Case No: 3327352/2017

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Sixtus Anogwi **v** **North Middlesex University Hospital NHS Trust**

Heard at: Watford **On:** 19 December 2017

Before: Employment Judge Bedeau

Appearances:
For the Claimant: Mr P Erdunast, FRU representative.
For the Respondent: Mrs S Ramadan, Solicitor.

JUDGMENT having been sent to the parties on 17 January 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented to the tribunal on 23 August 2017, the claimant claimed that the respondent had been negligent in the handling of his immigration and employment status in the United Kingdom and that he should be compensated for the loss of his employment and the fact that he faces a possible return to his home country.

2. In the response, presented to the tribunal on 11 October 2017, the respondent averred that the tribunal does not have jurisdiction to hear and determine a negligence claim and, in any event, the claim form was presented out of time. As a consequence of the Home Office stating that the claimant does not have the right to work in the United Kingdom, it was, by law, obliged to terminate his employment on 10 January 2017.

3. On 25 October 2017, the respondent's legal representatives applied to the tribunal for the case to be listed for a preliminary hearing, in public, before an employment judge to hear and determine the issues of: lack of jurisdiction in respect of the negligence claim; strike out, as the claim was presented out of time; strike out because the claim has no reasonable prospect of success; or to issue a deposit order as the claim has little reasonable prospect of success.

4. On 13 November 2017, the tribunal was informed by the claimant's counsel, Mr P Erdunast, that he was now representing the claimant on behalf of the

Free Representation Unit (FRU).

5. On 25 November 2017, the tribunal listed the case for a preliminary hearing to be heard today to consider the issues raised by the respondent's legal representatives.

6. On 4 December 2017, Mr Erdunast applied to the tribunal to amend the claim by substituting breach of contract claim in place of the negligence claim. The basis of the application being to put a label on matters already pleaded.

7. The application was opposed by the respondent's legal representatives in their letter dated 8 December 2017.

The issues

8. The issues for me to hear and determine are as follows:-

   8.1 Whether the claim form was presented out of time and, if so, whether time should be extended as it was not reasonably practicable to have presented it in time?

   8.2 Whether the claimant's application to amend should be granted?

   8.3 If the application is granted, whether his claim has no reasonable prospect of success and should be struck out or little reasonable prospect of success and a deposit ordered?

The evidence

9. I heard evidence from the claimant. No oral evidence was called on behalf of the respondent. The parties produced a joint bundle of documents comprising of 223 pages. In addition, the claimant adduced in evidence a conditional fee agreement dated 27 July 2017. References shall be made to the documents as numbered in the joint bundle.

Findings of fact

10. The claimant was born in Nigeria on 25 May 1979. On 13 January 2009, he was granted leave to enter this country as a student and was subsequently granted leave to remain as a Tier 4 migrant on 19 April 2010 which was later extended to 31 March 2012. On 10 September 2012, he was granted leave to remain as a Tier 1 post study migrant until 10 September 2014.

11. He has been educated to master's degree level.

12. On 1 September 2014, he commenced employment with the respondent as a bed manager working full time, 37.5 hours per week on an initial salary of £21,478 gross per annum. (Pages 53-62 in the joint bundle)

13. On or around 29 August 2014, he was issued by the respondent with a Certificate of Sponsorship "COS" on Standard Occupational Classification "SOC" code "2219 health professionals not elsewhere classified and five

and equivalent". This enabled him, it was assumed, to lawfully work in compliance with immigration requirements.

14. On 4 September 2014, he was granted leave to remain by the Home Office as a Tier 2 migrant with an expiry date of 14 September 2016.

15. He successfully applied for a three months internal secondment to the position of team leader, band 5, in the respondent's Women's and Children's Services and contacted Mrs Gerry Lame, head of workforce resourcing, about his SOC code. The team leader role was to become permanent and he was considering applying for it. Before doing so, he wanted to know whether his current SOC code would cover the new post or whether he would need a different code.

16. On 24 May 2016, Miss Dhrupsha Kara, deputy recruitment manager, informed him that he would not be able to transfer his current COS code to the team leader post and that the respondent would not be able to apply for another code for him because the team leader post did not fall into any of the categories of the SOC codes for which the respondent could issue a COS.

17. Accordingly, the claimant could not apply for the permanent team leader post.

18. On 13 September 2016, he made an application for further leave to remain as a Tier 2 migrant and for a Biometric Residence Permit.

