EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4109124/2018

Preliminary Hearing Held at Inverness on 21 March 2019

Employment Judge: Mr A Kemp (sitting alone)

Miss R Stewart	**Claimant** **Represented by:** **Ms D Freiss** **Representative**
Highland Health Board	**Respondent** **Represented by:** **Mrs L Gallagher** **Solicitor**

JUDGMENT

1. The Tribunal does not have jurisdiction to consider the Claims and they are dismissed.

REASONS

Introduction

1. This Preliminary Hearing was arranged to consider jurisdiction. It followed the terms of a Preliminary Hearing held on 25 January 2019 before EJ Hendry. Following that the Claimant had produced a Witness Statement, but had not

made any formal application to amend. The Respondent had produced a skeleton argument, as had been directed.

2. At the commencement of the hearing, I set out my understanding from the file that the Claimant had not sought to amend her claim to include a claim for discrimination on grounds of disability, or for unfair dismissal under section 98 of the Employment Rights Act 1996. The Respondent's solicitor confirmed that that was her understanding, and the Claimant's representative also then confirmed that that was the position (although the witness statement had referred to issues of disability discrimination). The claims before me were therefore those of age and race discrimination only.

3. I then explained to the parties that I had noted from the file that although a Claim Form had been held as received on 15 November 2018, being that the form which was copied to the then Respondent, the file disclosed that an earlier Claim Form had been tendered, but not then registered. I outlined the terms of that, and the correspondence disclosed on file. Mrs Gallagher indicated that she was content to proceed with the hearing.

4. Towards the end of the hearing, after hearing the evidence, I indicated that as it appeared that the file may or may not have a complete record of what had happened, it may be appropriate to make enquiries of the Glasgow office as to whether a letter dated 19 June 2018 addressed to the Claimant had been sent by post or by email, and whether or not any email had that letter attached to it. The parties were in agreement that that would be appropriate. I then indicated that as Mrs Gallagher had not been made aware of any prior history of a Claim, as referred to below, received by the Tribunal on 18 June 2018, that it may be appropriate to give her the opportunity to consider that aspect and to amend her submission. The additional time would also allow the Claimant to seek legal advice, and it was agreed by the parties that those enquiries be made, matters confirmed by email from the Tribunal thereafter, and that written submissions be provided within 14 days of that unless either

party wished to apply for a further open hearing for those submissions to be made.

5. There was no written record of any email sending out the letter dated 19 June 2018, nor any record of whether or not it had been sent by post. The parties were advised of that.

6. On 19 April 2019 the claimant's representative sent written submissions, and on 22 April 2019 the Respondent's representative sent written submissions. In the former submissions there is reference to a claim for disability discrimination. For the reasons set out above, that is not a claim that was before me and I cannot consider it. The submission for the claimant also seeks to add a claim of constructive unfair dismissal under section 98 of the Employment Rights Act 1996 and that has been treated as an application to amend.

Evidence

7. Evidence was given by the Claimant, and by her representative Ms Freiss. No oral evidence was submitted by the Respondent, but they had produced a bundle of documents which was referred to in cross examination.

Facts

8. The Tribunal found the following facts established:

9. The Claimant is Miss Roseina Stewart. Her date of birth is 14 December 1951.

10. She commenced employment with the Respondent, Highland Health Board, on 14 December 1998. She worked as a general kitchen assistant.

11. The Claimant was during her employment a member of the union Unison, and had advice from them as to her position.

12. The Clamant worked at Ross Memorial Hospital, Dingwall. Her work colleagues included her supervisor Ms P Mathiewson, and two sisters Ms R Cameron and Ms M Campbell.

13. The Claimant considered that those three employees were in a "clique" together, and excluded the Claimant from that.

14. From time to time one or more of them made derogatory comments about the Claimant. The comments were directed to the fact that her surname was the same as that of a family of travelling people in the area. They were also directed to her age. They also indicated that she should retire, and was too old to be working at the hospital, or words to that general effect.

15. The Claimant was distressed by such behaviours and comments.

16. She was off work signed by her GP as unfit for work from 25 April 2016 to 27 February 2017. She then returned to work on a phased basis, but then was off work again from 3 July 2017 onwards.

