EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107734/2019

Held via Cloud Video Platform (CVP) on 8 October 2020

Employment Judge J Young

Dr A Razoq	**Claimant** **In Person**
Dumfries and Galloway Health Board	**First Respondent** **Represented by:** **Ms H Craik - Solicitor**
Dr K Donaldson	**Second Respondent** **Represented by:** **Ms H Craik - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

(1) that although the claim for discrimination was presented outwith the three month period provided for in s123(1)(a) of the Equality Act 2010, the Tribunal is satisfied that in all the circumstances of the case, it is just and equitable to extend time but only in respect of the complaint that the respondents discriminated against the claimant by making a fitness to practice referral to the General Medical Council on 18 October 2018 contrary to s13 and 14 of the Equality Act 2010. All other complaints made of discrimination under s13,14,26 and 27 of Equality Act 2010 are dismissed as the tribunal has no jurisdiction to hear them.

(2) that under article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order the Tribunal does not have jurisdiction to hear the claimant's claim for breach of contract in respect of notice pay which is dismissed.

REASONS

Introduction

1. In this case, the claimant presented a claim to the Employment Tribunal on 16 July 2019 complaining that he had been unfairly dismissed; discriminated against on the grounds of race and religion or belief; and was due a payment in lieu of notice. He is a consultant physician and had been engaged by the first respondent to provide locum medical services at Dumfries and Galloway Royal Infirmary. Those services were provided between 4 June and 5 October 2018.

2. In his statement of claim the claimant maintained that the respondents act of referring him to the General Medical Council on 18 October 2018 was an act of discrimination and victimisation for the reasons given within the statement of claim. He also indicated that his claim for notice related to the first respondent 'refusing to pay the claimant a week's notice' when the engagement came to an end. In their response, the respondents admit that the claimant was referred to the General Medical Council for reasons given in their response but deny any discrimination or victimisation. They deny also that the claimant was entitled to payment of a week's notice. In any event they say the tribunal has no jurisdiction to hear the claims as they have been raised outwith the statutory time limits.

3. At a preliminary hearing on 27 September 2019, the claimant was required to be more specific in his pleadings and ordered to provide further and better particulars of his claim. In relation to the claim of timebar an order was made that there should be a preliminary hearing on 21 January 2020 on whether the tribunal had jurisdiction 'to consider the claims made, the terms of the pleadings as amended…. and any other issue of case management'. The claimant lodged further particulars of his claim and the respondent lodged a response to those further and better particulars. In that response, it was stated amongst other things that the claim made by the claimant in his further particulars of 'whistleblowing' was a "new head of claim" and "not discussed" at the previous preliminary hearing and that it should not be added by way of

particularisation but that it would be necessary for the claimant to seek an amendment to his initiating ET1 if he wished to pursue that claim. It was also stated that certain aspects of the claim should be struck out under rule 37 (1) (a) of the Employment Tribunal Rules of Procedure.

4. In any event, the preliminary hearing on jurisdiction fixed for 21 January 2020 was discharged and further case management discussion took place. At that time, it was determined that the parties should continue discussion on the provision of a statement of agreed facts; that consideration of the application for strikeout would be deferred until after a hearing on time bar; and that a further date for preliminary hearing should be fixed on the issue of time bar on the claims made. That hearing was subsequently fixed for 8 October 2020 by means of Cloud Video Platform.

5. At the hearing, some preliminary matters arose:

(i) The claimant raised issues regarding the presence of the first respondent's head of service who attended to observe and provide such instruction as might be necessary to Ms Craik. The claimant had taken exception to this individual and intimated that she had 'no place to be part of this hearing'. It was explained that this was a public hearing and Ms Craik was entitled to have a representative from the respondents attending in order that she could receive instructions as necessary. The claimant indicated that were the hearing to be in person the individual would not be in "his sight line" and this was "stressing" him. To assist Ms Craik indicated that the camera for the head of service could be switched off and she could continue to listen to the conduct of the hearing. The claimant agreed to proceed with the hearing on that basis.

(ii) I raised the issue of whether the claim of detriment as a result of making a protected disclosure should be part of the hearing on time bar as the claim by the respondents that this was a 'new claim' and would require to be included in the claims made by way of amendment had not been resolved. After some discussion, it was agreed that this

hearing on jurisdiction would proceed on the claims of (i) discrimination on the grounds of race (ii) discrimination on the grounds of religion or belief; and (iii) breach of contract for refusing to pay a week's notice.

Documentation

6. For the hearing, there had been lodged a Joint Inventory of Productions paginated 1 – 91, and a document entitled 'Statement of Facts for Preliminary Hearing on Jurisdiction (agreed by parties)'. The respondents had also lodged a list of authorities.