19. During the respondent's enquiry into whether he should be issued with a new COS code in relation to the team leader role, it discovered that the 2219 SOC code which he had been issued with in August 2014, was in fact the incorrect code for his role. It, therefore, could not renew his COS on the incorrect SOC code and there was no alternative SOC code which applied to the bed manager post.

20. On or around 8 November 2016, the claimant informed the respondent that his application for leave to remain under Tier 2 had been refused by the Home Office as he failed to obtain the necessary points under the Home Office's criteria. The Home Office also considered whether the role stated in the COS was a genuine vacancy, but as the application had been refused on other grounds, it was decided that there was no need to seek further information about the employment stated in the COS. The Home Office noted that the COS stated that the claimant's prospective employment most closely corresponded to SOC 1181, health service and public health managers and directors. This was incorrect as the duties and skills were not the same as that of bed managers and the minimum acceptable salary for SOC 1181 was £35,500 gross per annum for 39 hours per week whereas the claimant's salary would have been £27,015.04 per annum. The Home Office, however, gave the claimant the right to apply for an administrative review and should he choose not to do so, he did not have any other legal basis to remain in the United Kingdom.

21. The respondent carried out an Employer Checking Service enquiry, "ECS" on 21 November 2016 and received a Positive Verification Notice "PVN" on

27 November 2016, which stated that the claimant had the right to work.

22. On 29 November 2016, Miss Yana Le Tissier, senior human resources business partner, wrote to the Home Office informing them that an incorrect SOC had been used at the time of issuing the claimant's COS, and that this was a genuine administrative error. She requested advice on how to rectify the mistake as the respondent was keen to retain the claimant.

23. On 16 November 2016, the claimant rang Miss Helen Rushworth, human resources director, who encouraged him to stay calm and asked that he should she see her the following morning. During their meeting, Miss Rushworth reassured the claimant that she would try to sort the situation out and remained committed to helping him.

24. The claimant was being represented by Mr Daniel Koi, of Killic and Killic Solicitors, in relation to his immigration case, in that they challenged the Home Office's decision by way of an application for an administrative review of the refusal decision.

25. I was satisfied that Miss Rushworth and Mr Ray Conley, deputy human resources director, seriously engaged with the claimant, his solicitors and the Home Office, in attempting to persuade the Home Office to reconsider its decision regarding the claimant's immigration status and to allow him to work for the respondent.

26. On or around 21 December 2016, the claimant informed the respondent that his application for an administrative review was unsuccessful. A meeting was held on that day and the claimant was told that the respondent could no longer continue to employ him without committing a criminal offence and it would be required to pay a civil fine. His employment would, therefore, be terminated.

27. Mr Conley wrote to the claimant on 3 January 2017, confirming the decision to terminate his employment and stated that the respondent would continue to support him including providing him with finance towards his legal costs were he to make a further challenge to the Home Office's decision. The respondent would also be prepared to write a favourable testimonial and would make available its services although he was no longer an employee of the Trust. (Pages 105-106)

28. I was satisfied that taking into account the claimant's holiday, his last day of service was 10 January 2017 and was the effective date of termination. (Page 107-108)

29. On 7 April 2017, the government's legal department wrote to the claimant's solicitors about his judicial review application, stating that the Secretary of State for the Home Department would invite him to withdraw his judicial review application on the basis that the decision would be reconsidered within three months upon the receipt of a new Certification of Sponsorship (COS) from his sponsor, the respondent. (Page 127)

30. The respondent wrote to Mr Koi on 3 May 2017, in response to the government legal department's letter, stating that it would be prepared to re-

employ the claimant provided the necessary immigration permission could be obtained. It stated that:

> "Since Mr Anogwi's refusal of leave to remain under Tier 2, his administrative review has also been unsuccessful. In line with paragraph 245HD(K) of the Immigration Rules and associated UKVI guidance, Mr Anogwi is therefore prevented from further leave to remain until 12 months have passed. This is because his leave is deemed to have ended. Since the Tier 2 cooling off has not been completed by Mr Anogwi, regardless of his presence in the UK he is legally prevented from being employed at the present time.
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> So, I'm afraid that the Trust cannot actually take forward the government's legal department's proposals as things stand. Only if there is a specific written confirmation from UKVI that the cooling off period will not be applied to any leave to remain application by Mr Anogwi before 12 months have elapsed can the Trust potentially lawfully assign him a certificate of sponsorship. **It would be helpful that any such confirmation also states that the** immigration rules in place before 6 April 2017 will be applied to Mr Anogwi's circumstances, including the assignment of any new certificate of sponsorship …." (Pages 128-129)

