EMPLOYMENT TRIBUNALS

Claimant Mr. S Ibrahim

Respondents
v HCA International Limited

PRELIMINARY HEARING

Heard at: **London Central** **On: 14&15June 2017**

Before: Employment Judge Ayre (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr. K Bryant, Counsel

JUDGMENT

1. The claimant was not an employee of the respondent.

2. The complaint of sex discrimination was presented outside the primary limitation period and it is not just and equitable to extend time.

3. The claimant's grievances dated 15 and 22 March did not amount to protected disclosures.

4. The claim for unlawful deduction from wages does not have reasonable prospects of success and is struck out.

5. As a result of the above conclusions, there are no outstanding substantive issues and the claim is dismissed.

REASONS

6. By claim form dated 24 January 2017 the claimant brought claims of:-

   6.1. unfair dismissal
   6.2. wrongful dismissal
   6.3. whistleblowing
   6.4. breach of contract
   6.5. sex discrimination; and

6.6. unlawful deduction from wages.

7. All of the claims were resisted by the respondent.

8. A preliminary hearing took place on 4 May 2017 to consider the issues in the case and make case management orders. It was agreed at that preliminary hearing that an open preliminary hearing would take place to consider the issues set out at paragraph 6 above. A second preliminary hearing was therefore listed for 14th and 14th June 2017.

The issues

9. The issues that fell to be determined at the second preliminary hearing were as follows:-

9.1. Was the claimant an employee for the purposes of the Employment Rights Act 1996 ("the ERA")? The respondent concedes that the claimant was a worker.

9.2. Is the allegation of sex discrimination relating to an incident on 8 June 2014 out of time? If so, was the complaint presented within such other period as the Tribunal considers just and equitable?

9.3. In his grievances of 15 and 22 March 2016, was information disclosed which in the claimant's reasonable belief tended to show one of the following?

9.3.1. an unidentified person had failed to comply with a legal obligation to keep patient information confidential;
9.3.2. a miscarriage of justice had occurred in that the claimant had been falsely accused.

9.4. If so, did the claimant reasonably believe that the disclosure was made in the public interest?

9.5. Should the claim for arrears of pay be struck out as having no reasonable prospect of success?

9.6. The parties agreed that if the Tribunal found for the respondent on the above issues, there would be no remaining substantive issues for the Tribunal to consider, and the claim would fail.

The proceedings.

10. There was a bundle running initially to 461 pages, but which was not an agreed bundle. The claimant's position was that not all relevant documents had been included in the bundle. The respondent's position was that many of the documents in the bundle had been included at the request of the claimant but were not relevant to the issues to be determined at the preliminary hearing. Additional documents were added to the bundle, by agreement, at the beginning of the preliminary hearing.

11. At the start of the preliminary hearing the claimant made an application for an order that the respondent disclose additional documents. The Tribunal ordered the respondent to carry out a further search of its HR files to try and find any notes of meetings between the claimant and Lesley Pope on 15 March 2016 and between the claimant and Sheila Johnson on 22 March 2016.

12. At the beginning of the second day of the hearing Mr. Bryant, on behalf of the respondent, informed the tribunal that searches had been carried out by the respondent and that no notes had been found of the meetings on 15 and 22 March 2016.

13. The Tribunal heard evidence from the claimant, from Mr. Rashid El Sheikh, who attended pursuant to a Witness Order, and, on behalf of the respondent, from Mr. Troy Coldrick, Head of UK & International Relations at The Wellington Hospital.

14. At the outset of the preliminary hearing the claimant indicated that he intended to call Ms El Basri, his fiancée and former colleague, to give evidence on his behalf No witness statement had been prepared for Ms Basri and the respondent objected to her giving evidence without a witness statement. The claimant was given time to consider his position, and informed the tribunal that he did not wish to call Ms Basri to give evidence at the preliminary hearing, but that she would be giving evidence at the final hearing.

15. After lunch on the second day of the preliminary hearing the claimant was accompanied by Mr. Livingston of ELIPS. Mr. Livingston told the tribunal that he had had limited time to speak to the claimant and asked for a short adjournment to enable him to advise the claimant further. An adjournment was granted and following the adjournment, by agreement, Mr. Livingston assisted the claimant with his cross-examination of Mr. Coldrick.

16. Both parties produced skeleton arguments. At the conclusion of the evidence, given the lateness of the hour, it was agreed that the parties would send in written submissions. Both parties sent in detailed written submissions, for which the tribunal is grateful.