7. On the morning of the hearing, the claimant intimated further productions and a document entitled 'Submission to the Preliminary Hearing'. There was no objection taken to the documents intimated on the morning of the hearing by the claimant and are numbered as follows:-

- B1: Email exchange between the claimant and Roger Holden of the first respondent dated 22 October 2018;
- B2: Email from Sian Finlay of the first respondent to the claimant dated 22 October 2018;
- B3: Email exchange between the claimant and Alexander McDonald of the first respondent dated 22 October 2018;
- B4 – 4(a): Email exchange amongst Kirsty Bell, Alexander McDonald, Roger Holden of the first respondent and the claimant dated 13-14 August 2018; and
- B5: Organisation chart of the first respondent showing the position of the second respondent as Board Medical Director and clinicians within the first respondent organisation.

8. I asked the claimant if he agreed with the statement of facts which had been produced. He was reluctant to do so. Ms Craik advised that the statement of facts had been sent to the claimant in December 2019 and by email he had agreed the terms. The claimant indicated that there were certain additional facts that required to be canvassed. The hearing proceeded on the basis

that the statement of facts would require to be considered along with the supplementary information to be provided by the claimant. I explained to the claimant that he would be required to give evidence on the issue of time limits as it would be necessary to have his account of matters on when he became aware of the events which gave rise to the claims and his actions in then presenting his claim to the Tribunal on 16 July 2019. I advised that would entail him answering questions from Ms Craik in cross examination. He indicated that he had not anticipated such procedure. He asked if he would have the opportunity to cross examine Ms Craik. I advised that would not be the case as she attended as a representative for the respondents and not as the witness.

9. The claimant gave evidence under affirmation.

Issues for the tribunal

10. The issues for the tribunal were:-

(i) On the complaints of discrimination on grounds of race and religion/belief, whether the claims were presented within the period of three months beginning with the date of the act(s) complained of which would entail determining the date on which the act(s) of discrimination complained of took place. If not brought within the three month time limit, whether the tribunal should exercise discretion to extend time to such other period as the tribunal thinks "just and equitable".

(ii) On the claim for notice pay, whether it was reasonably practicable for the claimant to have lodged his claim within three months of the effective date of termination of the contract or if not, reasonably practicable within such further period as was reasonable.

11. From the documents produced, relevant evidence given and admissions made, I was able to make findings in fact on these issues.

Findings in fact

12. The claimant was engaged as a locum physician by the respondents between 4 June and 5 October 2018. His speciality is in acute medicine. He was engaged through the agency 'Locumpeople' (69-70).

13. In that period, the claimant received very positive references on his work from Dr A McDonald, Consultant in Acute Medicine and Critical Care, on 17 July 2018 (62); Professor Chris Isles, Consultant Physician and Undergraduate DME, of 29 August 2018 (63); Dr Ashraf Yacoub, Consultant Physician, on 19 September 2018 (64-66); Dr Rafferty, Consultant; and Dr Roger Holden, Consultant Physician/Clinical Director for Medical Department of 13 September 2018 (67).

14. These references indicated that the claimant had been a '*good colleague whom we would employ again'* and that he had maintained courteous and professional relationships with all his clinical colleagues and patients.

15. On 4 October 2018, the claimant raised concerns regarding F1 level (junior) doctors with the first respondent (71 – 74). At the same time, he indicated to Locumpeople that he would wish to end his assignment with the first respondent (73).

16. On 8 October 2018, the claimant emailed the second respondent indicating that they had not met but that he had '*worked as a locum medical consultant in CAU since the beginning of June'* and understood that the second respondent had been forwarded a complaint '*made about me by an F1'*.The claimant wished to advise the second respondent of the feedback and concerns that he had given which he believed were very relevant to that complaint and so forwarded the appropriate emails of 4 October 2018. In his email of 8 October 2018, the claimant also made comment on levels of staffing which he had indicated he had previously raised with management (75 – 76).

17. On 15 October 2018, the second respondent sought information from Roger Holden, Clinical Director for Medical Department on the claimant as he considered it was necessary to submit a '*fitness to practice recommendation to the GMC'* on account of allegations made but was aware that Dr Holden had provided the claimant with a '*glowing reference'* He indicated *"My*

*suspicion is that all you saw was good,I gather he behaved impeccably with peers but poorly with juniors and nurses. Can you provide me with some form of comment on your reference please?"(*79)

18. Prior to a reply from Dr Holden (provided on 19 October 2018 [78 – 79]), the second respondent intimated a referral to the General Medical Council (GMC) by email of 18 October 2018 timed 18:51:24 and confirmed as having been received by the GMC at 18:52. The "*Summary of Concerns"* referred to allegations of the claimant's behaviour with "*two FY1 doctors"* being "*confrontational, bullying and argumentative"* and also that there had been insistence from the claimant on an increased rate of pay for on-call cover which the first respondent felt pressured to pay (80 – 81).

