EMPLOYMENT TRIBUNALS

Claimant: **Mrs O Gahadza**

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

PRELIMINARY HEARING

Heard at: **East London Hearing Centre**

On: **9th November 2018**

Before: **Employment Judge Reid**

Appearances
For the Claimant: Mr J Nthini, friend and lay representative
For the Respondent: Mr Massarella, Counsel (instructed by Beachcroft LLP)

JUDGMENT (Reserved)

1. The Claimant's claim for unpaid wages contained in her claim form presented on 18th April 2018 was made outside the 3 month time limit specified in s 23(2) Employment Rights Act 1996 and the Tribunal decides that it was reasonably practicable for her to have brought that claim within the 3 month time limit. This claim is therefore out of time and the Tribunal does not have jurisdiction to consider it.

2. The Claimant's claims for race discrimination (including victimisation, separately referred to on page 7 as another type of claim) contained in her claim form presented on 18th April 2018 were made outside the 3 month time limit specified in s123(1)(a) Equality Act 2010 and the Tribunal decides that it is not just and equitable to extend time under s123(1)(b). These claims are therefore out of time and the Tribunal does not have jurisdiction to consider them.

3. All the Claimant's claims are therefore dismissed. The next hearing booked for 10th December 2018 is therefore cancelled.

REASONS

Background and issues at this hearing

1. The sole issue for determination at this hearing was whether the Claimant's claim form presented online on 18th April 2018 was in time. The background to this issue is set out in Judge Pritchard's judgment and reasons dated 25th July 2018 following a previous hearing on 29th June 2018.

2. By way of summary, the Claimant sent in two claim forms to the Tribunal. The first (Claim A) was sent by her lay representative by email to the London Central email address on 2nd December 2017. The second (Claim B, this claim) was successfully submitted online on 18th April 2018 with this claim number then attached to it after it was accepted. Claim A was not identical to Claim B because Claim B now included a new victimisation claim arising out of a referral by the Respondent about the Claimant to the NMC in December 2017.

3. Claim A (page 124) contained claims for wages, for race discrimination and for victimisation. Claim B (page 2) contained the same claims plus a claim for 'other payments' (page 7) but referring in this regard to a further victimisation claim, the claimed further victimisation being the December 2017 NMC referral.

4. The first issue for determination was therefore the status of Claim A and Claim B as to whether they were validly presented. The second issue as regards any accepted claim was then whether the claims in it were in time or not.

5. The Claimant attended represented by Mr Nthini. The Respondent attended represented by Mr Massarella. There was a one file bundle plus a Respondent's chronology. I was also provided with four authorities on behalf of the Respondent and written submissions which I allocated time for Mr Nthini to read. Mr Nthini's initial view was that he would not call the Claimant to give oral evidence although I explained to him that I had a few questions to ask her if she did. Mr Massarella also said he had around 10 minutes questions to ask her. I explained to Mr Nthini that it was a matter for him as to whether he wished to call the Claimant to give oral evidence. I asked him to decide what he wanted to do and he said that the Claimant would give oral evidence. He also put some initial questions to her and in re-examination.

6. I heard oral submissions on both sides as well as having Mr Massarella's written submissions. Mr Nthini had come with submissions prepared on his laptop.

7. I discussed with Mr Nthini that I was aware he was not legally qualified and that I would recap and explain the issues, which were complex, as I went along, which I did. He appeared to have a good understanding.

8. It had been identified at the previous hearing (para 21,23) that the Tribunal could make enquiries of London Central. I could see from the file that this had not been done and explained this to the parties. However given I was prepared to accept that Mr Nthini had in fact emailed Claim A to the London Central email address on 2nd December (evident from the automated response to it a minute later), there was no need to check that receipt with London Central. Secondly, if calls had been made by

Mr Nthini to London Central to chase up Claim A then because Claim A had never been allocated a claim number there would be no claim number against which calls would be noted, as it would be treated as a general enquiry. It was therefore very unlikely that there would be any notes now of his calls. He provided some evidence of calls himself from his own phone records.