Findings of fact

17. The respondent is a provider of private healthcare which operates a number of hospitals including the Wellington Hospital in London.

18. The respondent provides private medical care to patients, including a large number of patients for whom English is not their mother tongue, and who need a translator to be able to understand conversations in English.

Employment status

19. The claimant is a fluent Arabic speaker and was engaged by the respondent as a 'Bank Member' providing translation services. His title was originally 'Interpreter' but subsequently changed to 'International Patient Co-ordinator'. The respondent engaged a number of Bank Interpreters and also employed a number of employees who were carrying out the same role or a very similar role to the claimant.

20. There was a dispute as to when the claimant began working for the respondent. The claimant says it was in 2008, the respondent in 2009. The claimant's start date is not relevant to the questions that the Tribunal has to determine, so the Tribunal makes no findings on that issue. The claimant ceased working for the respondent in October 2016.

21. The claimant's managers during the time that he worked for the respondent were Ms Ilham Mohamed and Mr. Troy Coldrick.

22. In March 2008 the claimant signed a Bank Membership Form which contained statements to the effect that the respondent was not under any obligation to provide employment nor was there any guarantee of regular employment or any entitlement to sickness benefits. The document also stated that membership of the Bank could be terminated at any time by either party.

23. In September 2012 the respondent sent a number of documents to the claimant including a document headed "Appointment to the HCA Bank (non-Contracted) Terms & Conditions'. The document set out the terms that applied to membership of the HCA Bank, which included the following:-

"HCA is under no obligation to offer work to Bank Members and a Bank Member is not obliged to accept any offer of work.

Bank membership may be terminated at any stage and without notice by HCA or the Bank Member.

Bank Members are not classified as employees of HCA and are not entitled to Company benefits.

Bank Members are able to work across all of HCS's facilities and/or work for other organisations.

HCA reserves the right to cancel advanced bookings (i.e. within 2 hours of commencement of the shift) if circumstances are such that additional help is not required…

There is no guarantee of regular work as a Bank Member…"

24. The claimant signed this document on 9th September 2012 agreeing to its terms. On the same day he signed a Confidentiality and Security Agreement. That agreement contained, below the claimant's signature, a line beginning 'Status' and containing a number of options including "Employee", "Contract" and "Temporary Staff". The claimant selected the "Temporary Staff" category rather than the "Employee" category when completing the form.

25. The claimant worked for the respondent regularly and consistently over a number of years. He worked in a team which included employees as well as bank staff. His working hours varied, as did the number of days he worked each week. In 2016 the number of hours he worked each month ranged from 162 in January to 89 in June.

26. In 2014 the claimant raised the issue of his working hours with his manager, Ilham Mohamed. He told her that he was unhappy that he wasn't been given the hours that he wanted, as he needed to work at least 30 hours a week. The respondent tried, where possible, to provide him with 30 hours a week, but explained to him consistently that there were no guarantees.

27. In early 2016 the respondent introduced a policy of allocating overtime shifts to employees in preference to bank staff. This, together with a fall in the number of patients from the Middle East, resulted in a reduction in the amount of work available for bank members such as the claimant.

28. The claimant was not guaranteed any work or particular hours. At times more work was available for bank staff than at others. The respondent explained to the claimant on several occasions that he could not be guaranteed particular hours. For example, on 26 April 2016 Ilhan Mohammed wrote to the claimant "*Thank you for your email regarding the additional hours. We will try to accommodate your request where possible, but cannot guarantee the availability of these hours on a regular basis…*"

29. In May 2016 Lesley Pope told the claimant in an email "*As I explained when we met, the hours available to bank staff has reduced with the drop in Middle Eastern patients throughout the hospital.*"

30. The claimant was free to take time off as and when he wanted to and often chose to do so at short notice. He was not required to submit holiday requests, or to seek permission to take time off – he merely had to inform the respondent that he would not be working, so that the respondent could find someone else to work.

31. There were numerous examples in the bundle of emails sent by the claimant to the respondent informing the respondent that he would not be at work at short notice. For example:-

31.1. On 28 March 2016 the claimant wrote to Mr. Coldrick that "*I would like to inform you that I will be away for one week from Tues 29th March 2016 until Mon 4th April 2016, due to unforeseen circumstances."*

31.2. On the evening of 31 May the claimant informed Ilham Mohamed by email that he would not be able to work a shift the very next day – 1st June and also that he would be away from a week beginning on 2nd June.

