



EMPLOYMENT TRIBUNALS

Claimant: Ms J Griffin

Respondents: Guy's & St Thomas' NHS Foundation Trust

PRELIMINARY HEARING

Held at: London South **On:** Tuesday, 25 July 2017

Before: Regional Employment Judge Hildebrand

Representation

Claimant: Ms Esther Godwins, Consultant

Respondent: Ms Ishaani Shrivastava, Counsel

RESERVED JUDGMENT

1. The name of the Respondent is Guy's & St Thomas' NHS Foundation Trust. The order of 11 May 2017 stands.
2. The claim was presented outside the prescribed time and there are no grounds under the statutory provisions for time to be extended. The claim is therefore struck out in respect of all jurisdictions

REASONS

The issue for determination

1. A preliminary hearing was ordered by the Tribunal on an application of the Respondent contained in the covering letter to the Response to the claim dated 2 June 2017 and also dealt with in paragraphs 5 to 9 of the Grounds of Resistance. This is a claim of unfair dismissal and for notice pay and

holiday pay. In the letter of 2 June 2017 the Respondent identified as the jurisdictional issue:-

- 1.1 Whether Guy's and St Thomas's NHS Foundation Trust ("the Trust") has been identified as the Respondent to the claim and accordingly, whether the ET1 has been served on the Trust;
- 1.2 Whether the Tribunal should reconsider its acceptance of the claim given the deficiency in identifying the Respondent under Rule 10(b);
- 1.3 In any event, whether the Tribunal has jurisdiction to hear the claim because:
 - 1.3.1 It was reasonably practicable for the Claimant to submit the claim within the 3 month statutory deadline and she failed to do so; and
 - 1.3.2 The claim was not submitted within a reasonable further period.

The evidence and submissions

2. The Tribunal heard evidence from the Claimant and from Alison Pollard, Chair of the disciplinary panel which dismissed the Claimant. Both witnesses were cross-examined. I received written submissions supplemented by oral remarks from the Respondent and oral submissions from the Claimant. The Claimant's representative supplied the Tribunal with a copy of the authority ***Mr J Mist v Derby Community Health Services NHS Trust UKEAT/0170/15*** and from the Respondent ***Drake International Systems Ltd and others v Blue Arrow Ltd UKEAT/0282/15***.

The name of the Respondent

3. In relation to the name of the Respondent the facts are as follows. The Claimant presented a claim on 4 April 2017 giving as the Respondent "NHS Foundation Trust" and the address 3rd Floor, 200 Great Dover Street, London, SE1 4YB. The claim made clear that the Claimant had been employed from 5 October 2009 to 22 December 2016 as a Senior Nursing Assistant. At box 8.2 under the heading BACKGROUND the Claimant stated inter alia:-

"The employee started working with the special team call One to One in April. The team was subsequently discontinued and the Employee was moved to the Guy's and St Thomas in the Pulross Centre on the 25th October 2015 where she was employed as a Band 3 Health Care Assistant".

4. At the time of issue the Claimant supplied an ACAS early conciliation reference number. The certificate shows the Claimant's name and the prospective Respondent as "NHS Foundation Trust" at the address given in the Claim Form.
5. The claim was served on 13 April 2017. On 4 May 2017 solicitors for the Respondent applied for an open preliminary hearing to determine whether Guy's and St. Thomas' NHS Foundation Trust had been identified as the Respondent to the claim and to ask whether the Tribunal should reconsider its acceptance of the claim given the deficiency and indentifying the Respondent. The letter also raised the jurisdictional issue of time. In that application the Respondent indicated that it did not dispute that the Claimant was one of its employees nor that she had been dismissed for gross misconduct on 8 December 2016. It was disputed that the Claimant had met the minimum requirements to identify the Trust as a respondent to the claim in the ET1 form. The application stated that the Claimant was not employed to work at the address given in the ET1 and the Claimant had not provided her workplace at paragraph 2.4 of the ET1. It was said that there were other organisations including other NHS Trusts in NHS organisations which could be intended to be the Respondent using the address given on the ET1. The Respondent then set out a number of other organisations located at 200 Dover Street.
6. On 9 May 2017 in response to that letter the Tribunal on my direction wrote to the Claimant asking her to identify by 16 May 2017 the name of the Respondent. In the meantime the Tribunal received earlier on 9 May 2017, but not on the file at the time I gave my direction, correspondence from solicitors for the Claimant which enclosed the early conciliation certificate, the letter of 22 December 2016 from the Respondent to the Claimant setting out grounds for dismissal and the document headed "Claimant's statement of case." These documents named Guy's and St. Thomas' NHS Foundation Trust as the Respondent. In response to that correspondence on 10 May 2017 Employment Judge Baron directed that the name of the Respondent be changed to "Guy's and St Thomas' NHS Foundation Trust" and set a time for the response to be presented. The Judge indicated that consideration of applications made by the Respondent would be undertaken on receipt of the Response Form ET3.
7. The Response Form ET3 was received on 2 June 2017 within the time ordered.
8. The Claimant had in her statement of case supplied a copy of the letter to her confirming dismissal. She stated that NHS Foundation Trust was mentioned because the Claimant had been working in different places under "NHS Foundation Trust" and her last place of work was Guys' and St. Thomas' NHS Foundation Trust. It appears from the contract supplied and the Claimant's evidence that the Claimant's employment was always with Guy's and St Thomas' NHS Foundation Trust from her start date. The address used by the Claimant is the address given by the