Findings of fact

Acceptance of claim

9. I find that Claim A was sent to the London Central email address on 2nd December 2017 (page 122) at 11.09 pm. I find from the content of his email that Mr Nthini did attach Claim A (page 122) and that it was received by London Central because there is an automated response at page 113, timed for 11.10pm. It was not a claim started in accordance with Rule 8(1) of the Tribunal Rules 2013 because it was not submitted in accordance with the Practice Direction referred to in Rule 8(1). That Practice Direction (14th December 2016) says that there are only three ways in which a claim can validly be started namely by submitting it online on the employment tribunals website, by posting it to a central postal address (Leicester) or by physically taking a completed claim form to any Tribunal office (the addresses then being listed for those offices, but with no email address provided for these offices). None of those methods included sending a claim form to a Tribunal email address from which I find that Claim A was not validly submitted. Claim A was not accepted and it was never date-stamped or allocated a claim number.

10. I find that Claim B was successfully submitted online on 18th April 2018 and allocated this claim number because it was date stamped as received on 18th April 2018 and allocated this claim number. It had been sent in accordance with Rule 8(1) because submitted online, one of the methods specified in the Practice Direction.

11. The only claim in fact therefore accepted was Claim B. Claim A was never accepted. However what was going on as regards Claim A and London Central was potentially relevant to whether an extension of time for all or any of the claims should be allowed. However it does mean that the only claim validly presented was Claim B and so it is the claims in Claim B which require to be considered as regards a not reasonably practicable (wages claim) or just and equitable (discrimination claim) extension of time.

Claim for wages

12. The last wages payment made to the Claimant was on 14th April 2017 (page 42). If she was going to bring a claim in respect of any shortfall/non-payment, the time limit is 3 months from that date (unless the Claimant shows it was not reasonably practicable to do so and brought her claim within a further reasonable period). That 3 months expired on 13th July 2017. The Claimant did not contact ACAS to initiate early conciliation (EC) until 16th October 2017 some 3 months later. This means that the Claimant did not benefit from the automatic extension to her time to bring this claim by way of an EC extension.

13. I find that the Claimant was receiving advice from a RCN representative (Mr Paul Shroeder) by at the latest 10th May 2017 when she had her disciplinary

hearing (page 43). Given the nature of the allegations against her it was likely that he was involved at least a period of time before that hearing to be able to prepare for it. She therefore had a source of advice about what to do about any unpaid wages prior to the expiry of the time limit. Taking into account also my findings set out below as regards her health during 2017 and her ability to consult ACAS online and on the phone about EC, I find that she was also able at this time to access advice about bringing a claim from another source, apart from her RCN representative. She was able to draft detailed grounds of appeal against her dismissal on 18th May 2017 (page 55) (albeit with Mr Nthini's input) from which I find she was capable of bringing a claim for unpaid wages. I therefore find it was reasonably practicable for her to have brought her claim for wages within the usual time limit of 3 months ie on or before 13th July 2017.

Claims for race discrimination and victimisation

14. The last act complained of in Claim B (this accepted claim) was the referral to the NMC in December 2017 about the Claimant. This referral was made on 7th December 2017 (page 92), though the Claimant was not aware of it until she got the letter at page 110 dated 19th December 2017.

15. The 3 months time limit in respect of a claim about this last act was therefore 6th March 2018 (the 3 months running from the act complained of and not when the Claimant found out about it, though I take her later finding out about it into account below when considering a just and equitable extension for that claim). This was the latest act the Claimant complained of in Claim B, also arguing that there was a series of prior connected acts running up to this date which would also amount to a continuing act for the purposes of a discrimination claim.

16. The Claimant initiated ACAS early conciliation on 16th October 2017. Day A was 16th October 2017 and Day B was 7th November 2017 giving a total of an extra 15 days extension to the time limit based (at that stage) on her then latest complaint in Claim A about matters up until 23rd October 2017 when the outcome to her appeal was issued. The EC extension acted to extend her time limit at that point to 6th February 2018.

17. The ACAS extension obtained prior to December 2017 had expired on 6th February 2018. It could not be added again to assist the Claimant with time limits as regards the December 2017 allegation of victimisation. The time limit for the December 2017 victimisation claim therefore remained 6th March 2018.