31.3. On the afternoon of Sunday 12 June 2016 the claimant sent an email to Ilham Mohamed informing her that he would not be able to work on the 13th or 14th June. The response from Ms Mohamed was *"Thank you for your email yesterday and have a nice two days off...*"

32. The claimant was able, to some degree, to specify the hours that he would work. For example, on 19th June 2016 he wrote to the respondent stating that he would only be able to do certain days and hours that week and would not be able to work on other days or times. The respondent replied, asking him to let them know when he was available to work by Wednesday each week.

33. Ms Mohamed wrote to the claimant again on 22 June asking him to tell her what days he was available for the following week, so that the respondent could finalise the rota. The claimant responded that he was unable to tell the respondent what days he would be available because he did not yet know.

34. At 21.50 on the evening of Sunday 17 July the claimant sent an email to Ms Mohamed telling her that he would not be able to work on Monday 18th or Tuesday 19th July. Two weeks later on Sunday 31 July he wrote to Ms Ilham to tell her that he was not able to work on the following 2 days.

35. On Saturday 1 October the claimant wrote to Ilham Mohammed asking why he had been rostered to work in Rehab rather than 'Hospital Bleeps' and why he had not been given certain shifts. When Ms Mohamed did not reply by Sunday 2 October the claimant wrote to her telling her that as she had not replied, he was not able to work on Monday or Tuesday.

36. The claimant was free to accept or decline work as he saw fit.

37. In late 2015 the respondent advertised for two permanent International Patient Co-ordinators who would be employees of the respondent. The claimant was encouraged to apply for the roles as his performance had, to date, been very good and he was well regarded.

38. The claimant applied and was interviewed for the roles. His application was successful and he was offered one of the roles. The claimant did not accept the offer because the salary of £25,000 was, in his view, too low and below what he was earning as a bank worker. The claimant wanted a salary of £36,000 a year, and when the respondent did not offer him that much, he declined the offer and chose to remain working for the respondent as a member of the bank.

39. Mr. El Rashed gave evidence to the Tribunal. He works for the respondent as an Arabic interpreter. He was originally engaged as a bank worker but subsequently became an employee.

40. He gave evidence, which the Tribunal accepted, that after he moved onto an employment contract with the respondent:-

40.1. he had regular hours of work;
40.2. he was paid a fixed salary;
40.3. his hourly rate was lower than that of bank staff;
40.4. he was provided with benefits such as health insurance, childcare vouchers, cycle to work scheme and travel insurance;
40.5. he was provided with access to the respondent's pension scheme;
40.6. he had a set holiday entitlement (as opposed to when he was a bank worker and could take as much time off as he wanted)

41. Mr. El Rashed also gave evidence that when he was a member of bank staff he was not required to get express approval for holidays, although in practice he would tell his manager when he would be off.

42. He also told the tribunal that as a member of bank staff he could say 'no' to work and was not obliged to accept it when it was offered to him. He accepted that on

occasions he had turned down the offer of work, and that there were no penalties except that if he turned down work too often the respondent may not call him and ask him to work as often.

Qualifying disclosures

43. On 15th March 2016 the claimant met with Lesley Pope, the Director of Rehabilitation. The claimant asked her to investigate two issues that he was concerned about. The first was his belief that there were rumors that he (the claimant) had been involved in a breach or breaches of patient confidentiality, and the second was that that Ilham Mohammed had behaved in an unprofessional manner towards him.

44. On 16th March the claimant sent an email to Lesley Pope to follow up on their meeting the previous day. In that email he wrote:-

"…*I would like you to launch a formal investigation into the following two matters, which might be linked to each other or totally different matters, only an investigation will tell!*

First, to investigate into the rumors among the International patients and their families about my confidentiality and performance (I informed you before that I was blamed by some families for disclosing patients confidential information, but unfortunately they refused to make a complaint against me, although I tried with them to do so. I explained to you that I cannot accept this as a settlement and I need to clear my name otherwise I will not be able to do my work properly.

