



## EMPLOYMENT TRIBUNALS

**Claimant**

**Mrs F Mudekunye**

**Respondent**

**v Royal Free London NHS Foundation  
Trust**

## PRELIMINARY HEARING

**Heard at: Watford**

**On: 29 August 2017**

**Before: Employment Judge Smail**

**Appearances:**

**For the Claimant: Mr J Mudekunye, Husband**

**For the Respondents: Ms L Robinson, Counsel**

## JUDGMENT

1. Time is extended to the date of the presentation of the Claim Form for all claims.
2. The Respondent's applications for a deposit are refused.
3. There will be a Telephone Preliminary Hearing at 9.30am on 16 November 2017 to list and timetable the full merits hearing, refine the issues, consider judicial mediation and make case management orders. The Respondent is to email in proposed issues and orders by 14 November 2017, having liaised with the Claimant prior thereto.

## REASONS

1. A preliminary hearing was ordered by Employment Judge Alliott on 7 June 2017 to consider:
  - 1.1 Whether the claims have been brought out of time;

- 1.2 Whether it was reasonably practicable for the unfair dismissal claim to have been brought in time; and if not
- 1.3 Whether it is reasonable to extend time to the date of presentation;
- 1.4 Whether it would be just and equitable to extend time for presentation of the discrimination claims; and lastly
- 1.5 Whether deposit orders should be made on the basis that the claims have little reasonable prospects of success.

### **The claim**

1. This claim form was presented to the employment tribunal on 20 March 2017. The claimant was employed by the respondent as a Registered General Nurse between March 2008 and 20 November 2016 which was the effective date of termination being the expiration of a resignation notice of which was given on 21 September 2016. The claimant alleges the resignation amounted to an acceptance of a constructive dismissal.
2. The claimant alleges constructive unfair dismissal and race discrimination. The acts of discrimination and matters said to amount to repudiatory breaches of the implied term of trust and confidence are:
  - 2.1 On 14 December 2015 the claimant asked Matron Julie Nassau and Sister Deborah Kirby to swap upcoming shifts that she was due to work owing to childcare difficulties and this request was refused.
  - 2.2 On 29 December 2015 the claimant requested by email three nights' unpaid leave which was refused by Matron Nassau and Sister Deborah Kirby on 30 December 2015.
  - 2.3 On 30 December 2015 the claimant was also issued with a letter of improvement notice in respect of these requests.
  - 2.4 Matron Nassau and Deborah Kirby insisted that the claimant would work Christmas and New Year in the following December 2016.
  - 2.5 Most unfortunately indeed, the claimant suffered two bereavements in 2016. Two of her sisters very sadly passed away. In February 2016 she was given four days' compassionate leave instead of seven.
  - 2.6 On 7 July 2016 she applied for annual leave to go to Zimbabwe in December 2016 for the unveiling of the tombstones in respect of her two sisters. She asked for two weeks but was given only one week. She would need two weeks to make it feasible to travel to Zimbabwe and back. She alleges the failure to grant two weeks annual leave was discriminatory. She points out that as she worked two days a week, what she was requesting in fact was four days over two weeks.

- 2.7 She further alleges it was discriminatory to refuse the second week as unpaid leave. This refusal was communicated on 16 September 2016.
- 2.8 This led to the claimant's resignation on 21 September 2016 giving notice to 20 November 2016.

### 3. Time limits – law

#### Unfair Dismissal

- 3.1 By s.111(2) of the Employment Rights Act 1996... an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented to the tribunal (a) before the end of the period of 3 months beginning with the effective date of termination, or (b) within such further period as the tribunal considers reasonable in a case where it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months.

#### Discrimination

- 3.2 By section 123(1) of the Equality Act 2010, a complaint to an Employment Tribunal may not be brought after the end of (a) the period of three months starting with the date act which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable. By subsection (3) of section 123 conduct extending over a period is to be treated as done at the end of the period. This provision consolidates the pre-existing limitation law on discrimination claims.
- 3.3 The appellate courts have provided some useful dicta to guide the employment tribunal in exercising its in the decision making on limitation under these provisions. In Robertson V Bexley Community Centre [2003] IRLR 434 (CA) Auld LJ said 'time limits are exercised strictly in employment cases and there is no presumption that a tribunal should exercise its discretion to extend time on the just and equitable ground unless it can justify failure to exercise the discretion; the bonus is always on the claimant to convince the tribunal that it is just and equitable to extend time, the exercise of discretion is the exception rather than the rule.' In Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327, the Court of Appeal dismissed any suggestion that Auld LJ's comments in Robertson were to be read as encouraging tribunals to exercise their discretion in a restrictive manner. According to Sedley LJ, there was no principle of law dictating how generously or sparingly the power to enlarge time is to be exercised. Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case is not a question of either policy or law; it is a question of fact and judgment, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.

