



Reserved judgment

## **EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Claimant**

**Respondent**

**AND**

Mr R Jain

Medecho Ltd (1)

Gloucestershire Health and  
Care NHS Foundation Trust  
(formerly 2Gether NHS  
Foundation Trust) (2)

### **RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING**

**HELD AT** Birmingham **ON** 20<sup>th</sup> February 2020

**EMPLOYMENT JUDGE** Richardson

#### **Representation**

**For the Claimant:** in person

**For the Respondent:** Mr J Feeney, Counsel

#### **JUDGMENT**

**The judgment of the Tribunal is that**

- 1) The second respondent's application that the claimant's claim be struck out as having no reasonable prospect of success fails.
- 2) The tribunal has no jurisdiction to hear the claimant's claims against the second respondent. The claim was not filed in time and there were no grounds on which time could be extended.
- 3) The proceedings against the second respondent are dismissed.

#### **REASONS**

##### **Background and Issues**

1. The claimant was employed as a locum consultant psychiatrist in the second respondent, an NHS Foundation Trust (the Trust) which provides community mental health, substance misuse and learning disability

services to the populations of Gloucestershire and Herefordshire. The claimant was introduced to the Trust by the first respondent, Medecho Limited, a recruitment business (Medecho). The claimant was engaged and worked for three days before being dismissed summarily on 6<sup>th</sup> April 2018 by the Trust. By a claim issued against Medecho the claimant brought claims of unfair dismissal, and unpaid wages/notice pay/holiday pay on 19<sup>th</sup> August 2018 following a period of conciliation from 2<sup>nd</sup> July – 18<sup>th</sup> July 2018.

2. The claim for unfair dismissal was dismissed by Regional Judge Monk in a judgment dated 1<sup>st</sup> November 2018. The claimant applied to the Tribunal to join the Trust as a second respondent on 6<sup>th</sup> February 2019. The Trust was served with the claim form by letter dated 20<sup>th</sup> May 2019.
3. The Trust filed its response on 14<sup>th</sup> June 2019 and applied to strike out the claim against it because (i) the claim was filed out of time; and (ii) the case against the Trust was misconceived.
4. The claimant was paid by the Trust for wages in late October /early November 2018. The proceedings against the Trust relate to the payment of damages for breach of contract in respect of early termination of the claimant's contract. The claim for two weeks' notice pay is no longer pursued.
5. On 28<sup>th</sup> October 2019 a notice of preliminary hearing listed for 20<sup>th</sup> February 2020 was sent to the parties. The issues to be considered were:-

***(i) whether to strike out the claim against the second respondent on the ground that it has no reasonable prospect of success; and***

***(ii) whether the claim against the second respondent was made in time and if it was not, were there are any grounds on which time can be extended.***

### **Proceedings and evidence**

6. I was provided with an agreed bundle of documents exhibited as R1 containing the pleadings, correspondence between the parties and the tribunal; the template Healthtrust Europe NHS Framework agreement for the provision of service and specification document dated 1<sup>st</sup> November 2016. The claimant provided additional documents which had been obtained through a data subject access request. I have read and taken into account the documentation. The claimant did not provide a witness statement. However he gave oral testimony, having affirmed, and was

cross examined.

7. It was agreed that I would address the first issue and give my decision before the second issue was addressed.

### **Findings of Fact**

8. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on balance of probabilities. I have taken into account my assessment of the credibility of the witness and the consistency of his evidence with surrounding facts and documents. My findings of fact relevant to the issues which have been determined are as follows.
9. The claimant is a consultant psychiatrist and works as a locum. He suffers from recurrent reactive depressive disorder and another condition which is not required to be disclosed in these proceedings. At the time the claimant was engaged by the Trust, he was the subject of proceedings/an investigation by the General Medical Council (GMC) and the Medical Practise Tribunal (MPT). These proceedings were health related and placed no restriction or condition on the claimant working as a locum consultant psychiatrist.
10. The claimant registered with Medecho, a recruitment/temporary worker agency, who notified him at the end of March 2018 of a vacancy with the Trust. The claimant informed Medecho about the GMC and MPT proceedings and was later assured by Medecho that it had informed the Trust. The claimant was engaged initially for one month as a locum consultant psychiatrist with the Trust commencing on 4<sup>th</sup> April 2018. The terms confirmed by an engagement form produced by Medecho were.
  - 40 hour per week minimum
  - Period of engagement 4<sup>th</sup> April – 4<sup>th</sup> May 2018
  - Accommodation and travel to be paid for
  - Hourly rate of pay £100.
11. On arrival at the Trust premises on 4th April 2018 the claimant was not provided with a contract nor a statement of terms of engagement. No terms of engagement were discussed orally, in fact nothing was mentioned to the claimant; he was asked for and provided ID. The claimant asked Medecho about his IR35 status and the notice period. He was told 2 weeks by Medecho. The claimant did not know definitely at this stage whether he was employed by Medecho or by the Trust and his IR 35 status was not confirmed prior to his dismissal.