Second, I told you that I had a feeling that I was 'kicked out of my office' and as the time passes my feeling gets stronger and stronger. I accused Ilham of a major misconduct i.e. She took an action against me without giving me the chance to defend myself, and that she has been slandering me to my colleagues"

45. Lesley Pope referred the matter to the respondent's HR team. On 22nd March Sheila Johnson, Chief Human Resources Officer, met with the claimant and Nezha Elbassri. The claimant told Ms Johnson that he felt degraded, humiliated, shocked and confused, and that he believed there were rumors among patients and their families that he had been leaking patients' confidential information. He told her he wanted to clear his name and restore his reputation. Ms Johnson asked the claimant to prepare a document setting out the concerns that had been raised, and told him that she would then start an investigation.

46. The claimant wrote to Ms Johnson on 28th March summarising his main concerns as being– "*the rumors around the hospital accusing me of breaching the patient confidentiality policy*" and "*my relationship with my line manager – Ilham*". He went on to describe Ilham's behaviour and actions as "*totally unacceptable*", and to allege that "*she showed me very clearly that I am no longer welcome in the International Relations Office*" and "*I was treated as if I were a disgrace to my department*".

47. The claimant ended his email to Lesley Pope by saying that he wanted to raise a formal grievance.

48. David McIntosh, Consultant Liaison Manager, was appointed to investigate the claimant's complaint. The complaint was not upheld.

Complaint of sex discrimination

49. In June 2014 the claimant became concerned that he was not being given enough hours. On 8 June 2014 he sent an email to his line manager Ilham Mohamed complaining that a female bank worker, Zainab Abdulrahim, had been given more hours than him in the rota for that week. In his email he said that "*…I would have accept 30 hours had you not provided much more hours to Mrs Zainab, no need to mention Mr. Rashid. Please double check the rota and see how many hours you have given to Zainab, they are more than 40 hours. My question is why you can allocate 44 hours to Zainab but cannot do that for Samir?"*

50. Ms Mohamed replied the same day suggesting that the claimant arrange a meeting with Mr. Coldrick to discuss his concerns and explaining that "*Zainab is covering a female interpreter position with the rehab unit*". The claimant responded to Ms Mohamed's email writing "*Is it my fault I was not a female?.*"

51. Some of the respondent's female patients ask to be treated by female staff, and to have female interpreters. The respondent 's policy is to accommodate these requests and allocate female staff. Whilst there were some occasions when Zainab worked more hours than the claimant in a particular week, there were also weeks when the claimant worked more hours than Zainab.

52. In his claim form the claimant described his complaint of sex discrimination as Ilham having discriminated against him in favour of Zainab on 8 June 2014 by giving her more hours than him.

53. In response to the respondent's request for further particulars of the discrimination complaint, an in particular whether the claimant was raising any other allegations of unlawful sex discrimination, the claimant replied:-

"*The claimant raised another issue in his grievance regarding Ilham's discriminatory statement about women "I don't want any woman in my office".*

It is reasonable for the claimant to believe that he was subject to retaliation and was victimised by Ilham and Troy because he made a protected disclosure.

Finally, the claimant is reasonably convinced that Ilham had interest in him as a man, and because he refused to get involved with her in a relationship further than the normal employee-manager work relationship, Ilham abused her power as a manager to interfere into and influence his private life. (More details about this sensible matter will be disclosed in Nezha El Bassri's witness statement).

54. The claimant gave no evidence as to the dates of Ms Mohamed's alleged comment and / or interest in him. Given that his grievance was raised in March 2016 the tribunal can only conclude that the alleged comment if it was made was made before March 2016.

55. The claimant told the tribunal in cross-examination that he had not raised any complaints of discrimination between June 2014 and January 2017, and there was no evidence of him having raised discrimination in his grievance. The tribunal does not, therefore, find that he did raise a complaint of discrimination in his grievance.

56. In his witness statement, when dealing with the question of Zainab allegedly being given more hours than him, the claimant stated "*This sort of direct sex discrimination started in March 2014 and continued towards mid-September 2014".*

57. The claimant did not give any evidence to the tribunal as to why he waited until January 2017 to issue a claim of sex discrimination. He did however give evidence to the tribunal that he had taken legal advice in October 2016, and that his fiancée is studying law. He also told the tribunal that he was aware of the respondent's grievance process and that he had not mentioned discrimination in the complaint that he raised in 2016

58. In his witness statement the claimant gave evidence that an email sent to Sheila Johnson on 12th October 2016 had been sent on the advice of his solicitor. The tribunal therefore finds that the claimant had taken legal advice by 12th October 2016 at the latest.

Claim for arrears of pay

59. The claimant believes that he is entitled to arrears of pay covering the period from April 2013 through to the termination of his engagement with the respondent in October 2016.