19. On 18 October 2018 at 22:11, the second respondent emailed the claimant to say:

'After discussion with the GMC Employer Liaison Advisor, I need to inform you that I have submitted a Fitness to Practice Referral to the GMC with regards yourself. They will be in touch in due course.' (85)

20. The claimant advised that he expressed his 'astonishment at what had happened', namely the referral to GMC, to Dr Roger Holden, his direct manager Sian Finlay and Alexander McDonald. That resulted in three emails being sent to him:-

    (1) Email of 22 October 2018 timed 16:38 from Dr Sian Finlay (B2) indicating that he had "*spoken to Patsy, Alex and Nadeeka (the latter via email as she is on holiday). None of us knew the GMC referral had been made until today. I have emailed Ken Donaldson to ask for more information, but he is on leave, so I may not hear anything for a while."*

    (2) Email of 22 October 2018 timed 15:42 from Alexander McDonald to the claimant stating '*just a small email to let you know that Sian and I have discussed the situation and I have written (and I think Sian as well) to Ken Donaldson. I believe he is away at present, likely the*

reason for you not being able to contact him. I don't know where this may go from here, however I hope you may be slightly reassured that we have communicated to Dr Donaldson and the matter is then his. I wish you the best with your future jobs.'

(3) Email of 22 October 2018 timed 20:52 from Roger Holden to the claimant in which he indicated that Mr Donaldson was on holiday and '*unless there is something I don't have knowledge of here, it looks at present that there has been some unintended escalation at this end perhaps due to a communication error. If that does prove to be the case, and I hope it is, I am terribly sorry for the worry and anxiety this has caused. I would suggest that you copy this to the GMC and that they should wait until we can all catch up with Ken next Monday when he gets back from holiday. If there is nothing more than the concerns we have discussed as per my discussion on the phone and my following email to you on Friday, we will recommend that he formally withdraw the Fitness to Practice concern. It would be difficult to progress it given that I have emails from myself Sian and Nadeeka all stating that it was not appropriate. If you want me to email the GMC myself, please reply with the person handling your case's email and I will do so. Again, apologies as it appears you have been wrongly treated.'*

21. By this time Dr Roger Holden had responded to the email from the second respondent of 15 October 2018 seeking comment on the reference for the claimant by email of 19 October 2018 (78 – 79). Dr Holden advised that he was '*disappointed and surprised'* that the referral had been made to the GMC as he did not feel *'I am convinced it is necessary or appropriate at the present time…."* and "….*would remind you that we were very happy with Dr Razoq's clinical work right up until the day my holiday started on 2 October [2018]……..'*. That email had been copied (amongst others) to the claimant.

22. Dr Holden had also intimated by email of 23 October 2018 to the claimant (77) the name of the "*person who advised us on 4th October at which stage a FtP*

referral was not thought to be appropriate. His is the only name I have in relation to this. We have decided to contact him ourselves….."

23. The claimant advised that as a result of these emails, his impression was that the referral would be withdrawn as it was not appropriate.

24. By email of 24 October 2018 at 14:28:59, the claimant emailed the second respondent. That email was headed '*Pre-Legal Action Notice'* and in the first paragraph indicated that this was a '*formal pre-legal action notice'*. In that email, he indicated that in his view, the second respondent had acted *'utterly unlawfully, unreasonably and abusive of process by referring me to the GMC. You have also acted unlawfully, unreasonably and in abuse of process by referring me to the GMC in the way and manners you did. You have also committed an act of discrimination and an act of victimisation by doing what you have done.'* The email was of some length and made various points indicating that the referral was on '*no true grounds and no sufficient grounds at all'* and that he wished to say that the acts of the second respondent are '*liable and accountable separately from those of the GMC' ones and regardless of what those of the GMC were and going to be'* and '*ill advise from the GMC if proven to have been given, which surely you contributed to it being so, does not at spares you liability for failing to do your share of professional duty and from your discrimination and victimisation acts'*. He asked for a '*response urgently'* and '*advise that in your response to commit yourself to rectify. If you do the right thing, I may well let everything go, if you persist with your arrogance, abuse of process and discrimination, I have several legal actions prepared and ready to be launched.'*

25. The claimant advised that this notice to the second respondent was conveyed 'in anger and frustration'. He did not know why he had been referred to the GMC and wanted to make various points including no consultation with managers before making such a referral and that he was unaware of any specific allegations.

26. In cross examination, he advised that although the email had been headed "Pre- Legal Action Notice" he had not taken any legal advice on this matter

and the letter was written to get the GMC referral withdrawn. He considered that the letter contained 'generic' rather than specific allegations as he had not been notified of the particular matters resulting in referral to GMC and that on the face of it, "it must be discriminatory and an act of victimisation". It was not the case that he had several legal actions ready to launch. He was trying to salvage his reputation and these were "angry words". He wanted to get a reaction.