17. She sought assistance from her union in relation to the position when she was off work in the latter period. She wrote to Ms Nicola Murray of the Respondent on 6 August 2018 to set out some of her concerns.

18. The Claimant also sought advice from the Citizens Advice Bureau both in Dingwall and Tain (on dates not given in evidence)

19. On 1 February 2018 the Claimant was seen by an occupational health practitioner who then provided a report to the Respondent, which included a comment that the claimant was "fit to return to her role should assurances be put in place that the behaviours which she found particularly distressing and she alleges led to her absence from work will not occur again".

20. On 12 March 2018 she wrote to her union to seek support., referring to a meeting with managers of the Respondent on 5 April 2018 to discuss a phased return to work.

21. On 10 April 2018 she wrote to the Respondent to tender her resignation, referring to the deterioration of her physical and mental health and that she was "forced to retire fully from any future employment".

22. That resignation was with notice to be effective on 6 May 2018. The Claimant had unused leave, and the effective date of termination was 18 June 2018.

23. The Claimant, with assistance from Ms D Freiss, made an application for early conciliation on 28 April 2018. It had as the prospective Respondent "NHS Highland Nicola Murray (manager)". A certificate was issued on 2 May 2018.

24. Ms Freiss started on a part-time basis with the CAB in February 2018, was sent on a ten week course when she did so, and commenced to work on a part-time basis as an adviser in April 2018.

25. The Claimant prepared a Claim Form to the Tribunal and presented it on 18 June 2018. It called as Respondent Mrs P Mathewson at paragraph 2.1 of the Claim Form. It also had a Respondent named at paragraph 2.5 of the Claim Form, being Respondent 2, as "Nicola Murray (NHS Manager) + others". It had a number of principal documents as attachments.

26. The Claim Form was stamped as received at the Tribunal office on 18 June 2018 and given a reference number being 4113 3246 7000.

27. The Claim was assessed at the Glasgow Tribunal office. A letter was then prepared dated 19 June 2018 which had as the heading "Rejection of Claim", commented that the "claim cannot be accepted because you have not complied with the requirement to contact Acas before instituting relevant proceedings. It is defective for the following reason:

(i) You have provided an early conciliation number but the name of the respondent on the claim form is different to that on the early conciliation certificate

(ii) You have not provided an early conciliation number for each respondent and your claim is rejected insofar as it is made against the following respondents: Patricia Mathewson (NHS Supervisor).

I am therefore returning your Claim Form to you……..”

28. It also stated that the relevant time limit for presenting the claim had not altered and that there was a right to apply for reconsideration under rule 13.

29. That letter was not sent to the Claimant. The Claim Form and its original attachments were retained in the Glasgow office of the Tribunal.

30. Ms Freiss called the Tribunal office on or around 19 June 2018 and asked for confirmation that the Claim Form had been received. The person to whom she spoke stated that as there was a stamp and reference number on the Claim Form such that it had been received, or words to that general effect. No reference was made to a letter of that date. Ms Freiss assumed that all was in order.

31. By 30 October 2018 Ms Freiss was concerned that she had not heard further from the Tribunal office and called them. The person she spoke to referred to the letter on file dated 19 June 2018, which Ms Freiss said had not been received.

32. An email was sent to the Claimant that day by the Tribunal office, referring to the confirmation given by Ms Freiss that the Claimant had not received the rejection of claim letter. It attached the letter of 19 June 2018 and claim form, stated that the original ET1 form and supporting documents were “in the post”, and requested the making of “required amendments” and return to the office with “a covering letter asking for reconsideration of the rejection of your claim and explain why that was not carried out with[in] the 14 day period.”

33. The Claim Form and principal documents were posted to the Claimant on or about that same day.

34. On receipt of the email and documents Ms Freiss prepared a Claim Form which had at paragraph 2.1 “Nicola Murray (NHS Manager) + others”, with the same details retained at paragraph 2.5 of “Nicola Murray (NHS Manager) + others”. The Claim Form was otherwise in the same terms as that initially presented.