12. Although it is now not disputed that the claimant was initially engaged for a period of one month 4<sup>th</sup> April – 5<sup>th</sup> May 2018, the claimant worked on 4<sup>th</sup> and 5<sup>th</sup> April. In the morning on 6<sup>th</sup> April 2018 the claimant was summarily dismissed from his post because the Trust, having conducted checks which should have been done much earlier, became aware that the claimant was subject to GMC and MPT proceedings. These proceedings related to the claimant's health and the claimant believes that those checks by the Trust, put the Trust on constructive knowledge of his disabilities.
13. The Senior HR Manager of the Trust informed her work colleagues by email dated 13<sup>th</sup> April 2018 that although Medecho and the claimant should have notified the Trust of the claimant being subject to a process by the GMC, this had not been done. The usual pre-employment checks undertaken by the Trust had not occurred until after the claimant had commenced his engagement.
14. The summary dismissal by the Trust was deeply upsetting and humiliating for the claimant.
15. Following his dismissal on 6<sup>th</sup> April 2018 the claimant fell ill, he believes as a result of the abrupt, harsh treatment by the Trust. He believed he had adequately disclosed the GMC and MPT proceedings to Medecho and had relied upon them to inform the Trust as Medecho said it would. The claimant was unwell between April and August 2018 because of his existing condition of reactive depression arising from the GMC proceedings. His medication prescribed by his GP was increased. He worked as a locum between May to December 2018 on short term contracts of 4 – 6 weeks.
16. On 30<sup>th</sup> October 2018 the Trust generated internally a fixed term worker contract for the claimant. This document should have been provided to the claimant on commencement of his engagement but it was not. It was not seen by the claimant until he obtained a copy of it through his data subject access request the day before this hearing. Despite there being an unequivocal agreement originally to engage the claimant for one month this internal copy of the fixed term worker contract stated that he had been engaged for three days 4<sup>th</sup> -6<sup>th</sup> April 2018.
17. The notice provision in the fixed term contract at paragraph 29 states :  
“.....*your temporary employment under this contract with the Trust will automatically terminate on the date listed at paragraph 5 of the Front Sheet without the need for notice*”.
18. The front sheet of the online document stated the date of termination was 6<sup>th</sup> April 2018, not the originally agreed 4<sup>th</sup> May 2018.

19. Paragraph 29 continues: *“Should you or the Trust wish to terminate this contract before that date, you will be required to give the Trust and the Trust will be required to give you statutory minimum notice (ie. if you have more than one month’s continuous temporary employment with the Trust) then notice must be given in writing and may expire at any time. The Trust reserves the right to terminate your temporary employment by making a payment to you of salary in lieu of notice.”*
20. The claimant believed initially that Medecho was his employer. It was only after he received the P45 from the Trust in late October/early November 2018 that he understood that his employer had been the Trust. It may well be the case that the contract generated on 30<sup>th</sup> October 2018 showed the end date of the claimant’s engagement as 6<sup>th</sup> April 2018 in order to generate a P45 and to pay the claimant for his three days’ work. The claimant does not dispute that he was paid in November 2018.
21. Having learned in early November 2018 that the Trust was his employer as they had paid him for three days wages and he received a payslip, the claimant wrote to the Tribunal to say he was unsure whether he could now pursue his claim against Medecho. He claims that he followed the Tribunal clerk’s advice. The clerk asked him to send an email requesting to add the Trust as a respondent so that the Employment Tribunal could consider adding the Trust to the claimant. The claimant went on holiday for several weeks over December 2018 and January 2019. He spoke to a free legal advice service in London In January 2019 on return from India, and he discussed his situation with a work colleague. The claimant did not do any research on the internet about adding a second respondent, he said he had just followed the Employment Tribunal’s advice. The claimant did not write to make an application to add the Trust as a second respondent until 6<sup>th</sup> February 2019.
22. In cross examination the claimant stated that ACAS had believed originally that he was employed by Medecho. He had taken advice from ACAS but that advice had not included advice on time limits for filing a claim. The claimant said he had taken advice from the tribunal clerk and had not researched time limits for issuing proceedings against the Trust. He had simply been guided by and followed the tribunal’s advice. He said he was not aware of any time limit to add a respondent to the proceedings but he had read about HR and justice and fairness and the way the events unfolded; it was discretionary whether an Employment Judge would add the Trust as a second respondent. The claimant added that he realised that he should have read thoroughly about time limits in the Employment Tribunal
23. The claimant stated in cross-examination that he realised now that he

should have read thoroughly about time limits. He did not seek the advice of a solicitor because he feared running up legal costs and being stuck in a loop of legal fees. He remitted half of his salary to the upkeep of his parents in India. Whilst well paid when working, the claimant said that he had only been able to work intermittently.

