Appeal No. UKEAT/0146/14/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 22 August 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MS A GBIDI — APPELLANT

(1) MRS C EDWARDS
(2) MRS R J ARCHER (SYMONDS) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS AGNIESZKA GBIDI (The Appellant in Person)
For the First and Second Respondents	No appearance or representation by or on behalf of the First and Second Respondents

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

PRACTICE AND PROCEDURE - Postponement or stay

The Employment Judge refused an application to bring proceedings for race discrimination against a new Respondent. He did not, however, consider how and to what extent that respondent was prejudiced by delay. There was potentially important material on that point. Appeal allowed. Question whether it was just and equitable to extend time remitted for rehearing.

The Employment Judge stayed the proceedings pending a determination of conduct proceedings by the Nursing and Midwifery Council. It was doubtful whether there was any real purpose in a stay, given the different issues in the two sets of proceedings. However, the Nursing and Midwifery Council proceedings had now been determined in any event. The order imposing a stay was revoked only because it made the stay conditional on a determination by a particular Committee, and named the wrong Committee.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Miss Agnieszka Gbidi ("the Claimant") against aspects of a Judgment of Employment Judge Roper, sitting in Plymouth, dated 13 June 2013. By his Judgment the Employment Judge (1) maintained the stay of the Claimant's race discrimination claim against Mrs Carole Edwards pending a decision of what he called the "Fitness to Practise Committee" of the Nursing and Midwifery Council and (2) dismissed a race discrimination claim which she brought against Mrs Rebecca Archer, formerly known as Miss Rebecca Symonds, on the ground that it was out of time.

The Background Facts

2. The Claimant is a nurse by profession. She is originally from Poland, moving to the United Kingdom in February 2008. She was first employed at Consort Care in 2009. She then commenced employment at the Bedford Park Care Centre in Plymouth in November 2009, working in a medical unit for elderly residents. Her employer was Aermid Healthcare plc (hereafter "Aermid"). The centre manager was Mrs Edwards. Mrs Archer was at first a colleague and then the Unit Manager.

3. On 19 March 2010 the Claimant was dismissed from her employment. Two reasons were given for the dismissal in a letter written by Mrs Edwards. Firstly, it was said that the Claimant had removed a chest drain from a patient. Secondly, it was said that she had failed to mention a previous employer on her CV. It is the Claimant's case that this letter came out of the blue and that she was dismissed summarily without any disciplinary process or investigation.

4. During the summer of 2010 Aermid reported the Claimant to the Nursing and Midwifery Council. The consequent investigation led to four charges against the Claimant. The first charge related to the time when she had worked for Consort Care. In April 2009 a patient had fallen from a chair. It was alleged that she had not notified the patient's daughter and had not undertaken or recorded adequate observations of the patient. The second and third charges relate to the Claimant's CV. It was alleged that she did not declare her employment at Consort Care and that this failure was dishonest. The fourth charge was that on 13 March, having been asked to change a patient's drain bag and dressings, she attempted to remove the patient's chest drain tube, acted without using the correct aseptic technique and did so in the communal lounge in the presence of residents.

5. It is convenient, before returning to the Employment Tribunal proceedings, to record that these charges have now been determined by the Conduct and Competence Committee of the Nursing and Midwifery Council. I have seen a copy of its determination, which runs to some 52 pages. The determination was finally made in May 2014 after various adjournments and delays, mostly by reason of the Claimant's health or her desire to seek legal representation.

6. As regards the first charge, the committee found it proved that the Claimant had failed to notify the patient's daughter. This was a breach of the NMC Code, but it was not sufficient to amount to misconduct. That charge did not lead to any sanction. As regards the second and third charges, the committee found it proved that the Claimant had failed to disclose her employment with Consort Care and that the failure was dishonest. The Claimant's case had been that she resigned from Consort Care and did not mention her employment when she applied to Aermid because it was unnecessary to do so. The committee found differently. It found that she had been dismissed by Consort Care and she had dishonestly failed to declare her

employment so as to avoid the possibility of a less than favourable reference. The committee, however, took into account her general good character and imposed, by way of sanction, a caution for three years. As regards the fourth charge, the committee found that there was no case to answer. The witness whose evidence was relied on, Mrs Archer, did not prove the case against the Claimant. Her evidence was described as unclear, both as to the instruction she had given and as to what she saw took place. There were discrepancies between her oral evidence and her witness statement.