Matters involving London Central

18. Mr Nthini sent Claim A to the London Central email address on 2nd December 2017 (page 112). This would at this stage have been in time, if it had been submitted in accordance with the Rules, because it was before the EC extended date of 6th February 2018 for the race discrimination and victimisation claims (as brought at that stage ie excluding the December 2017 NMC referral victimisation claim). He said at the hearing that he had tried to submit it online first but there had been a technical problem so he found the London Central email address somewhere online (he was not sure where). He had obtained the claim form which he then emailed to London Central from the Employment Tribunal website via the gov.uk link.

19. I find that Mr Nthini was aware (page 123) that time limits were important and affected by the ACAS process. He was also not sure that he was sending it to the right place (page 122) and asked for advice or for it to be redirected (page 123). I find therefore that he was aware that the way he was doing it was not necessarily the right way and that time was running. He received an automated response (page 119). This told him that new claims would need to be checked and that the email was only confirmation of receipt. This was slightly misleading because it gave the slight impression that a claim sent by email to this address could be a valid way to submit it, when it wasn't. The email also said that correspondence would be responded to within working 10 days, even if not about a new claim. I therefore find that Mr Nthini was given an indication of when he might expect to hear, namely at the latest within 10 working days or so. He chased with a further email on 22nd December 2017 (page 113) and received the same automated response (page 114). He chased again on 25th January 2018 (page 115) and received the same automated response (page 116). He chased again on 12th April 2018 (page 112) and received the same automated response (page 118).

20. Mr Nthini also said he had called London Central. He produced evidence of calls made on 21st December 2017 (page 152) and 18th April 2018 (page 153). He did not produce any evidence of other calls from which I find these were the only calls he made, albeit on a phone apparently paid for by someone else, Mrs Musamadya.

21. I find that Mr Nthini was therefore on notice from 2nd December 2017 and told via the automated emails repeatedly thereafter that he should expect to hear something within around 10 working days. He carried on chasing whilst knowing there was a problem because he had not heard back from London Central, in a context when he had been aware from the outset that emailing the form to London Central was not necessarily the correct way to submit the claim. Whilst I accept he is a lay representative there was sufficient information before him to be well aware that there was a problem, when he was already aware of time limits. He waited for around 4 months to finally address the problem which had been evident from at least the end of December 2017. He also did not after 19th December 2017 when made aware of the NMC referral take any steps to add that new claim to Claim A or to bring another claim about the NMC referral.

22. However Mr Nthini's failings were not the Claimant's failings. He was trying to be a helpful friend to the Claimant. However she had decided to hand over the submission of her claim form to him, knowing there were time limits – see findings below.

23. When Mr Nthini spoke to London Central on 18th April 2018 (page 153) he was advised to submit the claim online which he then did later that day.

<u>The Claimant's stated reasons for not bringing the claims in time</u>

24. At the hearing the Claimant explained she had two reasons for not bringing the claim in time. These were firstly her lack of knowledge of how to bring a claim and secondly her health issues affecting her between the summer of 2017 and the end of 2017.

25. As regards her claimed lack of knowledge, I find based on her oral evidence that Mr Durkin, her RCN representative who attended her appeal hearing on 20th October 2017 with her, told her about referring her complaint to ACAS. I find also based on her oral evidence that she then looked at the ACAS website and after that called ACAS who told her that in order to start the EC process she would have to provide details in writing. I find it unlikely that on none of these occasions she was not made aware of time limits ie unlikely that Mr Durkin did not tell her, that she did not read about them on the website or was not told about them by ACAS on the phone. She consulted the ACAS website and there is an easy to find link to the gov.uk website as to how to make a claim with then a further link to the T420 guidance note which sets out the three methods of bringing a claim. Whilst she said Mr Durkin had advised her to hold off contacting ACAS till after she knew the outcome of her appeal, this did not prevent her bringing her claims of race discrimination (as they stood at the point her appeal was not upheld on 23rd October 2017) before the time limit of 6th February 2018 as even after the appeal outcome there was still plenty of time. In addition in any event she did not take that advice because she contacted ACAS on 16th October 2017 before the appeal hearing on 20th October 2017. The advice to delay pending the appeal, did not disadvantage her because she was not claiming unfair dismissal and taking into account she went on to include the appeal outcome as part of her race discrimination claim.