- 3.4 In British Coal v Keeble [1997] IRLR 336 (EAT) it was thought helpful to have regard by way of analogy to the factors set out under section 33 of the Limitation Act 1980 in respect of the discretionary extension of time in personal injury cases. Those factors are (a) the length of and the reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the parties sued co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the possibility of taking action; (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.
- 3.5 As to a continuing act: Mummery LJ in Commissioner of Police of the Metropolis v Hendricks [2003] IRLR 96 stated that the question is whether, at looking at the substance of the complaint made by the claimant, the respondents (or any of them) are responsible for an ongoing situation or continuing state of affairs in which the claimant on protected grounds received less favourable treatment than an appropriate actual or hypothetical come parrot, or suffered harassment. In Aziz v First Division Association [2010] EWCA Civ 304 Jackson LJ suggested that the question is whether the various incidents complained of are so linked as to be continuing acts which constitute an ongoing state of affairs. At the PHR stage the question is whether the claimant has raised a prima facie case establishing the link, while at a full merits hearing the tribunal will decide on the evidence heard and facts found whether that link has been established in fact. Another way of formulating whether complaints were capable of being part of an act extending over a period was that the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. Ma v Merck Sharpe and Dohme Ltd [2008] EWCA Civ 1426 was cited where it was said '..... it is not enough simply to assert that the acts are a continuing acts or that the evidence of this state of affairs extending over a period. The complainant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.' In Aziz it was suggested that in considering whether separate incidents form part of an extending over a period, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents.

#### 4. Time limits facts

- 4.1 So, the primary unfair dismissal time limit is three months from the effective date of termination. That brings the matter to 19 February 2017. The ACAS conciliation certificate was between 26 January and 17 February 2017. It is common ground that the primary time limit would therefore have been extended by 22 days but as the time limit would have then expired during the period beginning with Day A and ending one month after Day B, it is common ground that the time limit expired one month from 17 February 2017, namely 17 March 2017. The claimant's

claim was received by the tribunal on 20 March 2017 meaning it was three days out of time in terms of unfair dismissal.

### Earlier Claim Form

- 4.2 However, the claimant and her husband had attempted to send in an ET1 earlier. An ET1 had been sent in to arrive at the tribunal on 13 March 2017. However, it was an old form. They did not know it was an old form. They had, I think, found it somewhere on the internet. The tribunal rejected the form by letter dated 14 March 2017, upon which day also the tribunal telephoned the claimant's husband. In the letter sent reference was made to the correct internet address for the submission of claim forms online. In the telephone conversation the claimant's husband was told that the tribunal would send out a correct form. It seems that there was a discussion between the claimant's husband and the tribunal official as to the effect of the presentation of the first claim form. I find that the employment tribunal official told the claimant's husband that it would be taken into account that he had sent the form so as to arrive on 13 March 2017. With these words having been said to him, the claimant's husband returned the second ET1 on the day he received it by putting it into first class recorded post. He received it on 17 March 2017 which was a Friday. It was received then at the tribunal on Monday 20 March 2017. The claimant's husband sent it out on the date being the last day for receipt. However, I further find that the Claimant's husband did not know the 17<sup>th</sup> was the last date for submission within the primary limitation period as adjusted by the early conciliation procedure. I accept from him that the Tribunal did not inform him of that. They said to him a new form would be sent out. It was and it was turned around by return first class post. I accept from him, that if he knew he absolutely had to get the form to the Tribunal on 17 March, he would have done so.
- 4.3 The respondent maintains that it was reasonably practicable to present the claim in time on the basis first, that it was open to the claimant and her husband to submit the claim form online on 17 March, alternatively to drive it over from Waltham Abbey to Watford on 17 March. The respondent submits that the decision to send it necessarily meant that the claimant's husband knew that it was going to be presented late.
- 4.4 In terms of the time for presentation of the discrimination claim, the respondent has relied upon a comment made by the claimant's husband today in argument that he did not rely upon the constructive dismissal per se as an act of discrimination but rather the matters leading up to it. The last of the matters leading up to it relied upon took place on 16 September 2016, therefore, submits Ms Robinson, counsel for the respondent, the primary period and limitation for the discrimination claim expired on 15 December 2016, the claim being presented therefore 3 months and 5 days out of time.