The Employment Tribunal Proceedings

7. I return now to the Employment Tribunal proceedings. They have been lengthy. There is a fuller description of them in the Written Reasons of Employment Judge Roper and in the Judgment of HHJ Eady QC at the rule 3(10) Hearing of this appeal. I can summarise the position quite briefly.

8. The Claimant originally commenced proceedings against Aermid and Mrs Edwards. The proceedings principally complained of the circumstances surrounding dismissal, but there was also a complaint of a decision to appoint Mrs Archer as Unit Manager rather than the Claimant. A Judgment in default was granted against them. Aermid, however, was in administration. The administrator consented to the continuation of the proceedings and there was a change of company name, but the Employment Appeal Tribunal has now been informed that the company was dissolved on 17 September 2013. HHJ Clark directed that it be removed from these appeal proceedings.

9. The Judgment against Mrs Edwards was revoked – apparently on the basis that Mrs Edwards had not been informed of the Employment Tribunal claim, although I understand today that the Claimant disputes that position. Mrs Edwards remains a party to the claim.

10. No proceedings were originally brought against Mrs Archer. The Claimant's case is that she first learned that Mrs Archer was implicated in the circumstances which led to her dismissal when she received the witness statement of Mrs Archer given to the Nursing and Midwifery Council. That, she says, was in early May 2012. She brought an ET1 claim form against Mrs Archer on 6 August 2012. Mrs Archer put in an ET3 defending the case and saying it was out of time.

The Hearing and Reasons

11. The matter came before Employment Judge Roper on 10 June 2013 to determine various issues. The Claimant and Mrs Edwards both attended. So did Mrs Archer. The Employment Judge records that he heard from Mrs Archer.

12. I am told by the Claimant that Mrs Archer's statement to the NMC was before the Employment Judge. It is important to quote two paragraphs from it:

> **"54. I was next on duty on Monday 15th March. When I arrived, I reported the incident to Carol Edwards. At the time a lady from Continuing Healthcare was also present. I asked if I needed to provide a statement and at first I was told no. Carol Edwards then came to me to ask me to prepare a statement as she needed to send it to the Area Manager. I attach a copy of this statement as my exhibit RS/4...**
>
> **57. Agnes also came to my home several times after she was dismissed. She was very upset and was pleading for me to please change my statement and asking me to tell Carol Edwards to stop the action against her. She said that she had a daughter and an elderly mother and this would make life very difficult. She asked me to please tell Carol Edwards that I had made a mistake and to change my statement. I explained that I could only report what I had witnessed and it was not for me to say whether it was right or wrong, but I have a duty to report it."**

13. It is, therefore, to my mind plain that Mrs Archer was saying that the Claimant knew long before May 2012 that the Claimant had made a statement implicating her to Aermid at the request of Mrs Edwards.

14. On the question relating to Mrs Archer, the Employment Judge set out the contentions of the Claimant in paragraphs 10-12 of his Reasons. I need not set those out in full. I should, however, mention that the Claimant says she first learned of Mrs Archer's statement on 3 May not 1 May. 1 May was, she tells me, the date of the letter from the Nursing and Midwifery Council. She would have received it about two days later. She says that, while she may have mentioned the date of 1 May in a letter to the Employment Tribunal (see paragraph 10 of Employment Judge Roper's Reasons), that was a mistake.

15. The Employment Judge made reference to section 68(1) of the **Race Relations Act 1976**, then applicable, which provided for a three-month time limit "beginning when the act complained of was done" and made reference to leading cases on the question of time limits and amendment. He approached the case as one concerned with amendment. I am not quite sure why he did this since the Claimant appears to have issued fresh proceedings against Mrs Archer. However, he directed himself correctly that the claim was long out of time and said that the essential question was whether it was just and equitable to extend time.