31. The claimant's solicitors replied on 3 May 2017, to the respondent's letter clarifying the government legal department's position and further invited the respondent to liaise with the claimant to issue a new and correct COS with the appropriate SOC to facilitate a favourable decision by the Home Office. (Pages 133-135)

32. In further correspondence, it would appear that the claimant's solicitors were of the view that the appropriate SOC code was not 1181 as contended by the respondent but 2219. (Pages 137-148)

33. I was satisfied that Killic and Killic were unable to persuade the respondent, in particular, Mr Conley, that the appropriate code was 2219. On the 17 May 2017, realising that the position could not be salvaged, Mr Koi spoke to the claimant by telephone informing him of his unsuccessful attempt to change the SOC code and that the claimant's last option would be to go to an employment tribunal. The claimant said in his witness statement the following:

> "He explained to me that we may have difficulties with being out of time but he'd have to seek further advice from an employment barrister to ascertain the prospects of bringing a claim at the tribunal." (Page 29)
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> "On 22 May 2017 Daniel Koi called me to say that he has spoken to the barrister and they said it will cost me £600 for them to give their advice. I asked him to go back and negotiate with them as the amount was high considering that I had limited funds." (Page 30)
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> "On 23 May 2017 Daniel Koi sent me an email to say that he has spoken to the counsel's clerk and they insisted that it would be £600. However, I was not pleased with the figure but I told him to go on as I had no other choice (Email between Daniel Koi and me dated 23 May 2017)." (Page 31)
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> "The next day, Daniel Koi came back to say that he had spoken to the barrister and that we could progress with the employment claim. At this point, I told him

> that before we can begin the process, I would like to go and see Ray (Conley) and speak to him again on how this whole sad incident has turned my life and that of my family into a living hell and to also see if he will issue a COS. Daniel agreed with me that it was a good move."

34. The claimant said in evidence and I do find as fact, that he was aware on or around 24 May 2017, following the conversation he had with Mr Koi, that there is a three months' time limit within which a claim should be presented to an employment tribunal. He was also aware that the time limit had passed but that an application could be made to extend time. He further stated that Mr Koi would refer the matter to Mr Patrick Opoku-Boateng, solicitor and a specialist in employment law. Mr Opoku-Boateng was on leave and returned to work on 22 June 2017. The claimant further stated that Mr Koi was prepared to put the matter on hold until Mr Opoku-Boateng's return.

35. Mr Opoku-Boateng did speak to the claimant on 23 June 2017 and after taking details about the case, said that he would notify ACAS but until an agreement had been reached in relation to Killic and Killic's services regarding payment, he could not submit a claim to an employment tribunal.

36. On 27 June 2017, Mr Opoku-Boateng notified ACAS. On 11 July 2017, the claimant met with him for between 25-30 minutes and he explained how the employment tribunal worked and Killic and Killic's fee arrangements.

37. Attempts to conciliate were unsuccessful and on 27 July 2017, ACAS issued a certificate.

38. The claimant told me that he was the one who had to inform Mr Opoku-Boateng on 4 August 2017 that he was no longer required to pay an issue fee to proceed with a claim before an employment tribunal following the judgment of the Supreme Court in July 2017 in the Unison case. He became disillusioned as Mr Opoku-Boateng said that the money in Killic and Killic's possession would not cover their work in representing him in his employment case.

39. On 14 August 2017, the claimant was emailed by Mr Opoku-Boateng, a conditional fee agreement and was advised that the deadline for presenting his claim form would be 25 August 2017. The claimant contacted the Mary Ward Legal Centre and on 22 August 2017 he emailed Killic and Killic withdrawing his instructions to them. On 23 August 2017, he completed his claim form and presented it to the employment tribunal.

40. In the emails sent on 23 May 2017, the first is from Mr Koi to the claimant in which he wrote:

> "Hi Sixtus,
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> I have spoken to counsel's clerks about the fees as discussed yesterday and they are adamant that they can't reduce the fees. Please let me know whether you want me to proceed with our response without the input of the legal opinion on the prospects of bringing a claim at the employment tribunal."

