RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs O Gahadza**

Respondent: **Essex Partnership University NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **Friday 29 June 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: Mr J Nthini, friend and representative

Respondent: Mr D Massarella, counsel instructed by Beachcroft LLP, Bristol and also in attendance Ms C Beckinsale, senior HR advisor

JUDGMENT

The judgment of the tribunal is that this preliminary hearing on jurisdictional time-points is postponed to be heard in full by any judge on Friday 9 November 2018 at East London Tribunal Service, 2nd Floor, Anchorage House, 2 Clove Crescent, London, E14 2BE starting at 10am, with a time estimate of one day.

REASONS

1 The situation which has come out today is unprecedented, certainly in my experience. The claim on its face is late. The claim is for race discrimination and for arrears of pay/breach of contract. It is not a claim for unfair dismissal as Mr Nthini has explained. He did not consider that the claimant had a full 2 years continuous service as an employee. She was a bank worker for much of the period. At the time of her dismissal with effect on 12 May she did not have 2 years continuus employment. The claimant informed the tribunal that she was band 5 nurse and she is currently working part-time at band 5.

2 She brings a claim now in respect of many different acts, the last which is a reference the respondent made to the NMC by email of 7 December. The claimant

probably knew nothing about that until she was formally notified of it by recorded delivery from the NMC on 19 December. The allegations against the claimant were:

2.1 Breach of professional boundaries.

2.2 Making malicious allegations against colleagues.

2.3 Unprofessional behaviour towards colleagues.

Whatever else we know about the claimant, she has not been struck off as a nurse.

3 The claimant referred her employment situation to Acas for early conciliation on 16 October 2017 more than 5 months after termination of her employment. The certificate was issued on 7 November 2017. The claim was not received by East London Employment Tribunal until 18 April 2018 when it came in the usual way from Leicester as an online claim form. (Mr Nthini actually filled in the claimant's Westcliff postcode wrong. He put the same Romford post code as the respondent, when it should have been SS0 9AB).

4 Mr Nthini is on the record as the representative throughout. He clearly made efforts to get the claim in to the tribunal on time but he was ignorant of the correct way of doing this, as follows.

5 I have been shown today an email dated 2 December 2017 at 11.09 sent to London Central employment tribunal apparently with a pdf attachment called "Olipah ET1 – ENG. Pdf". Its size was 403 KB. That ties in with the London Central automatic response timed at 11.10pm that day. I have been shown a string of London Central automated responses.

6 The next email from Mr Nthini to London Central was dated 22 December 2017. It did not reattach the claim. Mr Nthini stated "I am writing to follow up on this claim I submitted on 2 December 2017." The ETI claim form is referred to in the heading of the email: "Submitting a claim form R196351/17 Gahadza v Essex Partnership NHS Trust". This number was that on the EC certificate number - the certificate issued on 7 November.

7 By contrast It is hard to see at present what day A (the reference to ACAS early conciliation) was in time relative to, in the events of this case. The claimant had been formally dismissed on 12 May and 16 October is 5 months after that. That will be the claimant's biggest problem at the postponed preliminary hearing on time points.

8 I did some research into delay in chasing up an ET1. All I could find is the case of *Capital Foods Retail Ltd v Corrigan* [1993] IRLR 430 EA*T*. This covers unreasonable delay in following a claim up, but that was in respect of a claim that never had arrived. That was why it had never been acknowledged. In this case there is a *prima facie* case, even without having been shown the attachment to the 2 December email (which Mr Nthini has not brought to the tribunal today), that a claim was sent to the tribunal and it arrived, even if it was not the correct regional office. This still needs to be seen to be the case. A copy of the attachment needs to be produced to the tribunal and the respondent (see directions below). There must have been some hard copy of some sort to make a

pdf scan, one presumes.

9 Mr Nthini provided his contact details but had no response from the London Central tribunal (other than the automated acknowledgements). He gave his mobile number. He next chased it again on Thursday 25 January.

> "Can you please provide an update on the matter above? I've been waiting for someone to get back to me on this matter as it appears that the matter has not been dealt with? Do you need me to resubmit the form?

10 Mr Nthini shows the tribunal there was no response to that either. Finally he emailed on 12 April 2018 and this time he attached the original attachment. There were 2 emails on 12 April at 9.18am and 11.27am. In the first email the attachment was attached. After the second email time he spoke to a woman member of staff at Central London tribunal who told him that he should submit the claim online and he then duly did so. It was very shortly after that that it was received at Leicester on 18 April 2018.

11 I made enquiries of the staff at the tribunal who confirmed that this office and presumably all tribunal regional offices are "receiving offices" for ET1 claims. If we receive one in the office delivered by hand or post we forward it by post to Leicester but we date stamp it here. The receipt date is the date it first enters the tribunal system, however it enters. I am assuming that the Central London would be the same.