16. The key passage in his reasoning appears to me to be the following:

> **"26...The only grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that she did not know of the third respondent's alleged actions until then. However, the claimant knew of this potential claim against the third respondent on 1 May 2012, and discussed it with her representative, who was experienced in employment law and employment tribunal procedures. They chose not to issue proceedings against the third respondent at that stage or within any further three-month time limit (always assuming there was such a limit if time started running from 1 May 2012 which is by no means clear), and they did so for deliberate tactical reasons on the assumption that it would assist their objections to the application to review and revoke the Default Judgment. They simply did not wish to be seen to be seeking to issue proceedings against the third respondent so long after the employment ended which in their view would have undermined their**

criticism of the first and second respondents' application. As to (iii) above, the claimant then changed her mind, but the delay in issuing proceedings promptly after 1 May 2012 was of her own choosing, and she was not precluded from issuing proceedings by any lack of knowledge, illness or other impediment either promptly or within three months of 1 May 2012. She simply decided on advice not to do so.

27. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the *Keeble* decision. I deal with each of these in turn.

a. The first is the length of and the reasons for the delay. The delay is some two years after the termination of the claimant's employment, but even if her knowledge of the potential claim only commenced on 1 May 2012, she chose deliberately not to issue proceedings at that time.

b. Secondly I have considered the extent to which the cogency of the evidence is likely to be affected by the delay. There is bound to be some effect because of the delay, but this should not be of any overriding concern because most of the issues will be addressed at the NMC hearing in any event.

c. Thirdly I have considered the extent to which the parties co-operated with any request for information. This is not relevant in these circumstances.

d. Fourthly, I have considered the promptness with which the claimant acted once she knew the facts giving rise to the cause of action. The claimant did not act promptly at all. Indeed, she deliberately chose not to issue proceedings promptly.

e. Finally, I have considered the steps taken by the claimant to obtain appropriate professional advice. The claimant has had experienced advice from different representatives from time to time, and at the time in question discussed time limit issues and the potential claim with her chosen representative.

28. I have also considered the comments in Auld LJ in the *Robertson v Bexley Community Service* decision as follows 'It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule.' The claimant was not convinced me that it is just and equitable to extend the time.

29. In conclusion I find that the claimant's claim against the third respondent was presented out of time, and the greater prejudice is against the third respondent in allowing the proceedings to continue against her when the claimant deliberately chose to seek to protect the Default Judgment against the first and second respondents. The claimant has not advanced any argument to suggest that it is just and equitable to extend the time limit in circumstances where she had made a considered decision after taking advice not to issue proceedings promptly. In my judgment it is not just and equitable to allow an extension of time and to allow the amendment of this claim to include the late proceedings against the third respondent. Accordingly the claimant's remaining claim against the third respondent is dismissed because it is out of time."

17. As regards the stay of the proceedings the Employment Judge simply said the following:

"30. Finally, I repeat the order for a stay which was previously made in the April 2013 CMO. The hearing of the NMC misconduct proceedings is apparently imminent and they should be determined first. The claimant's remaining discrimination claim against the second respondents is therefore stayed pending the decision of the Fitness to practise Committee of the NMC."

The Stay of Proceedings

18. I can deal with this aspect of the appeal quite briefly. The Claimant argues that her case ought not to have been stayed pending the decision of the Nursing and Midwifery Council. Mrs Edwards does not oppose the appeal, saying in a letter in early May that:

> **"All I want is for the race discrimination claim against me to now continue so that I can have the opportunity to defend that claim."**

19. Mrs Archer has been served with the appeal proceedings but has not responded and has been debarred from taking part in the appeal by order dated 26 June 2014.

20. Now that the Nursing and Midwifery Council has made its determination it is inevitable that the stay should be lifted. The lifting of the stay would have been automatic except that the order of Employment Judge Roper refers to the Fitness to Practise Committee rather than the Conduct and Competence Committee. So far as I can see from my papers, the stay has not been lifted. For the avoidance of doubt, I will set aside paragraph 5 of the Judgment dated 10 June 2013, which is plainly wrong to refer to the Fitness to Practise Committee.