35. She sent that Claim Form and attachments, being the principal documents that had been returned to the Claimant to the Tribunal with a letter dated 13 November 2018 stating, amongst other matters, that she had been “reassured by a gentleman that everything was ok”, that when there was a call in October 2018 and the rejection of the form explained “I had received no written or electronic information stating this”, and asking that it be reconsidered.

36. That Claim Form was accepted, and a letter was sent to the Claimant from the Tribunal Office dated 19 November 2018 stating that the decision had been reconsidered and that the claim can be accepted. It added that the claim “will be treated as presented on 15 November 2018”. That Claim Form was the one intimated to the Respondent.

37. On 21 November 2018 a further letter was sent to the Claimant by the Tribunal which confirmed that the Claim had been accepted only against Nicola Murray, and appeared to have been presented outside the three month period for bringing such a claim (although that period can be extended in some circumstances). It added that it could be discussed at the preliminary hearing.

38. Intimation of the Claim was made to the Respondent on 22 November 2018 by the Tribunal, who then intimated a Response Form. The Respondent had subsequently been amended to the Claimant’s employer, as stated above.

Submissions for Claimant

39. The following is a brief summary of the written submission. The claimant had been discriminated against on the basis of her age. Examples of that were provided. Similarly examples were provided in respect of discrimination on grounds of race. For the reasons given above I do not record the arguments made as to disability. There was also reference to the claimant's right to raise a grievance and a right not to be treated negatively for doing so. It is claimed that there was little alternative but to retire from the Respondent, and it is added "In light of the above the claimant would like the following to be considered, even retrospectively, constructive dismissal". Instances founded upon for that are provided. The submission, I must record, does not address directly the issue of jurisdiction of the Tribunal.

Submissions for Respondent

40. The Respondent, in a lengthy and detailed submission, argued that any alleged acts of race or age discrimination are time barred and should be dismissed. They take the point that no claim of disability discrimination had been made and they do not address it. They argue that the Claimant has not pled that her resignation amounts to a dismissal or should be treated as an act of discrimination. They argue that alleged discriminatory comments must have been made before 3 July 2017 and more likely in early 2017. They must therefore be time-barred. They argue that the resignation was not connected to allegedly discriminatory comments but to a breakdown in working relationships. The employment terminated on 18 June 2018 and the Claim should have been lodged by 17 September 2018. The application for early conciliation had concluded on 2 May 2018 such that there would be no extension. The Claim Form was not accepted until 15 November 2018. It is therefore out of time.

41. In relation to the just and equitable extension, reference was made to the cases of ***Robertson***, and ***British Coal***, commented on further below. The factors in that latter authority are addressed and that the claim is out of time by at least a year. Under reference to ***Apelgun-Gabriels v Lambeth London Borough Council and another [2110] ICR 713*** it is argued that pursuit of an internal process would not normally constitute sufficient grounds for delay. There would inevitably be an issue with the cogency of evidence. There was no lack of co-operation by the Respondent, and the Claimant had not acted sufficiently promptly. The Claimant had received advice from her union and the CAB.

42. In relation to the potential dismissal, the argument is that the claim made is two months out of time. There is reference to the original claim made, and the Tribunal letter on file of 19 June 2018. It is argued that it cannot be concluded that the letter was not sent. The Claimant was aware of the rejection of her claim by late October 2018. The correct information could have been provided when the first claim was lodged in June 2018, but was not. The Claimant should have checked with the Tribunal office, but had waited about two and a half months before doing so. That was an unreasonable delay and no satisfactory evidence in relation to it had been given. There were the same issues as above as to cogency of evidence.

Law

43. Age and race are protected characteristics under section 4 of the Equality Act 2010 ("the Act"). There may be discrimination either directly, indirectly or by harassment, under sections 13, 19 and 26 of the Act. In a claim of direct discrimination, a comparator must be provided, either a person or a hypothetical person. Where there is a claim of indirect discrimination, the provision, criterion or practice must be provided by the Claimant. In each case, the onus is on the Claimant to plead, then prove, a prima facie case, subject then to the provisions as to burden of proof in section 136 of the Act.