60. The respondent pays bank workers differently to employees. Bank workers providing translation services are on a much higher hourly rate of pay than employed International Patient Co-Ordinators. In 2013 the hourly rate for bank members was £15.45 during the week and £19.86 at the weekend, whereas the hourly rate for employees was £12.82.

61. In his claim form he complains that in March or April 2013 permanent employees were offered a new contract as International Patient Co-ordinators (IPCs) with a significant salary increase. He alleges that "*We the Bank staff as well became IPC's and were promised that our pay rate will be reviewed accordingly but this did not happen despite our constant requests.*"

62. In his witness statement the claimant gave evidence that the Bank Interpreters "*Were told that our title and responsibilities have also been changed…We, the Bank IPCs were happy and expected to receive pay rate increase sooner rather than later…"*

63. The claimant also gave evidence that in April 2014 he had spoken to Troy Coldrick about the pay for bank IPCs. His evidence was that he had requested a pay rate increase for Bank IPCs and that Troy and Ilham "*promised to look into our request.*"

64. In June 2014 in another meeting with Troy and Ilham the claimant asked the managers to update him regarding the pay increase and they responded that they were still looking into it.

65. The hourly rate for Bank IPCs was increased in 2015 to £16.23 during the week and £20.87 at weekends.

66. The issue of pay came up again in a meeting in September 2016 when the claimant was given a sheet showing the increase in the Bank rate that had taken place in 2015.

67. On 7 September 2016, in an email to Sheila Johnson the claimant raised the issue of a pay increase for Bank IPCs. He wrote that "*I asked Troy and Ilham to review the Bank IPC pay rate pay accordingly. Troy and Ilham welcomed the idea and promised me to look into it, but nothing happened since that time*."

68. In a meeting of the International Relations Team on 29 September 2016 the claimant asked a question about pay rates. The minutes of that meeting record "*SI asked about when bank rate might increase. AE said that he has contacted head office but has not heard back.*"

69. Mr. Coldrick gave evidence to the tribunal that he had many conversations with the claimant about the claimant's wish for a pay rise, and that he had promised him he would look into the question, but had not at any time promised the claimant an increase. The tribunal accepts his evidence, which is consistent with the documentary evidence in the bundle, and indeed with the evidence of the claimant himself.

70. There is no evidence before the tribunal that the claimant has ever been promised a pay increase. All of the evidence is that the claimant asked for a pay increase and was told that management would look into it. He continued to ask about it right up until September 2016, the month before his engagement with the respondent terminated.

The Law

<u>Employment status</u>

71. Section 94 of the ERA provides that "*an employee has the right not to be unfairly dismissed by his employer*".

72. Section 230 of the ERA defines an employee for these purposes as "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".* Contract of employment is defined as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

73. In order for there to be a contract of employment the relationship between the parties must contain what is often termed the "irreducible minimum" of :-

73.1. personal service;
73.2. control; and

73.3. mutuality of obligation.

74. In addition, all of the other factors defining the relationship must be consistent with there being a contract of employment.

75. In *Autoclenz Ltd v Belcher and others [2011] IRLR 820* the Supreme Court held that the question to be determined is what the true agreement between the parties is. This is not always what is in the written contract, as there are occasions when the express contractual provisions do not reflect the reality of the situation.

76. The Supreme Court also concluded that the relative bargaining positions of the parties is a relevant factor when it comes to determining whether the written contract accurately reflects the legal position. The Court recognised that 'employers' are often in a position to decide what written terms should be included in the contract, and the individual often has little option but to accept those terms.

Limitation period for the sex discrimination complaint

77. The time limit for presenting a complaint of sex discrimination to the employment tribunal is contained within section 23 of the Equality Act 2010 ("the EA") which provides as follows:-

"*Proceedings…may not be brought after the end of –*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable."

Protected disclosures

78. Section 43A of the ERA defines a protected disclosure as "*a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*

79. Section 43B provides that :-

"*…a " qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-*

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be concealed."

80. Section 43C states that "*A qualifying disclosure is made in accordance with this section if the worker makes the disclosure…to his employer"*.

81. The respondent admits that if the claimant made a qualifying disclosure falling within section 43A of the ERA, then it was a protected disclosure within section 43C.