21. I will just say a word about the more general issue. Whether to stay Employment Tribunal's proceedings pending proceedings elsewhere is generally a matter of case management where the Employment Judge has a broad discretion to do what is right, a discretion to be exercised in accordance with the overriding objective applicable to Employment Tribunals.

22. I would only say that where, as here, the stay is opposed, it is important to keep carefully under review what purpose, if any, the stay really would serve. In this case the first charge, concerning Consort Care, did not figure at all in the Employment Tribunal proceedings. The

second and third, concerning the dishonest reference, did figure in the Employment Tribunal proceedings but were matters which the Employment Tribunal could determine, whereas the NMC could not determine whether anything which occurred amounted to unlawful race discrimination. The final matter, relating to the removal of a drain, was within the remit of the NMC, but the issue for the Employment Tribunal in any event was one which the NMC could not consider whether the treatment of the Claimant was unlawful race discrimination. Likewise, only the Employment Tribunal could have considered the issue relating to Mrs Archer's appointment in preference to the Claimant as Unit Manager.

23. The Employment Judge's decision to continue the stay might possibly have been justified because he was told the NMC hearing was imminent. Otherwise a much more careful review would have been called for. But I need say no more about this aspect of the appeal because it is now inevitable that the Employment Tribunal proceedings must continue. There is no reason to postpone them any further.

Mrs Archer

24. I turn to the question whether there is any error of law in the Employment Judge's conclusion that it was not just and equitable to extend time for a claim to be made against Mrs Archer. The Claimant's Skeleton Argument for this hearing has ranged far and wide, but the essential legal point was identified by HHJ Eady QC at the rule 3(10) hearing where she decided that there were reasonable grounds for appealing. I will quote the following passage:

> **"34 In determining the question of the balance of prejudice in this matter, the Employment Judge had apparent regard to the potential prejudice to the Claimant but dismissed it as resulting from her own tactical decision not to bring the claim against the Third Respondent as early as she could have done. It seems to me, however, that there may be an arguable point that, in balancing the interests of prejudice to the Claimant, on the one hand, and the Third Respondent, on the other, the Employment Judge simply assumed prejudice to the Third Respondent without giving proper attention to that issue. In particular, given that the Third Respondent would still be giving evidence in the NMC proceedings and would therefore still have to recall the events in question and indeed had given a statement to the NMC regarding these matters, the question arises as to what prejudice she suffered by not knowing of the potential claim against her by the Claimant in the Tribunal proceedings from 3 May, (when**

> **the Claimant would argue it was the first time when it would be just and equitable to expect her to put in a claim), and 6 August 2012. It may be that there is an answer to that and that the EAT at a Full Hearing of this matter will simply uphold the Judgment of the Employment Judge below. It does, however, seem to me to give rise to an arguable point of law with prospects of success which should be considered at a full hearing."**

25. The Claimant has relied on that point, saying that there was, in effect, no prejudice to Mrs Archer and that this is a matter which was left out of account by the Employment Judge.

26. The Employment Appeal Tribunal hears appeals only on points of law (see section 21(1) of the **Employment Tribunals Act 1996**). In a case such as this, where the Employment Judge's task was evaluative, the Employment Appeal Tribunal will not intervene merely because it considers the decision might have been different. It will intervene only if the Employment Tribunal has not applied correct legal principles or if it has left out of account a factor which it was essential to bring into the evaluation, or brought into account a factor which was wholly irrelevant. The Employment Appeal Tribunal will also read the Employment Judge's reasons in the round without being pernickety or overcritical.

27. There were certainly points of difficulty for the Claimant in her application for an extension of time on the grounds that it was just and equitable to do so. She said that she had learned about the matter on 3 May 2012. Proceedings had, however, not been commenced until 6 August 2012 for essentially tactical reasons. That is unfortunate, and in a case where the claim was already long after the primary three-month time limit, a significant feature for an Employment Judge to take into account in the exercise of his discretion.