44. Acts prior to termination of employment which are unlawful under the Act may be detriments. A dismissal may be unlawful under the Act. The terms of section 39 of the Act provide as follows:

> **"39 Employees and applicants**
>
> …….
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.
>
> ……
>
> (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
>
> …….
>
> (b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

45. The provision in the Act as to time bar is section 123 which provides:

> "**123 Time limits**
>
> (1) [Subject to section 140A and 140B] proceedings on a complaint within section 120 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.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

46. The burden of proof to establish that it is just and equitable under that provision is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434,*** CA). The test is a multi-factorial one with no factor determinative, and potentially relevant factors include the issues of prejudice and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278.***

47. Guidance was earlier given in the case of ***British Coal Corporation v Keeble & Others [1997] IRLR 336*** which set out a checklist of factors which a Tribunal could consider when deciding whether to refuse or grant an application to extend the time limit. These factors are:-

(i) The length of and reasons for the delay.

(ii) The extent to which the cogency of the evidence is likely to be affected by the delay.

(iii) The extent to which the party sued had co-operated with any requests for information.

(iv) The promptness with which the Plaintiff acted once he or she knew of the facts giving rise to the cause of action.

(v) The steps taken by the Plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

48. The Court of Appeal that that checklist was a guide only, and did not require to be adhered to, in ***Southwark London Borough Council v Afolabi [2003] ICR 800.*** It stated that there were two factors which were almost always relevant in this context:

(i) The length of, and reasons for, the delay; and

(ii) Whether the delay has prejudiced the Respondent.

49. The Court of Appeal stated in ***Abertwawe Bro Morgannwg University Local Health Board v Morga [2018] ICR 1194*** that Parliament had chosen to give Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contained a list such as in ***Keeble.***

50. The provisions as to Early Conciliation (EC) are set out in section 18A of the Employment Tribunals Act 1996, with the detail being provided by the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. The rules of procedure are contained in the Schedule to these regulations and are known as the Early Conciliation Rules of Procedure. Further procedural requirements relating to the EC scheme are contained within the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Rules 10, 12 and 13.

51. Under the Early Conciliation Rules of Procedure:

(i) Respondent is defined as follows - “respondent” means the person against whom proceedings are brought in the Employment Tribunal” (rule 2)

(ii) Paragraph 8 of the Schedule provides that:

"An early conciliation certificate must contain—

(a) the name and address of the prospective claimant;

(b) the name and address of the prospective respondent"

52. The relevant rules of procedure under the 2013 Regulations are as follows:

"Rejection: form not used or failure to supply minimum information

10.–(1) The Tribunal shall reject a claim if—

(a) it is not made on a prescribed form; . . .

(b) it does not contain all of the following information—

(i) each claimant's name;

(ii) each claimant's address;

(iii) each respondent's name;

(iv) each respondent's address; or

(c) it does not contain one of the following—

(i) an early conciliation number;

(ii) confirmation that the claim does not institute any relevant proceedings; or

(iii) confirmation that one of the early conciliation exemptions applies].

(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.

……..

Rejection: substantive defects

12.–(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

(a) one which the Tribunal has no jurisdiction to consider; . . .

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;

[(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a)[, (b), (c) or (d)] of paragraph (1).

[(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.]

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

Reconsideration of rejection

13.–(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—

(a) the decision to reject was wrong; or

(b) the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.

(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

53. Regard should also be had to the overriding objective in rule 2, and to the terms of Rule 34 which gives a Tribunal discretion to "add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings….."

54. There has been judicial consideration of these provisions. In ***Science Warehouse Ltd v Mills [2016] ICR 252*** the EAT held that section 18A should be given a broad interpretation.

55. In ***Treska v Master and Fellows of University College Oxford UKEAT/0298/16***, there was a disparity between the name of the Respondent in the EC certificate (University College, High Street, Oxford) which was not accurate, and the name given in the claim form which was accurate (being "The Masters and Fellows of University College Oxford"). It was held by the EAT that there had been compliance with the statutory requirements notwithstanding that disparity.