Reasonable prospects of success

82. Paragraph 37 of the Employment Tribunals (Constitution & Rules of Procedure Regulations 2013 gives the tribunal the power to strike out all or part of a claim or response on a number of grounds, including it if consider that the claim is "*scandalous or vexatious or has no reasonable prospect of success."*

83. Paragraph 37(2) provides that a claim may not be struck out "*unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."*

84. The right not to suffer unlawful deductions from wages is contained within section 13 of the ERA which provides that:-

"*(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

(a) the deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

85. Wages are defined in section 27 of the ERA as "*…any sums payable to the worker in connection with his employment, including …any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."*

Submissions

Employment Status

86. The claimant submits that he was an employee of the respondent as the true nature of the relationship between the parties was one of employer and employee. In support of this submission he says that:-

86.1. He provided personal service in return for weekly remuneration and was not permitted to send a substitute to do the work;

86.2. He worked regularly for the respondent over a period of years;

86.3. He was subject to the control of the respondent in the way in which he provided the services;

86.4. He had to attend mandatory training;

86.5. The conduct of the parties was inconsistent with the written contract such that the contract did not reflect the reality of the situation;

86.6. The respondent had agreed to provide him with a minimum of 30 hours a week;

86.7. There was an obligation on the respondent to provide him with work;

86.8. He was obliged to perform the work that was offered to him;

86.9. There was a mutuality of obligation between the parties; and

86.10. He was provided with equipment by the respondent including a uniform and a name badge.

87. The respondent accepts that the claimant was engaged under a contract throughout the period of his engagement, but disputes that the contract was a contract for services.

88. The respondent submits that the claimant knew he was a bank worker and that his status was different from that of employees. His hourly rate of pay was much higher than that of employees and he was not provided with employee benefits. He had been given the opportunity to become an employee but chose not to do so preferring to remain on his existing contract because he was paid more

89. In the respondent's submission the question for this Tribunal is whether the claimant worked under a contract of service, and the starting point is to look at the written terms and then consider whether they have been 'displaced'.

90. The respondent refers to *Arnold v Britton [2015] AC 1619* as authority for the proposition that the construction of written terms involves the Tribunal identifying the intention of the parties at the time the terms were agreed by reference to what a reasonable person with all the background knowledge that would he been available to the parties at the time, would have understood those terms to mean.

91. The respondent submits that the terms of the written contract are clear and are consistent with the claimant being a worker rather than an employee .

92. The key question in this case, in the respondent's submission, is whether there is a mutuality of obligation between the parties, and the Tribunal is referred on that issue to the case of *Clark v Oxfordshire Health Authority* [1998] IRLR 125. The respondent says that there was no mutuality of obligation between the parties as there was no obligation on the respondent to offer the claimant work, no regular pattern of work, and no obligation on the claimant to accept work that was offered to him. The respondent referred to numerous examples of occasions when the claimant had turned down work, often at very short notice.

93. The respondent submits that what happened in practice was consistent with the terms of the written agreement.

Limitation Period

94. The claimant submits that it would be just and equitable for the Tribunal to extend time and to consider his complaint of direct sex discrimination. He says that he was not aware that the less favourable treatment he received in 2014 could amount to sex discrimination and was discouraged from discussing the issue.

95. The claimant referred the tribunal to the cases of Robertsons *v Bexley Community Centre [2003] IRLR* 534 and *London Borough of Southwark v Afolabi [2003] IRLR 220.*

96. The respondent submits that the primary time limit for the discrimination complaint expired on 7 September 2014 so the ET1 was presented more than 2 years and 4 months out of time.

97. The respondent further submitted that it would not be just and equitable to extend time for the following reasons:-

97.1. The claimant has not put forward any evidence to explain the significant delay;

97.2. The claimant knew that he had a right to complain as he raised a grievance in March 2016;

97.3. There is nothing to suggest that the claimant did not have access to legal advice from June 2014;

97.4. There is evidence that the claimant had received legal advice by October 2016 yet he did not issue proceedings until 24 January 2017.

Qualifying Disclosures

98. In his written submissions the claimant submits that he made two protected disclosures, the first to Lesley Pope on 15 March 2016 and the second to Sheila Johnson on 22nd March 2016.

99. He says that he complained of rumors accusing him of breaching patient confidentiality and that he was 'kicked out' of the International Relations Office.

100. The claimant submits that patient confidentiality is a matter of public interest and the fact that his intention in raising the complaint was to clear his name does not affect this. He referred to *MS v Sweden [1999] 28 EHRR 313* as authority for the proposition that the protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his/her right to respect for private and family life, and that respecting the confidentiality of health data is a vital principle.