Respondent in the dismissal letter of 22 December 2016 as the address to which an appeal should be made, namely to Mrs Cepta Hamm and Julie Glyn-Jones – Head of Nursing, Adult Community Services, Guy’s and St. Thomas’ NHS Foundation Trust, 3rd Floor, 200 Great Dover Street, London SE1 4YB.

Submission on identity of Respondent: Respondent

9. The Respondent’s submission is that the Tribunal lacks jurisdiction because the Respondent was not the one identified on the Claim Form and in the early conciliation certificate and the Claim Form was not served on the Respondent’s Trust. The application invited the Tribunal to reconsider its order of 11 May 2017 and/or its acceptance of the claim. It was said that the Claimant had not sufficiently identified and pursued a claim against the Respondent. The details used by the Claimant could identify any number of Trusts. The form should have been rejected for the discrepancy. The Respondent relied on the authority of ***Mr I Giny v SNA Transport Ltd UKEAT/0317/16***.

Submission on identity of Respondent: Claimant

10. The Claimant’s submission on the identity of the Respondent was that the request for early conciliation had not been rejected and the claim not been rejected by the Employment Tribunal. The error of failure to include the full name of the Trust was a minor error. The Claimant was entitled to amend to have the full identity of the Trust set out. The claim had been sent to the Respondent at the address given by the Respondent to the Claimant. The correct Respondent was identified in section 8.2 of the Claim Form. The Respondent had received the claim in good time and there was no prejudice to it. At the time of presentation of the claim the Claimant’s appeal was still ongoing. The Respondent was aware of the facts of the case. The representative made a submission on relative prejudice stating that the Claimant would have no recourse even though she had a valid complaint if the case did not proceed against this Respondent. She relied on the authority of ***Mr J Mist v Derby Community Health Services NHS Trust UKEAT/0170/15*** and the authority of ***Drake International Systems Ltd and others v Blue Arrow Ltd UKEAT/0282/15***.

Identity of Respondent: Law

11. The relevant rule is rule 12[(2A)] of the Rules of Procedures. This states:-

“The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to the name or address and it would not be in the interest of justice to reject the claim.”

Sub-paragraphs (e) and (f) of rule 12(1) cover situations where there is a difference in the name of the Claimant and the difference in the name of the Respondent. Sub-paragraph (f) is therefore the rule engaged here.

Aside from the issue of acceptance, which on the basis of the rule cannot be challenged, the Respondent's challenge is in relation to the subsequent amendment to give the full name of the Respondent. It is difficult to see the basis on which this should be reconsidered. I appreciate that it might be said to have been a decision taken in the absence of comment from the Respondent. The judge did however indicate that any applications would be considered on receipt of the Response to the claim and that is how the matter comes to be considered today.

Identity of Respondent: Conclusion

12. I consider that the error made by the Claimant is properly described as a minor error. The correct name of the Respondent is clearly apparent on the face of the claim to the Employment Tribunal. The address given was correct and in accordance with correspondence received by the Claimant from the Respondent. The claim quickly found its way to the correct quarter and solicitors were instructed to contact the Tribunal. The Claimant's representative responded promptly, in fact it appears before notification from the Tribunal, to give details of the correct name for the Respondent. I therefore consider the error to have been a minor one and there is no basis for reconsideration of the order of Employment Judge Baron. He granted leave to amend the name of the Respondent. He clearly had good grounds to do so and acted in accordance with the overriding objective.

Time Jurisdiction: Evidence

13. The second issue in the case is the correct date for the termination of the Claimant's employment and the consequent time limit for presentation of the claim. There is a mechanical recording of the disciplinary hearing on 8 December 2016. There has however been no dispute in relation to what was said on that occasion. A copy of the transcript has been supplied. Alison Pollard was recorded at page 167 of the bundle saying to the Claimant:-

"I am therefore summarily dismissing you from your post with immediate effect due to gross misconduct, namely negligence that affects the health of the patient. This is (sic) will be without notice of pay or in lieu of notice; you will be entitled to payment for any annual leave you have owing."

She went on to identify that the Claimant had a right of appeal which would be 14 days from the date of the outcome letter and details of how to appeal would be given in the outcome letter. Before giving her conclusion Ms Pollard had already given details of her findings on the two allegations.