56. In ***Mist v Derby Community NHS Trust [2016] ICR 543***, the Claimant when initiating early conciliation had described the Respondent as 'Royal Derby Hospital' and had stated the Respondent on the Claim Form more fully, and correctly, as 'Derby Hospitals NHS Foundation Trust'. It was held that the Claim Form was compliant with the early conciliation requirements. The EAT held that the requirement to set out the name and address of the prospective Respondent 'is designed to ensure ACAS is provided with sufficient information to be able to make contact with the prospective Respondent if the claimant agrees such an attempt should be made.'

57. The EAT further held that the early conciliation procedures did not require that the full legal title of the prospective Respondent be given; instead, for example, a trading name would suffice, and that if a claim is subsequently presented to a tribunal, and shows a disparity between the name on the claim form and the name on the EC certificate, an employment judge has power under Employment Tribunal Rules rule 12(2A) to accept the claim if the error is minor and it would not be in the interests of justice to reject it. It further held that where a claimant wished to apply to amend an existing claim by adding a second Respondent there is no requirement to present a further EC form and obtain a further EC certificate.

Discussion

58. I was satisfied that both witnesses were credible, and sought to give honest evidence. The Claimant did the best she could when giving her evidence, and did so in a particularly charming manner. The Claimant could not however recall much of the detail when asked. She was not able to give specifics as to date on many occasions, for example when she had visited the CAB offices amongst other such details, and admitted to a degree of confusion when giving her evidence. It was not therefore possible to determine some details of the evidence, such as when an incident had occurred, with precision. Ms Freiss gave evidence clearly, and was I considered both credible and reliable.

(i) The First Claim

59. One issue was what had happened when the first Claim Form was presented on 18 June 2018, and whether a letter of rejection of it had been sent, then received. The indication from the Tribunal file is that that letter was sent by post, as there is no email sending that letter by that method on or about that date on file. The letter stated that the original documents with the first claim form were returned with it. The evidence for the Claimant was that the letter had not been received. I accepted that evidence.

60. It did not appear to me likely that there had been a letter sent with the attachments, being the principal documents returned, on or about 19 June 2018. Those principal documents were returned "in the post" following the conversation recorded in the email dated 18 October 2018 which would not have been possible if they had been sent to the claimant in June 2018. It appeared to me more likely that for some reason the letter of 19 June 2018 was not sent. That is one factor to have in mind – the Claimant had not been informed of the rejection of the Claim at that stage.

61. Separately, I also considered whether the original Claim Form ought to have been accepted in so far as it named Ms Murray as Second Respondent. There was an Early Conciliation Certificate naming her. Having regard to the authorities referred to above, the need for a broad interpretation, and in particular the comments of the EAT in ***Mist,*** I respectfully consider that the Claim Form was wrongly not accepted in June 2018. It appeared to me that had the Claimant been aware of the rejection, she may have been able to seek reconsideration of that in relation not the Second Respondent. That was not done, as the Claimant was not aware of the rejection nor was there any follow up by her until 30 October 2018 as I shall come to. That is a further factor to consider.

62. Had there been such an application for reconsideration in late June or early July 2018, and if that were to be granted, the claim in relation to dismissal would have been made in time I consider (assuming that such a claim is made, an issue commented on below).

63. I now turn to consider the claims of detriment and dismissal which require to be considered separately.

(ii) Detriment

64. The claims as to detriment are said to have arisen at the workplace, and involved comments from work colleagues. The evidence as to what was said, and particularly when, was not specific. It was clear however that it can only have been prior to the Claimant's second period of absence which commenced on 3 July 2017. She was then off work until her resignation on 10 April 2018, which was concluded after using annual leave on 18 June 2018. She did not return to the workplace. There was an indication of an incident when one of those employees had made a remark and gesture when both that person and the Claimant were in a car, but there was nothing in the evidence of that matter as to its date, nothing that tied it to the workplace save the person who was involved, and nothing to indicate that it was an issue in relation to the protected characteristics relied upon.