26. I therefore find that the Claimant had sufficient knowledge herself about time limits and was not solely relying on the advice of Mr Nthini. She had access to trade union and ACAS advice about how and when to bring a claim and had consulted the ACAS website where there is an easy to find link to specific advice on the gov.uk website as to the three ways in which a claim can be brought.

27. The Claimant herself initiated the ACAS EC process (page 1). It is not something she was relying on anyone else to do and given I have found that she had been advised about time limits (see para 25 above) I find that she was aware therefore that time limits to bring a claim would be affected by this process. On 17th November 2017 when she received the certificate, she was aware that the ACAS process was complete and was therefore aware that the clock was now ticking.

28. The Claimant said at the hearing that she was not mentally well after the summer of 2017 which affected her ability to put in her claim on time. The only medical evidence produced was the letter dated 26th June 2018 (page 121) which said that she needed long-term counselling. This letter did not amount to evidence of her state of health during the latter part of 2017 and early 2018 but was a general statement made in June 2018 that she needed counselling. Whilst it was said at the hearing that she had evidence in her GP records these were not provided for this hearing. Further, what the Claimant was able to achieve in the latter part of 2017 was inconsistent with a claimed inability to submit her claim on time due to being mentally unwell. I find that she was able to move to Belfast in around October 2017 and look for agency work from around December 2017. If she could work in a skilled job from December 2017 she was mentally able to bring her claim in time. She was able to prepare with Mr Nthini's help an extremely detailed letter of appeal prior to her appeal hearing on 20th October 2018 (page 55). The emails sent by the Claimant between July and September 2017 as regards the organisation of and preparation for her 20th October 2018 appeal hearing (pages 95-109) did not say that the reason for the

postponements being requested by the Claimant was because of health problems but were for other reasons (page 95,100).

29. I therefore find that the Claimant was not affected by her mental health such that she was affected in her ability to bring her claim in time. She was not relying therefore on the help of Mr Nthini because she needed to, but because she chose to hand the matter over to him. She was not relying solely on Mr Nthini's advice about submission of the claim because she already knew herself about time limits and had had access to advice about how to bring a claim in the right way.

30. I therefore find that this was not therefore a situation where the Claimant from the outset handed the matter over to Mr Nthini. She handed it over to him (in circumstances where I have found she did not need to due to her health) when already aware of time limits and having received the EC certificate. The Claimant was in a position to and capable of submitting the claim herself, knowing about time limits, but chose not to do so.

Relevant law – time limits

31. The relevant law as regards the claim for unpaid wages is s23 Employment Rights Act 1996 which provides that a claim must be brought before the end of the period of 3 months from the date of deduction unless the Tribunal is satisfied that it was not reasonably practicable for the claim to be presented before the end of that period and that it was presented in such further period as the Tribunal considers reasonable. It is for the Claimant to satisfy the Tribunal that it was not reasonably practicable for her to submit this claim in time.

32. The relevant law as regards the claim for race discrimination (including victimisation) is s123 Equality Act 2010 which provides that a claim must not be brought after the end of the period of 3 months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

33. As regards the race discrimination claim, the factors set out in s33 Limitation Act 1980 are factors of assistance as regards the discretion to extend time, in addition to considering the balance of prejudice between the parties (British Coal Corporation v Keeble [1997] IRLR 336, Abertawe Local Health Board v Morgan [2018] ICR 1194).

34. Chohan v Derby Law Centre [2004] IRLR 685 decided that where the delay in bringing the claim was due to incorrect advice from a solicitor, that should not be visited on the employee as otherwise there would be a windfall for the employer. Barber v Bernard Matthews Food Ltd 1501308/00 decided that where a solicitor had not told the employee about the tribunal time limit it was reasonable for the employee not to know about it and to have reasonably relied on the solicitor.