12 If the East London regional office receives an ET1 form by email we print it out, date stamp it, and forward it by post to Leicester. Leicester will then allocate the regional case number to it depending on the work place and will then send it officially to that region to process future correspondence then is with the regional office.

13 The presentation of the ETI claim form might therefore arguably have been in time relative to day B (the date of the certificate).

14 There needs to be <u>much</u> more explanation about day A (the date of first EC reference). This judgment really does not affect that because the normal 3-month time limit applies to make the Acas reference on 16 October 2017. I cannot see relative to what events that is in time, 5 months after the date of termination.

15 I informed Mr Massarella that if I could not decide everything today I would not decide anything today but I have to state a provisional view that his submission appears to be correct that the claim for pay is out of time whichever way one looks at, it either as a breach of contract claim or an unlawful deduction from pay claim under Part II of the Employment Rights Act 1996. It will depend on what the claimant says about "not reasonably practicable" and "such further period as the tribunal considers reasonable". I am not deciding that today but give an indication that unless the claimant comes up with quite a strong argument it would be very difficult to extend time.

16 This time limit under section 23(4) the Employment Rights Act 1996 is one for which the only "escape clause" if it was not "not reasonably practicable" to have presented the case in time. From that point of view, tribunals regularly consider the availability of good online advice and resources on applying to the Employment Tribunal. There are CAB's.

17 The NMC reference complaint is complicated, and not wholly separate from the jurisdictional presentation problems referred to above at London Central. Mr Nthini has been extremely straight forward in saying that the attachment to his emails to London Central remained the same through his successive presentations to London Central. Even by the time he chased it up on 22 December it is likely that the claimant knew then that her case had been referred to the NMC. The NMC was not mentioned even on 25 January. It was not raised until 18 April when the whole claim was resubmitted online. By this time it was *prima facie* outside the 3-month time limit.

18 If one takes into account the whole story of the earlier presentations to London Central and that tribunal's apparent lack of action on them, then it might have some bearing on the "just and equitable" discretion under s 123 of the Equality Act 2010. Time limits under the Equality Act are comparably more favourable to claimants than the "not reasonably practicable" time limits. There is a lot of case law on s 123 which is worth looking at. The respondent's counsel has shown me the case of *Robertson v Bexley Community Centre* [2003] IRLR, 434, CA (as respondents usually do).

19 Mr Massarella cited the case of *Chohan v Derby Law Centre* [2004] IRLR, 685, EAT, only to argue it should not apply in the present case because the claimant did not trust a "skilled" adviser, but a lay person who is a friend. I express no view on that contention at the present time because everything is up for argument next time.

20 There was no amendment application in respect of the NMC complaint, if this claim is to be considered as a continuum from the London Central claim of 2 December (whatever that was).

Directions

21 First Could Mr Nthini please provide to the tribunal and to the respondent a copy of the original attachment to the 2 December email, by email is preferable please, citing this case number here 3200820/2018. I have established it was only attached to the 2 December and 12 April emails. It was not attached to the chasing emails in between. The tribunal will not make any enquiries of the London Central tribunal until we have a copy of that attachment.

22 The tribunal would also please like to see a gmail print out of those chasing emails on January 25th and December 22nd 2017.

23 Work remains to be done researching the system. This tribunal is undertaking to make enquiries of London Central. In *Riley v Tesco Stores Ltd and Greater London CAB Service* [1980] IRLR, 103, CA, it was suggested by the appeal court that when a third party was going to be in some way criticised in the course of a hearing like this about an apparently out of time claim, it is only fair that that third party should have a right to be heard on the point.

24 I note the ET1 form was sent after the tribunal fees had been abolished as they were in July 2017 following the *Unison* judgment, so that will not be a consideration in this case. I informed the parties it is likely that all the tribunals do not have access to their email inboxes going back much further than 2 months. Retrieving older ones can be an

expensive process. However Mr Nthini has provided the majority of useful documentation in these bundle additions today. I just request that the extra documentation that I have requested could please be sent soon so that it can be used to make enquiries of Central London tribunal in good time before the next preliminary hearing.

25 Mr Massarella has insisted that Mr Nthini provide "all the emails". For my own part I do not consider that Mr Nthini has not already done so. If he knows of anything he has not provided, then it would be helpful now. He even volunteered his telephone bill to show placing a call to the London Central tribunal presumably on 12 April 2018.

26 If Mr Nthini could provide that extra documentation part of which he has volunteered by **31 July 2018**.

27 The case is now adjourned to **Friday 9 November 2018** to be heard afresh on all issues of time. The time estimate is I day. The judge at that preliminary hearing will make any consequential directions for any future final hearing if the claims, or any of them, are not dismissed.

Employment Judge Prichard

25 July 2018