24. The effective date of dismissal was 6<sup>th</sup> April 2018. The ACAS Early Conciliation Notice against Medecho was filed in time on 2<sup>nd</sup> July 2018. The claimant filed his ET1 against the first respondent on 19<sup>th</sup> August 2018 one day late. There was no Early Conciliation against the Trust. The Trust was served with the claim form and grounds of complaint by post dated 20<sup>th</sup> May 2018.
25. The Trust filed its response on 14<sup>th</sup> June 2019 and applied to strike out the claim against it because (i) the claim was filed out of time; and (ii) the case against the Trust was misconceived.

### **Submissions**

26. I heard submissions from the parties and have retained a full note of them on the tribunal file. I have re-read the submissions and taken them into account in my deliberations and conclusions.

### **Law**

27. A concise statement of the applicable law is as follows:

Article 7 of the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994 applies. A claim for breach of contract must be filed within three months beginning with effective date of termination on which the employee worked in the employment which has been terminated. Where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within time, it may be presented within such further period as the tribunal considers reasonable.

28. There is a considerable amount of authority on the 'not reasonably practicable' test. I summarise key principles to be taken into account by the tribunal.
29. Whether it was reasonably practicable to present the claim in time is a question of fact for the tribunal taking into account the circumstances of the case.
30. Reasonably practicable means reasonably feasible, for example a temporary impediment or hindrance which affects the claimant and not a mistake of law.

31. Relevant factors may be taken into account by the tribunal may include consideration of what was the substantial cause of the failure to comply with the time limit? Was the claimant physically prevented from complying – eg. by illness or postal strike? Did the claimant know at the time of the offending act whether he had the right to complain to the tribunal? If he did not know, was this reasonable, bearing in mind his intelligence and level of education? Was there any material fact misrepresented to the claimant by the employer? Was the claimant being advised and if so by whom? What is the extent of the adviser's knowledge of the facts of the claimant's case and the nature of any advice given? Was there any substantial failure by the claimant (or his advisers) which led to the failure to comply?
32. If throughout the period of time limit there were crucial or important facts unknown to the claimant which later came to his knowledge and led him to believe that he had a claim, may lead to a finding of not reasonably practicable to file complaint in time. Unknown facts must be related to right to claim, not value or whether it is advisable to bring claim etc.
33. Ignorance or mistaken belief will not lead to a 'not reasonably practicable' conclusion if the claimant is at fault for not making enquiries as was reasonable in the circumstances.
34. Ignorance of the right to complain would not make it not reasonably practicable if the claimant should reasonably have known of that right.
35. If the claimant claims the reason for non compliance was illness, medical evidence will be required that the claimant was incapacitated and unable to instruct lawyers or file a complaint form in time.
36. If the Tribunal decides that it was not reasonably practicable for the claimant to file within the time limited, it must then decide what is a reasonable further period of time for presentation of it.

## Conclusions

***(i) strike out of the claim against the second respondent on the grounds that it has no reasonable prospect of success***

37. I gave reasons orally at the hearing but at the request of the respondent, set out below the reasons given.

38. I considered carefully the respondent's submissions. They were, in summary, that (i) there was no agreed notice for one month; and (ii) the claimant cannot rebut the statutory position under S86 ERA 1996 that there is no requirement to give notice where employment is less than one month.

39. It is not now in dispute that the claimant was engaged originally between 4<sup>th</sup> April and 5<sup>th</sup> May 2018. No written standard terms of engagement were provided by the Trust to the claimant. There were no other relevant terms agreed. The engagement was essentially a fixed term contract. There was no agreement on termination of the contract prior to the expiry of the fixed term. The agreement was terminated prior to the expiry of the fixed term by the Trust. The claimant is prima facie entitled to be paid for the fixed terms engagement.

40. Therefore with regard to the first issue, I do not strike out the claimant's claim for contractual damages against the Trust as having no reasonable prospect of success.

