In determining whether to extend time I have considered the balance of prejudice. For the reasons set out below I regard the claim as having little reasonable prospect of success in any event. That being the case, the prejudice to the Claimant caused by not extending time is low.
23. For purposes of a strike out/deposit application made by the Respondent in the alternative to the time point, I have had to consider the substantive merits of the claim, and have heard the Claimant's evidence as to why he contends that he suffered direct disability discrimination. I take the Claimant's version at its highest, and in any event what he says is not disputed.
24. The Claimant's agent sent a CV to the Respondent which was read and considered by the Respondent's interviewing officer before the interview on 27/1/21. That CV contained a lengthy and detailed "*synopsis of (the Claimants) disability*" which at that stage was thought by him to be dyspraxia only. The synopsis included a detailed description of his writing, speaking, organisational and reasoning abilities.
25. During the interview the Claimant told the interviewer that he (the Claimant) not only had dyspraxia, but had recently been diagnosed with autism also. In response to this the interviewer asked the Claimant the following question "*How does your disability affect you in the workplace or office?*"

26. The Claimant agreed that the asking of this question would have been perfectly acceptable if asked by an HR officer, or once the job had been offered and accepted, but he objected to the question having been asked during the interview itself.
27. The Claimant agreed that the asking of this question, was the only evidence that he had or could adduce that the subsequent decision by the Respondent not to accept him for the role was because of his disability.
28. Section 60(6) Equality Act 2010 permits questions about how an applicant's condition affects the his/her ability to carry out functions intrinsic to the work concerned.
29. Furthermore, seeing that the Claimant himself had placed his conditions and their effects at the forefront of his application, and referred to a further recent diagnosis during the interview, it is hardly surprising that the question was asked.
30. In the circumstances, the asking of the question would be unlikely to assist the Claimant in establishing a prima facie case which passes the burden of proof to the Respondent under section 136 Equality Act 2010.
31. The assertion that the Respondent decided not to progress the Claimant's application because of his disability is also somewhat undermined by the Respondent's actions in inviting the Claimant to an interview in the full knowledge of disability in the first place.
32. In summary, the Claimant has not satisfied me that it is just and equitable to extend time for this claim to be brought.
33. Hence it is struck out as outside the jurisdiction of the Tribunal.

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Notice under Rule 71

1. After the above decision and reasons had been finalised, I received from the Claimant an email dated 10/12/21 timed at 16.58 in which he asked for reconsideration of the judgment based on further material he had received from ACAS, which was attached to his email. I have treated this as an application under Rule 71.
2. The attachment insofar as it applies to the instant claim was an email sent at 16.40 on 10/12/21 from ACAS to the Claimant confirming as follows "*Original EC certificate issued via email on 11/2/21...copy of certificate sent by email on 6/5/21*".
3. This ACAS email is consistent with my findings in the reasons for the above judgment that the original certificate was sent to and received by the Claimant on 11/2/21.
4. I consider that there is no reasonable prospect of my judgment being varied or revoked so the application for reconsideration is refused.

2202104 2021

J S Burns Employment Judge
London Central
10/12/2021
For Secretary of the Tribunals
Date sent to parties : 13/12/2021