65. It is not clear therefore precisely what was said and when, and whether those comments can be said properly to be part of a series. That is a factor to consider. If however one proceeds on the assumption that they could be part of a series, that series ended on 3 July 2017 at the latest.

66. The Claimant did not commence early conciliation until 28 April 2018. That was therefore well outside the three month period to do so. The delay is of over six months.

67. When considering whether it is just and equitable to extend the period to allow that claim to be pursued I require to consider a number of factors. The first is the length of and reason for the delay. The length of delay is I consider significant, being over six months. I accept that the Claimant had been off ill during that period, suffering from stress in general terms, but the occupational health report in February 2018 indicated that she could return to work if arrangements to avoid the difficulties she experienced at work were put in place. Having regard to that, it appeared to me that the Claimant was not likely to have been unable to take decisions, or to seek advice where she wished to, or to undertake her own enquiries. I also consider that she did have access to advice from the union and from the CAB, both of which organisations she consulted, although precisely when for the latter was not given in evidence. There was no real evidence given as to the reason for delay, save some general evidence that the union were not providing the support that was sought from them.

68. On the issue of balance of prejudice, I consider that the Respondent is likely to suffer prejudice in light of the delay. As the matter was not raised by that formal way the Respondent were not on notice of such a claim. They did not at that stage conduct the kind of investigation that they might have done had that formal stage been taken. The Claimant was at work during the period up to 3 July 2017 for a number of months. There is no real explanation tendered for her concerns not being formally raised at that time. The extent of prejudice is significant in my judgment.

69. I then considered the issue of the chances of success of the claim. I have concluded that in light of the lack of detail of dates and incidents either pled, or spoken to by Mrs Stewart in her evidence, there is a limited prospect of success for her. Two different protected characteristics are given, age and race. Whilst she is older than those others she complains about, that fact of itself is not sufficient. She has the initial burden of proof, subject to the reversal provisions of section 136. She must establish a prima facie case. I consider

that she would be likely to have difficulties in doing so given the terms of her evidence before me.

70. I consider taking all of the circumstances into account that it is not just and equitable to extend the time period to allow the claims of detriment to proceed, and the Tribunal does not have jurisdiction to consider them.

(iii) Dismissal

71. In respect of the claim as to dismissal, the position is I consider more complex. The pleadings in the case do not either specify that the resignation was a dismissal, nor do they state specifically that that was because of a protected characteristic.

72. The Claimant had an early conciliation certificate that referred both to NHS Highland, and Ms Nicola Murray. In light in particular of ***Mist,*** as I indicated above, I consider that the Claim presented on 18 June 2018 was competently initiated in respect of Ms Murray as Second Respondent, and ought to have been accepted in relation to that Second Respondent but rejected in respect of the First Respondent. The rejection of the Claim letter was not I consider sent, but was based on a decision that had been taken to reject the Claim. That letter which recorded that decision referred specifically to Ms Mathewson, but did not refer specifically to the Second Respondent Ms Murray. In my respectful view, it ought to have done so and confirmed that that claim, with Ms Murray as Respondent 2, had been accepted.

73. As I also have held, the Claim Form was I consider not sent back to the Claimant with the letter of rejection dated 19 June 2018 which was on file. I consider it likely that the letter was left on file, and the original Claim and its attachments retained. They were later sent to the Claimant after the conversation on 30 October 2018. Had they been sent to the Claimant on 19 June 2018 that would not have been possible.

74. Ms Freiss spoke to a conversation with a member of staff at the Tribunal office around 19 June 2018. Why that call was made was not clear from the evidence. It could not have been a response to the letter of that date not received. In any event, I accepted her evidence that that call had been made, and that the person she had spoken to referred to the Claim Form having been given a reference number. I infer that that conversation took place before the letter dated 19 June 2018 had been prepared. She assumed from it that all was in order. I consider that she was reasonable in her position at that stage.

75. There was then however a lengthy period of delay after that conversation. Nothing was heard from the Tribunal. That lack of any written reply, either a formal acknowledgement of the Claim or reference to the Response Form of the Respondent would have alerted a reasonable person to there being some form of issue. I consider that a reasonable person would expect a written response to a Claim Form being submitted. In my judgment, allowing for the fact that the Claimant's representative was not legally qualified but a part-time CAB adviser, a period of up to four weeks would have been reasonable.