28. The factor, however, which is noticeably missing from the Employment Judge's reasons is any consideration of the position of Mrs Archer. It is possible that she was greatly prejudiced by the delay. She might have given a statement to the Nursing and Midwifery Council and then

long forgotten about the matter. Or she might have been giving a statement to the Nursing and Midwifery Council long after the matter when it was no longer fresh in her mind. It is, however, also possible that she was scarcely prejudiced at all. She had, accordingly to her witness statement, given a statement contemporaneously to Mrs Edwards, and she may have had the question to the forefront of her mind throughout, knowing that she was going to be a witness. No consideration of this part of the case appears at all in the Employment Judge's Reasons.

29. Nor is there any reference to paragraph 57 of Mrs Archer's witness statement, which I have quoted. This might be important in more ways than one. It appears that Mrs Archer is saying that the Claimant really knew about her involvement long before May 2012. If that were to be the case, it would militate strongly against the grant of an extension of time. On the other hand, if Mrs Archer was lying about that in her witness statement, it might contribute significantly to a conclusion on the question whether and to what extent she had suffered any prejudice. Some evaluation of this question by the Employment Judge was to be expected. It might have pointed one way or the other on the question whether time should be extended. It might even have led to the conclusion that the best course to take was to put over the question of an extension of time to be dealt with at the Full Hearing where a proper assessment could be made of the credibility of the two parties.

30. For these reasons it seems to me that the Employment Judge did not take into account a factor which it was essential for him to take into account when reaching his conclusion.

31. There is a reference in the Employment Judge's Reasons, in paragraph 27b, to the extent to which the cogency of the evidence is likely to be affected by the delay. It is, however, purely

a general reference, not apparently based on any specific finding relating to Mrs Archer. It is simply impossible to know what the Employment Judge made of Mrs Archer's position.

32. When an appeal is allowed in these circumstances, the Employment Appeal Tribunal does not, unless the position is absolutely plain, substitute its own conclusion. This is a case where it is far from plain whether it is just and equitable to extend time for the bringing of the claim. As I have said, there are considerations on both sides to be weighed up, and there is the potential importance of paragraph 57 of Mrs Archer's witness statement. The matter must therefore be remitted to the Employment Tribunal for reconsideration.

33. When the Employment Appeal Tribunal remits a matter to the Employment Tribunal for reconsideration, it also decides whether reconsideration should be the same, or by a different, Employment Judge. In each case, the Employment Appeal Tribunal takes a decision in the round, having regard to criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763.

34. In this case, I think the hearing should be before a different Employment Judge. The hearing was, now, more than a year ago. It may be very difficult to recapture after a year evidence and arguments from a short hearing such a time ago. It seems to me much more satisfactory that the hearing should be before a differently constituted Employment Judge. As I say, that Employment Judge may decide to grant the extension of time, to refuse the extension of time or to put over the question whether an extension of time should be granted to be heard with the merits. All those are possible options. I express no view as to which is the correct option to be taken.

35. I should mention three final matters. The first is that Mrs Archer has not engaged with the appeal process. She will of course receive a transcript of this Judgment. She would be very wise to engage carefully with the process of the Employment Tribunal. She would be wise to consider for herself the issues and, if she has the capacity to do so, to take some legal advice about them.

36. The second matter is this. The Claimant, in the course of wide-ranging submissions before me, complained that she had been expected to work very long hours at the care home and appeared to be saying that this was or ought to be part of her claim for discrimination against Mrs Edwards, possibly also against Mrs Archer. I pointed out to her that there was no sign of this claim in her ET1 claim form. She is a very long time out of time for making any application for permission to amend. If she wishes to do so, that is a matter for her, but she is on notice that there is no reference to this in her claim form and, as it stands, the issue is not one which can be adjudicated upon by the Employment Tribunal.

37. Thirdly, at the conclusion of the hearing the Claimant questioned the order of His Honour Judge Peter Clark removing Aermid from the proceedings. She pointed out that there appeared to be linked companies with similar shareholders or directors. There is, however, no doubt that Aermid has been dissolved and it seems to me that the order of His Honour Judge Peter Clark was correct.

38. In the circumstances the appeal will be allowed. The stay will be set aside - that is to say paragraph 5 of the Judgment dated 10 June 2013 will be revoked. Paragraph 4 of the Judgment will also be revoked, and the issue whether an extension of time should be granted is remitted for reconsideration by a differently constituted Employment Tribunal.