Reasons

Wages claim

35. Taking into account the above findings of fact, the Claimant's claim for unpaid wages was made outside the 3 month time limit for such a claim and it was reasonably practicable for her to have brought this claim so within that 3 month period.

Disability discrimination (including victimisation) claim

36. The relevant factors of assistance set out in s33 Limitation Act 1980 are factors (a) (length of and reasons for delay), (b) (due to delay, evidence likely to be less cogent), (d) (duration of any disability), (e) (extent to which acted promptly and reasonably once knew possible claim and (f) (steps taken to take medical, legal or other advice).

37. The time limit for bringing Claim B based on the last event complained of (the December 2017 NMC referral) was 6th March 2018 and the length of the delay was therefore between that date and when the claim was brought on 18th April 2018, around 5 weeks later. Taking into account the Claimant did not find out about the referral till she received the letter dated 19th December 2017) (presumably on 20th December 2017) that would be an additional period of around 2 weeks delay when the Claimant could not do anything about it, because she did not know about it. However even taking this into account, this Claim B was still not brought until 18th April 2018. I have found that the Claimant was not relying on Mr Nthini solely as regards time limit advice throughout the period because she already knew about them, including at this stage.

38. The fact that Mr Nthini was in error in sending Claim A to the London Central email address should not be visited on the Claimant. However I distinguish Chohan and Barber because the delay in the presentation of Claim B by the Claimant was not due to incorrect advice about time limits from Mr Nthini because the Claimant was already aware of them, based on the above findings. She was not relying on Mr Nthini's advice about time limits. The Claimant did rely on him entirely to present her claim in time but that was not reasonable given I have found she was aware of time limits and able to present the claim herself. This was the case up to and after the December 2017 NMC referral. Whilst Claim A was sent to London Central within the (then) time limit, the Claimant did not act reasonably in handing over entire responsibility to a friend to get the claim in on time and in the right way; this is a very different situation from handing it over to a solicitor, advice worker or a trade union representative on whom an employee might reasonably rely. Given she nonetheless chose to hand it over to him, she reasonably should not have relied on him but should have checked herself what was going on between the period when she handed it over to him to submit it and the expiry of the time limit.

39. The allegations in Claim B were said to date back 2 years (page 8). Whilst the disciplinary process in the second half of 2017 was documented by the Respondent and was not so long ago that evidence about it would be hard to recall, the matters before that, were by the time Claim B was presented, over a year old. The second protected act referred to in February 2017 (page 8) was said in evidence and at page 55 to be an email from the Claimant dated 22nd February 2017. The Respondent's case was that no such email had been sent (page 71) because they had looked for it and not found it. The Claimant has not produced this email to date. The Respondent also identified at this stage (October 2017) that the Claimant's failure to escalate any issue (it was said she had to the contrary confirmed at the appeal meeting that it had been resolved) had undermined their ability to investigate it. This was around 6 months after the claimed complaint by the Claimant. Claim B was brought over a year after the claimed complaint by the Claimant and in the absence of her production of the email she says was the second protected act, a significant pillar of her claim is

not in place. In addition witnesses would have to be recalling what happened or was said in February 2017, quite some time ago.

40. Weighing up these factors, in particular the reasons for and length of the delay and the extent to which the delay has prejudiced the Respondent (Abertawe para 19) and the balance of prejudice (including the fact that a decision against the Claimant will mean she is unable to pursue her claim) I conclude that it is not just and equitable that the Tribunal extend time for her race discrimination (including victimisation) claims. In a nutshell, the Claimant had trade union advice, had advice from ACAS and knew of the time limits. She did not act reasonably in handing the whole matter over to Mr Nthini a friend and lay representative and it was not reasonable for her to rely on him as regards submission of her claim. Whilst it was unfortunate that she relied on him and he was trying to help, she chose to do that when she did not need to. Although Claim A was sent within the (then) time limit and is a factor I have taken into account, it is not just and equitable to extend time taking into account that the Claimant did not act reasonably when she failed to double check herself over several months that Claim A had been accepted. It was equally not reasonable to rely on Mr Nthini to submit the further NMC referral claim when it arose in December 201, after Claim A had been sent.

Employment Judge Reid

18 November 2018