101. He also submits that the respondent failed to investigate a serious breach of its legal obligation to maintain patient confidentiality.

102. The respondent submits that it is only the first disclosure (15 March 2016) that can be relied upon by the claimant.

103. It further submits that the claimant's complaint, in essence, was that there were rumors amongst patients and their families that he had breached patient confidentiality but that he had not done so, and wanted to clear his name and restore his reputation. This does not, in the respondent's submission, amount to disclosure of information tending to show that someone had breached a legal obligation. Instead, it was a complaint that the claimant had not breached a legal obligation.

104. The respondent says that a rumor, even if untrue, is incapable of tending to show a miscarriage of justice, and that before there can be a miscarriage of justice there must be a judicial determination of a criminal or civil right.

105. The respondent also says that the claimant did not have a reasonable belief that the information he disclosed tended to show a breach of a legal obligation or a miscarriage of justice because what he was clearly saying was that he had not done anything wrong.

106. Finally the respondent submits that the disclosure was not in the public interest as it was made purely for the claimant's benefit and his wish to clear his name. The respondent referred in support of this submission to *Chesterton Global Ltd v Nurmohamed [2015] IRLR 614.* That decision has subsequently been appealed and the Tribunal has considered, in reaching its decision, the conclusions of the Court of Appeal which are at *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979.*

<u>Reasonable prospects of success</u>

107. The claimant submits that his claim for unlawful deductions does have reasonable prospects of success for the following reasons:-

107.1. His job title was changed from Interpreter to IPC in 2013 and the salaries of employed IPCs were increased at the time by up to 33.5%;

107.2. The respondent agreed that the nature of the claimant's role would change and that IPCs would no longer be required to perform administrative duties;

107.3. Mr. Coldrik admitted in a meeting on 8 September 2016 that the claimant was entitled to a pay rise due to a change in his title and responsibilities in 2013;

107.4. Mr. Coldrick did not come back to the claimant and dragged the issue of the pay rise out for 2.5 years; and

107.5. The claimant was misled and deceived to make him perform extra duties and responsibilities for free.

108. The respondent submits that, putting the claimant's case at its highest, the claimant 's claim is that management promised to look into the possibility of a pay rise. The respondent also submits that that the claimant does not say (and has never said) that he was told he would be given a pay rise, and that in order to succeed in this element of his claim, the claimant would have to show that he was entitled to a higher rate of pay.

Conclusions

Employment Status

109. The terms of the written contract between the parties are consistent with the claimant being a worker and not an employee. The Tribunal has no reason to believe that the written contractual arrangements were a 'sham' which did not reflect the reality of the relationship between the parties.

110. The respondent was not obliged to offer the claimant work, and the claimant was not obliged to accept it. The claimant was free to work as and when he chose, and to decide not to work when it suited him. The claimant was also free to work for other organisations if he wished, and he was not guaranteed any hours by the respondent.

111. He was not provided with the benefits that were provided to employees and was paid a much higher rate of pay to compensate for this. His contract could be terminated at any time.

112. Although the translation and interpretation services that the claimant provided were also provided by directly employed employees, the mere fact that the work the claimant carried out was similar to that carried out by employees does not in itself mean that the claimant was an employee.

113. The claimant chose to have worker status rather than to be an employee because it suited him. As a worker he was paid a higher rate of pay and could work the hours that he wanted to. Although in many employer / employee or employer / worker relationships the bargaining positions between the parties are such that the individual has no choice but to accept the terms offered, this was not the case as far as the claimant was concerned.

114. The claimant was well aware of the differences between being a Bank worker and being an employer and turned down the opportunity to become an employee when it was offered to him. He chose, voluntarily, to be a Bank worker because he was paid a higher rate of pay as a result.

115. What the claimant is seeking to do, by claiming after his engagement was terminated that he was in fact an employee, is to have the benefit of employment status, but without the obligations and reduction in hourly rate that went along with it.

116. It is clear from the evidence before the Tribunal that the claimant was required to provide personal service and was subject to the control of the respondent.

There was however no mutuality of obligations between the parties, as evidenced by the fact that the claimant could turn down work whenever he wanted to and was not obliged to work, and by fact that the respondent did not guarantee the claimant worked, and changed his working hours. The claimant could, and often did, turn down work at short notice, without any adverse consequences.