41. The claimant replied 22 minutes later stating the following:

> "Hi Daniel,
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> Honestly I have made some enquiries, this is just a complete rip off just to get piece of advice that your firm should be able to provide to your clients on a normal day. I have told you times number that the funds you have with you are my only hope of surviving.
>
> Anyway, what can I do ….. go ahead and let's see what we get out of it. Please send me the draft and need to send it to Ray tomorrow, it's been about a week now since he wrote to us." (Page 195)

42. I was told by the claimant that Killic and Killic is a large firm but he is unclear whether Mr Opoku-Boateng was, at the time, the only employment specialist.

The law

43. I have considered article 7, Employment Tribunals Extension of Jurisdiction Order 1994 in that a claim must be presented to a tribunal within three months and if not reasonably practicable within that time, within a reasonable time thereafter. Time can be extended following ACAS conciliation, article 8B.

44. A claimant must show that it was not reasonably practicable to present his or her claim in time. The burden of proving this rests firmly on the claimant, Porter-v-Bandridge Ltd [1978] IRLR 271,CA.

45. The question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide. The test of what is reasonably practicable is reasonable feasibility, Palmer and Saunders-v- Southend-on-Sea Borough Council [1984] IRLR 119 CA. May LJ said that factors which the tribunal can take into account include, amongst others, a substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; and whether the claimant had been advised by anyone, and the nature of any advice given.

46. In the case of Walls Meat-v-Khan the Court of Appeal held that ignorance or mistaken belief before that is accepted, it would not be reasonable if it arises from the fault of the complainant in not making such enquiries as should reasonably, in all the circumstances, be made.

47. In Dedman-v-British Building and Engineering Appliances Ltd [1973] IRLR 379, the Court of Appeal held that if, upon inquiry by the tribunal, the claimant was at fault in allowing the time period to pass then it could not be said to have been impracticable for the complaint to have been presented in time.

Submissions

48. I have taken into account the submissions by both by Mr Erdunast, FRU representative, on behalf of the claimant and Mrs Ramadan, solicitor on behalf of the respondent. I do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. I have also considered the authorities they have referred me to.

Conclusion

49. I have come to the conclusion that the claimant had been given several assurances and re-assurances by the respondent that it would do everything to facilitate his re-employment and in that regard, would provide assistance to him in his interactions with the Home Office. The conditional fee agreement he had with Killic and Killic was in relation to the immigration issue. He reasonably expected a successful outcome and did not wish to incur further costs in pursuing a claim before an employment tribunal. The respondent was quite candid in its correspondence that it was at fault in ascribing to the claimant's employment the wrong SOC code. The claimant, was, therefore, hopeful of a successful outcome.

50. The 3 months statutory time limit ran from 10 January 2017 to 9 April 2017. During that time all parties' focus of attention were on the claimant's immigration status. However, by mid May 2017, it was clear that the respondent would not be able to provide the assistance necessary to allow the Home Office to reconsider its decision as there was a difference in views on the appropriate SOC code. The claimant was, therefore, advised by Mr Koi to seek counsel's advice on a possible employment tribunal claim.

51. By 24 May 2017, several matters were apparent. Firstly, the claimant knew of the three months' time limit. Secondly, the time limit had expired. Thirdly, that an application could be made to extend the time limit. Fourthly, a claim form had to be pursued with great expedition. The ACAS extension provision in article 8B do not apply as it was notified on 23 June 2017, after the three months statutory time limit.

52. All of the above were in the possession of the claimant and Mr Koi. Although I accept Mr Koi is not an expert in employment law, it would not have been difficult for him to have made an enquiry of the employment tribunal as to the next steps in presenting a claim. Further, the claimant being educated to master's degree level, could have made a similar enquiry. He is a very intelligent man capable of expressing himself orally as well as in writing. Uppermost in his and Mr Koi's mind should have been the need to present a claim before the tribunal as a matter of urgency. There was, in my view, nothing effectively preventing them from doing so. Mr Koi had the advice from counsel he needed about the claimant's employment position and, in my view, should have taken steps to protect the claimant's interests as best he could by putting in a claim form within a reasonable time.

53. I do not accept that it was reasonable for the claimant to have waited until

23 August 2017, some three months after counsel advised that the claim was already out of time. I have come to the conclusion that the claim form should have been presented by 31 May 2017, that being within a reasonable time.

54. Accordingly, the tribunal does not have jurisdiction to hear and determine the claim and it is struck out.

55. I felt some sympathy for the claimant as the termination of his employment was not of his making.

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Employment Judge Bedeau

Date: 15 March 2018

Judgment sent to the parties on

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For the Tribunal office