***(ii) whether the claim against the second respondent was made in time and if it was not, were there are any grounds on which time can be extended.***

41. I accept that at the commencement of his employment by the Trust, the claimant understood and believed that agency workers were "employed" by the agency rather than the end user, in this case the Trust. His belief was supported by and perhaps based on his previous experience and the guidance of ACAS who advised him to issue proceedings against Medecho as his employer. He filed proceedings against Medecho on 19<sup>th</sup> August 2018.

42. The claimant was engaged for a very short period of time – three days. He must have been shocked by, from his point of view, the peremptory dismissal on 6<sup>th</sup> April 2019. I accept that because of the confusion in his mind about his employment status, whether he was subject to IR35, and the claimant's medical condition (of which I have seen evidence), I find that the claimant has established it was not reasonably practicable for him to have filed proceedings against the Trust as a respondent within the stipulated time.

43. I then consider whether he then presented his claim within a reasonable time.



44. In their response filed in September 2018 Medecho denied that they employed the claimant and asserted that the Trust was the employer. Because the claimant had no confidence in Medecho and thought they were unreliable because they had let him down regarding notifying the Trust about the GMC/MPT investigations, the claimant did not respond to Medecho's stated position.
45. When the claimant received his payslip and a P45 for three days' wages from the Trust at the end of October/early November 2018, the claimant now had a second very large hint that he had not filed against the right respondent and should do something about it. Indeed, the claimant wrote to the tribunal in November 2018 to inform them that he did not think he could proceed against Medecho as they appeared not be his employer. The tribunal clerk suggested to the claimant in November 2018 that the claimant should email the Tribunal to request adding a second respondent.
46. The claimant went on holiday for several weeks in December 2018/January 2019 and took no action before he left in December, nor immediately when he returned in January. In January 2019 he took further legal advice from a free legal advice centre in London. He did not formally apply to add the Trust as a second respondent until early February 2019.
47. The Tribunal must ask itself the question: what did the claimant know and what knowledge the claimant should have had if he had acted reasonably?
48. There is a three month delay before the claimant took action to remediate the situation in relation to adding the Trust as a respondent. Whilst I accept that the situation may have been complicated immediately after his dismissal and until the end of October 2018, from early November 2018 onwards the claimant was on notice that he needed to take steps to amend his claim form to include the Trust. On his salary, given his level of intelligence, his computer literacy, the invitation from a tribunal clerk that he write to the tribunal, and the fact that he did attempt to take advice from CAB o- line (although he did not disclose what CAB told him) it would have been reasonable for the claimant to have sought legal advice from an employment practitioner, or done research himself as to time limits and to have filed his claim before the end of November 2018.
49. The claimant submitted that he had been unwell, having had a sudden deterioration in his medical condition because of the abruptness and brutality of his dismissal. I accept the evidence that the claimant was taking medication and had been significantly affected initially by his dismissal by the Trust; *but*, as the respondent submitted, the claimant

was nevertheless working as a locum between May – December 2018. I cannot avoid the fact, and the conclusion, that if the claimant is able to perform his duties, highly skilled and important duties as a consultant psychiatrist over that period, he must have been capable of making an assessment of the tribunal proceedings and to find out whether he needed to do anything once he knew that the Trust and not Medecho was his employer. He was aware of the initial time limit in proceeding against Medecho and he had the mental capacity to either research time limits himself on line, or to decide to seek timely, specific advice on whether adding a second respondent would involve consideration of a time limit.

50. I find that the claimant did not apply any diligence or sense of urgency in finding out what he needed to do, and by when. It would have been entirely reasonable for the claimant to have taken specific, targeted legal advice on time limits and adding a second respondent, or to have undertaken his own research in September 2018 and he should have taken positive steps to do so at the latest after his contact with the Tribunal in early November 2018. That failure to take prompt action in November 2018 and to pick the matter up only when he returned from holiday in January 2019 was not reasonable and is fatal to his application to extend time.

51. I am aware that the claimant wishes to add a complaint of disability and to amend his claim accordingly. That application was not before me. Although the legal test for amending a claim under the Equality Act 2010 is different to the test to extend time under the 'not reasonably practicable test', the time limits are nevertheless strict and the claimant would have still faced the hurdle of explaining to a Tribunal why, if he claims that the Trust was on notice of his disability on 6<sup>th</sup> April 2018 after it made inquiries of the GMC/MPT, he did not bring a disability claim against the Trust in September 2018, or indeed include it when he did finally issue against the Trust in May 2019.

Employment Judge Richardson  
24<sup>th</sup> March 2020