117. The conclusion of the Tribunal is that the claimant was not employed by the respondent, but rather was a worker.

Limitation Period

118. The claimant's claim of sex discrimination was submitted more than 2 and a half years after the acts that the claimant complains of (taking the 8 June as the date of discrimination) and more than 2 years and 4 months after the alleged discrimination if the claimant's suggestion that the discrimination lasted until September 2014 is accepted. The complaint is, therefore, significantly out of time.

119. The Tribunal can extend time and allow the complaint to proceed if it considers it is just and equitable to do so.

120. The discretion to extend time is a wide one. In deciding whether to exercise it, the Tribunal should consider factors such as:-

120.1. The prejudice to each party as a result of granting or refusing an extension;

120.2. The length of and reasons for the delay;

120.3. The extent to which the cogency of the evidence is likely to be affected by the delay;

120.4. the extent to which the respondent co-operated with any requests for information;

120.5. the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and

120.6. the steps taken by the claimant to take advice once he knew of the possibility of taking action.

121. The key factors in this case are, in the Tribunal's view, that:-

121.1. The extent of the delay was significant;

121.2. The claimant has provided no evidence as to why he delayed in bringing a claim. He was clearly aware of the facts giving rise to the claim in June 2014, yet did not issue proceedings until January 2017;

121.3. The claimant took legal advice in October 2016 yet did not submit his claim until January 2017;

121.4. There would, in the Tribunal's view, be prejudice to the respondent in having to defend a claim for discrimination although equally the claimant would be prejudiced by not being allowed to bring a claim.

121.5. There was, in the Tribunal's view, no cogent reason for the claimant not to have issued proceedings sooner. Time limits exist for a reason and should be respected.

122. Although not required to make any findings in relation to the merits of the discrimination complaint, the Tribunal notes that on the evidence presented at the preliminary hearing, it does appear that the respondent has a strong defence to the complaint.

123. The complaint of sex discrimination is, therefore, out of time, and the Tribunal does not have jurisdiction to consider it.

Qualifying Disclosures

124. The matters complained of by the claimant were that:-

124.1. He was the subject of false rumors that he had breached patient confidentiality; and that

124.2. Ilham Mohamed had behaved badly towards him.

125. In relation to the first allegation, the Tribunal accepts the respondent's submissions that complaining that false rumors have been made does not amount to a disclosure of information tending to show that someone has breached a legal obligation or that there has been a miscarriage of justice. The claimant has not identified any legal obligation that may have been breached when the false rumors were made, if indeed they were made.

126. The Tribunal does not consider that false rumors are capable of amounting to a miscarriage of justice in the circumstances of this case.

127. In relation to the second allegation, a suggestion that a manager has behaved badly could potentially amount to a disclosure of information tending to show that the manager has breached a legal obligation, but in this case it does not. As the claimant was not employed by the respondent there was no implied duty of trust and confidence and the claimant's contract could have been terminated at any time without notice.

128. In any event, the disclosures that were made by the claimant were not made in the public interest, but rather they were made with a view to the claimant clearing his name and re-establishing his reputation.

129. The Court of Appeal in *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979* held that :-

129.1. the tribunal has to determine (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so, whether that belief was objectively reasonable.

129.2. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation.

129.3. There are no hard and fast rules about what it is reasonable to view as being in the public interest.

129.4. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter in which the worker has a personal interest) there may be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case.

130. Whilst the Tribunal accepts that disclosure of information tending to show that patient confidentiality has been breached would be a matter of public interest, the claimant did not disclose information tending to show that patient confidentiality had been breached. Rather, he complained that others had falsely accused him of breaching patient confidentiality.

131. The disclosures were not made in the public interest, but rather with a view to clearing the claimant's name.

Reasonable prospects of success

132. The claimant's complaint of unlawful deduction from wages does not have reasonable prospects of success.

133. In order to succeed in such a claim, the claimant would have to establish that the respondent had unlawfully withheld sums which were due to the claimant.

134. There is no evidence whatsoever to suggest that the respondent did withhold sums which were due to the claimant.

135. On the claimant's case alone, no pay increase was agreed or promised by the respondent. Rather, in response to questions from the claimant, the respondent promised to look into the matter of pay. It did not agree to any pay increases, other than the increase in hourly rate which was paid to the claimant.

136. Accordingly, the complaint of unlawful deduction from wages is struck out.

Employment Judge Ayre
28 September 2017