14. Ms Pollard gave evidence that she forewarned the Claimant that written confirmation of the disciplinary decision would not reach her within seven days as provided for by the policy due to some annual leave and that it would be sent to the Claimant within 14 days. This was confirmed on the first page of the disciplinary outcome letter. No further deliberation was undertaken during this period and the letter, on Ms Pollard's evidence, confirmed the detailed reasons why the Claimant had been summarily dismissed.
15. The Claimant's testimony was as follows:-

“Following the hearing, and after considering all the available information the Deputy of Head Nursing, Alison Pollard did not give me any written notice but terminated by (sic) contract of employment.”

The letter dated 22 December 2016 included an explanation and confirmation that Ms Pollard had informed the Claimant that she would write within 14 days which was outside the seven day timeframe stated in the policy because she was on annual leave following the hearing. It appears that letter was delivered to the Claimant's address on or about 23 December 2016 and did not come into the Claimant's possession until 4 January 2017. The Claimant accepts however that the date of dismissal on her case is 22 December 2016.

Submissions on Time Jurisdiction: Respondent

16. The issue of the date of termination therefore falls to competing contentions. The Claimant's representative contends that it was not until the confirmatory letter was written that the employment was brought to an end. The Respondent submits that there was a clear dismissal of the Claimant at the meeting on 8 December 2016. The Respondent relies on the Supreme Court Authority ***Gisda Cyf v Barratt [2010] UKSC41*** where it was said at paragraph 43:-

“And, of course, and employer who wishes to be certain that his employee is aware of the dismissal can resort to the prosaic expedient of informing the employee in a face-to-face interview that he or she has been dismissed.”

The Respondent's representative also referred to ***Kirklees Metropolitan Council v Radecki [2009] EWCA Civ 298*** paragraph 49:-

“the effective date of termination will be the date of summary dismissal, as long as that is known to the employee.”

The Respondent submitted that the Claimant knew she had been summarily dismissed on 8 December 2016 and her employment terminated on that day. The words spoken were clear. She had not attended work after that day and she did not receive pay after that day. The Claimant's evidence was that Alison Pollard terminated her contract of employment.

Submissions on Time Jurisdiction: Claimant

17. The Claimant's submission was that the date of dismissal was when the Claimant was aware she was dismissed by the letter dated 22 December 2016. The Claimant did not understand that she had been dismissed before than. The letter of dismissal had to be in writing so that she could get advice. That was an entirely acceptable and reasonable position for her to take. She took the view from the outset that her dismissal was on the 22 December 2016. Her appeal letter sent by her solicitors said that the dismissal took effect from 22 December 2016.

Time Jurisdiction: Conclusion

18. I refer to the authorities cited by the Respondent and in particular **Gisda Cyf**. The date of dismissal is an issue of fact. I conclude that the date of dismissal in this case is 8th December 2016. The Claimant was clearly informed on that date of her dismissal. The recording of the hearing is not challenged by her and makes it clear that she was dismissed on that date. The letter of 22 December 2016 clearly states that it is written following the disciplinary hearing of 8 December 2016. It records what took place at the hearing and states "Your last day of employment is 8 December 2016." The Respondent has made its position clear orally and by subsequent confirmation in writing. There was no question that Ms Pollard would be taking her decision at a later date or that it would not have effect until the Claimant received the confirmatory letter. The dismissal was oral and on 8 December 2016.
19. Time for presentation of a claim accordingly runs from 8 December 2016. The Claimant should have presented a claim of unfair dismissal in accordance with section 111 of the Employment Rights Act 1996 within 3 months of the effective date of termination. Three months runs to 7 March 2016. The Claimant did not apply for early conciliation until 16 March 2017 after the time for presentation of the complaint had expired. The early conciliation certificate is therefore of no effect. The claim was not presented until 4 April 2017 almost 4 months after the date of dismissal.
20. Section 111(2)(b) provides that if the complaint is not presented within the three month period it is to be considered if it is presented within such further period as the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. The same statutory format

is employed in relation to the Claimant's other claims of breach of contract and for accrued holiday pay.

21. The Claimant was candid in her evidence that immediately she received the letter of 22 December she took advice from her solicitor on it. The solicitors were involved in the appeal process. The Claimant clearly had access to and had the benefit of advice from an early stage shortly after the date of her dismissal.
22. It is difficult to see how the Claimant can argue in those circumstances that it was reasonably practicable for the claim to be presented in time. It may be that the solicitors instructed misapprehended the date on which the dismissal took effect. No evidence has been supplied from the solicitors to explain that circumstance if that is indeed the case. The case has been argued solely on the basis that the dismissal was on 22 December 2016. The position on the facts is clear that the dismissal took place orally at the meeting on 8 December 2016. The claim is therefore out of time and there are no grounds under the statutory provisions for time to be extended. The claim is therefore struck out in respect of all jurisdictions.

Regional Employment Judge Hildebrand

24 August 2017 London South