76. At that point however, four weeks after the submission of the Claim Form, I consider that a reasonable person, whether advised by someone or not, and whether or not the adviser was legally qualified or had any form of training, would have made enquiries of the Tribunal. Had that been done, then a reconsideration application could have been made. That would have been undertaken by 17 July 2018 at the latest.

77. Ms Freiss waited however until 30 October 2018 to ask the Tribunal what was happening to the claim. That was in the context of a termination of employment which had taken place on 18 June 2018. Early conciliation having concluded, any Claim required to be presented on or before 17 September 2018. It was necessary for a Claim Form to have been presented by that date, and be accepted as having complied with the statutory requirements. A check of the position before that date was therefore important.

78. No step of that kind was taken however until 30 October 2018. There was no explanation for that delay save an understanding from the call referred to that all was in order. I do not consider that that was however a reasonable step to take. The time-limit for making a Tribunal Claim is reasonably short, and checking that a Claim is being processed is a basic requirement, particularly where there is no written response at that stage in the hands of the Claimant or her adviser.

79. Ms Freiss called on 30 October 2018 to find out what was happening, was informed of the rejection and had the documents returned, and then made the amended Claim which had Nicola Murray referred to as the first Respondent, but also still as second Respondent, together with reference to NHS Highland, and unspecified "others". Since then, Ms Murray has been replaced as Respondent by the Highland Health Board, as the correct Respondent and employers of the individuals who had been named.

80. That course of events is significant I consider. I have been concerned that there may have been an error by the Tribunal in not registering the Claim as against the Second Respondent, but the Rules provide for reconsideration that allow such issues to be addressed.

81. That matter alone cannot however be determinative, as the ***Pizza Express*** case has clarified. All of the matters that might be relevant to the issue of what is just and equitable require consideration, and the test is a multifactorial one.

82. The rejection of the Claim Form in such circumstances is one factor that weighs heavily in the balance for the Claimant. But another factor is the lack of action by or on behalf of the Claimant in the period from 17 July 2018, by when a reasonable person would I consider have raised the issue with the Tribunal in light of the lack of receipt of any written communication, to the end of October 2018, a period of over three months. In the context of Tribunal proceedings, that is a lengthy period. During it, the time bar for the claim also

passed, again without any action by or on behalf of the Claimant before it did so to ask about the lack of a written response.

83. The Early Conciliation had been commenced on 28 April 2018, and lasted only four days. Once the decision to resign was intimated on 10 April 2018, it would have been competent to commence early conciliation for any alleged dismissal by 9 July 2018.

84. The time-periods in this case are not materially affected by the early conciliation that did take place, as that concluded before dismissal took effect (as the Respondent set out in their submission).

85. The outcome as to the issue of delay is that there is a very strong argument for the Claimant for the initial part of it, but for the period after 17 July 2018 and up to 30 October 2018 it is weak.

86. I then considered the balance of prejudice. I had regard to the comments in the Note from EJ Hendry. He referred to the possibility of making an amendment for a claim of constructive dismissal and for disability discrimination, and no such application has been made (at least until the written submission was sent on 19 April 2019). I consider that his reference to constructive dismissal is to the more frequently encountered usage of that term, being a claim under a combination of sections 95(1)(c) and 98(4) of the Employment Rights Act 1996, rather than specifically to a claim under section 39 of the Equality Act 2010, although it is possible for that term to apply under section 39.

87. The pleadings however have not been amended, and give little specification of essential matters. Even with the terms of the written submission being taken as a form of amendment, they do not provide the detail that would be required for a constructive dismissal claim. What are provided are more in the nature of subject headings, rather than dates of events taking place for

example. They also include issues that could not affect the issue, being a complaint of lack of union support for which the Respondent cannot be liable.