5. **Discussions and conclusion on the time limits matters**

- 5.1 The Claimant and her husband cannot be criticised for sending in an old form in the first place, which was sent in time. They did not know it was an old form. They thought it an appropriate form. The Tribunal then sent out a new form and said in a telephone conversation, rightly, that it would be taken into consideration that an old form had been sent otherwise in time. In those circumstances I find it entirely natural that the Claimant and her husband would send back the new form by return and by first class recorded post. All the more so when they were not told that 17 March was the deadline. It is of course theoretically possible that the new claim form could have been hand delivered or that a form be submitted online on 17 March. Whilst theoretically possible it was not reasonably practicable for the Claimant or her husband to do so when i) they did not know 17 March was the deadline; ii) a new form was sent out to them; iii) it was a natural assumption simply to send the form back by return, first class recorded delivery; iv) they had been expressly told, rightly, that it would be taken into consideration that they had sent in an earlier form.
- 5.2 Accordingly, in my judgment, it was not reasonably practicable for this Claimant, whether by herself or her husband who was taking charge of the matter, to send the new form in on time in the particular circumstances they found themselves in. I extend time to the date of presentation of the new form.
- 5.3 As to the discrimination claims: in my judgment it is an entirely reasonable position to present the discrimination claim at the same time as the unfair dismissal claim which was believed by the Claimant to be presented in time. Where there is a pending unfair dismissal claim arising essentially from the same facts as the putative discrimination claim, it is entirely reasonable to present the claims together. That is the explanation for the claims being presented together. The explanation for any lateness with the unfair dismissal claim is set out above. In my judgment those explanations are good enough for the Tribunal.
- 5.4 It is also possible, it seems to me, for the Tribunal to consider at the full merits hearing whether the constructive dismissal amounts to an act of discrimination even if the Claimant's husband appeared to distinguish the acts leading up to the dismissal from the dismissal itself. Be that as it may.
- 5.5 Applying the Keeble considerations, furthermore, the cogency of the evidence in the case will not be effected at all by any delay in bringing the claims. As to the merits, at first blush it seems to me that these claims are arguable. See below.
- 5.6 Accordingly, it is in my Judgment just and equitable to extend time for the presentation of the discrimination claims to the date of presentation of the new claim.

6. **Application for a Deposit Order**

6.1 Further, or in the alternative, the respondent applies for a deposit order on the basis that the claims have little reasonable prospects of success. Ms Robinson submits that the claims amount to a bare assertion of race discrimination. The claimant is black, of African Zimbabwean ethnic origin. Notwithstanding an invitation in the response to provide further particulars, she submits, which further particulars were provided by the claimant on 7 May 2017, there is no reference to any actual comparator suggesting a white colleague in an analogous position to the claimant would have had his or her requests granted. Ms Robinson submits there is no even prima facie case of discrimination. Furthermore, she says, in the bundle there are references to email correspondence from the respondent at the time pointing out to the claimant that colleagues also had had their request for leave over Christmas 2016 refused.

6.2 To my mind it is too early to say that these claims have only little reasonable prospects of success. The fact that the claimant's request to enable her to attend the unveiling of the tombstones of her sisters in December 2016 was not accommodated prior to her resignation is on one view an unattractive position adopted by the respondent. These were unusual and extreme family circumstances faced by the claimant. It is entirely natural that she would wish to go to Zimbabwe for the unveiling of the tombstones of her two sisters. She had given five months' notice of her desire to attend this matter. It is arguably most unattractive that the hospital did not manage to accommodate it. It does raise the possibility that a decision tarnished by race may come into it. I do not at this stage of the proceedings say that the claimant has little reasonable prospects of success. It seems to me that disclosure in respect of responses to requests for annual, special or compassionate leave may well be instructive.

7. There now needs to be a telephone preliminary hearing to set the matter up going forward, including whether a Judicial Mediation may be desirable.

---

**Employment Judge Smail**

Dated: 1 November 2017

Sent to the parties on:

.....1 November 2017.....

For the Tribunal:

.....