88. I consider that the Claim Form, whilst not specifically using the term "dismissal" has sufficient within it, particularly the phrase "I was forced to take the decision to retire" to lead to the conclusion that the claim may include one for dismissal. As there was no notice of termination by the employer it can only be a constructive dismissal. There was also a reference to the intention to work to 70 years of age, which is also consistent with an argument that there had been a dismissal. I take into account that the Claimant has not been legally represented. But what is missing is specification as to why there was such a dismissal, what facts are founded upon to amount to a repudiatory breach to found such a claim, which are necessary for a claim under the 1996 Act, and what facts may lead to an inference that the protected characteristics founded upon had been engaged in so far as a claim under section 39 of the 2010 Act is concerned. The Claimant has the onus of proof for any claim as to a dismissal. In short, I do not consider that the pleadings or written submission provides adequate detail of why a claim of dismissal is made, and as the onus is on the Claimant to set that out, that is a further factor that weighs against her.

89. It is not I consider likely that the evidence would be materially affected by the delay of approximately four months in lodging the Claim, but that requires to be seen in its full context. Many of the events that the Claimant seeks to rely on go back to at least early 2017, and more likely earlier. There has been little if any real specification of who said what, when and in what circumstance. What is said to be the basis for the dismissal, in the sense of a constructive dismissal, has still to be specified. I consider that the Respondent would be prejudiced if at some point later in 2019 they would require to seek to investigate issues that until then have not been capable of investigation as the necessary detail to do so has been missing. They are liable to include issues of what caused the decision to resign, whether there had been acquiescence by the Claimant in light of the delay until resignation, and other

matters, including what the provision, criterion or practice may have been for a claim of indirect discrimination, and any defences under the 2010 Act itself (for example of objective justification of indirect discrimination or that a proposed adjustment was not reasonable to make).

90. The prospects of success for any claim having regard to the pleadings are I consider weak. There was also nothing said in the letter of resignation of this being a constructive dismissal in any way, including a discriminatory one. That is not conclusive, but it is one adminicle of evidence of some significance.

91. As stated above, the pleadings in their current form are not clear. Details as to what is founded on for the claim in relation to age discrimination, what was said, by whom, and when, are at best scanty. Precisely what is said to be the basis for the claim that comments were made in relation to race is not clear. It is not likely that the same comments apply to each of those two characteristics. What happened after 3 July 2017 and up to the point of the decision to resign to cause that decision, which may or may not be a dismissal, is not clearly pled. What factor or factors led to that decision, and if there was a “last straw” what that was, and why, are not specified. What is required is both pleading and later evidence as to what amounts to a repudiatory breach of contract by the Respondent, and the pleading is lacking.

92. Similar considerations arise over the evidence. The burden of proof is on the Claimant. The lack of clarity from the Claimant’s evidence before me is a further factor I require to consider in this matter, and it is I consider doubtful that the evidence on the merits of a claim would be sufficient to succeed and discharge the evidential burden on the Claimant.

93. Taking consideration of the matters before me in the round, I consider that the Claimant has poor prospects of success in her Claims.

Conclusion

94. There are matters that favour the Claimant, and others that favour the Respondent. There is a balance to be struck between the competing factors that I have set out above. This has not been a straightforward exercise.

95. I have however concluded that the balance favours the Respondent. Whilst I was and remain concerned at the rejection of the initial Claim so far as directed against the Second Respondent, and that a letter of 19 June 2018 confirming rejection was not sent, which weighs heavily in favour of the Claimant, the combination of other factors weigh in favour of the Respondent. There are in particular the delay by or on behalf of the Claimant in addressing the lack of response in writing from the Tribunal in the period after 17 July 2018, which is a significant period of time notwithstanding that the Claimant's representative is not legally qualified and is a matter that I require to have regard to, the material level of prejudice that the Respondent would suffer in what remains a case that is pled without much in the way of specification, and the assessment I have made as to the limited prospects of success for the Claim, led me to the conclusion that it was not just and equitable to allow the Claim to proceed.

96. I do not accordingly have jurisdiction to consider it. I regret that it must therefore be dismissed.

Employment Judge: **Alexander Kemp**
Date of Judgment: **01 May 2019**
Entered in register: **02 May 2019**
and copied to parties