27. The claimant heard nothing from Dr Donaldson in response to his 'pre-legal action notice' and nothing from the GMC and so emailed the second respondent on 30 October 2018 timed 14:27 when he advised that given the failure to respond to the pre-action letter, he would start a legal case *'against you personally and the trust'* if there was no response received by the following day.

28. On 31 October 2018, Kenneth Donaldson wrote to the claimant indicating:

'I am writing to you in response to your emails of 24 October and Tuesday 30 October.

I have been in communication with both the General Medical Council and the Central Legal Office with regards to your emails and, on their advice, I would like to inform you that I will not be responding to either of your emails, nor will I respond to any future emails from yourself.'

29. At this stage, the claimant was aware in general terms of the time limits affecting claims to an employment tribunal without having specific knowledge or making any specific research to identify particular timescales.

30. He made an approach to ACAS as regards early conciliation on 6 November 2018 in respect of the prospective claim against both respondents and was issued with a certificate from ACAS on 14 November 2018 confirming that he had complied with the early conciliation requirements "*before instituting proceedings in the Employment Tribunal*" (28 – 29). He was thus in a position to institute tribunal proceedings at that point.

31. He advised that he had instituted the early conciliation procedure with ACAS as his 'priority was to stop the GMC referral' and 'to confirm matters to the Trust and for a message that the referral should not proceed – bit of a threat, if you like'. He advised that he still had not received any information on the GMC complaint. He indicated that he should have heard from the GMC within two weeks of the referral being made to them of any investigation to ensue. Reference was made to the acknowledgement to the second respondent of his referral to the GMC (80) stating that the referral would be reviewed and that the GMC would *'tell you within two weeks whether we will be investigating it further'*. The claimant advised without contradiction that he would also be told at that time if a referral was proceeding. The claimant indicated that he was aware of the process of referral to GMC and of the two week timescale of notification.

32. The claimant advised that he had not taken any advice, legal or otherwise, on the matter but that he did not proceed to present any claim to the employment tribunal after receipt of the ACAS certificate because:-

    (i) given the representations made to the second respondent and that he had heard nothing from GMC on the referral proceeding (and if the complaint was proceeding then he should have) he considered that he had achieved his objective of the referral being withdrawn; and

    (ii) in any event, he had no knowledge of the specific grounds which had been made out in the referral to GMC and so would be unable to particularise any claim to the employment tribunal.

33. By letter of 1 May 2019 (received by the claimant on 3 May 2019) from GMC, the claimant was advised that they had received a referral from the second respondent, a copy of which they enclosed, and that before they decided an investigation was required, they needed to make *'a provisional enquiry about the concerns raised by this referral and gather some further information'*. (88)

34. The letter indicated the concerns raised being:

    - '*Attitudinal and behavioural conduct towards junior colleagues;*

- *Inappropriately demanding higher fees at short notice and threatening not to work on call shifts if not increased, thereby jeopardising patient safety;*
- *Claiming and receiving payments for time not worked;*
- *Attending agreed clinical shifts later than at the agreed start time and therefore not being available or contactable for clinical obligations'.*

35. The claimant advised that this was a 'bombshell' both as to the complaint proceeding the content and given what he regarded as 'lies' that 'racism was at play'.

36. He said that he realised at that point that he required to make a claim to the employment tribunal and repeated the process with ACAS. In respect of the first respondent, he notified ACAS on 8 May 2019 of early conciliation and they issued a certificate on 23 May 2019. In the case of the second respondent, he intimated early conciliation on 23 May 2019 and the certificate was issued on 7 June 2019 (30-31). His claim against the respondents was then presented to the Tribunal on 16 July 2019.

37. Separate from his view that the complaint to the GMC must have been withdrawn, he repeatedly stressed that until he knew the precise grounds of complaint to the GMC, he would not be able to particularise his claim to the Employment Tribunal and that until he got the letter of 1 May from GMC, he did not "know about the particulars" other than a suspicion that there may have been a concern about the complaint from junior doctors which he had become aware of in October 2018. He certainly had no knowledge of the allegations that he had been 'inappropriately demanding higher fees at short notice and threatening not to work on call shifts; claiming and receiving payments for time not worked; attending clinical shifts later than the agreed start time'. These grounds were new to him. He knew of the detriment he faced when he knew of the particulars of the claims he was facing. He denied that the statement of claim in his ET1 was very similar in its wording to his email to Dr Donaldson of 24 October 2018.

Submissions

For the respondent

38. It was submitted that on the discrimination claims the act complained of was referral of the claimant to the GMC by the second respondent on 18 October 2018 and the claim should have been presented within 3 months of that time. The ET1 lodged by the claimant made it very clear that the fact of referral to GMC was the act complained of. The first six paragraphs of the statement of claim all referred to the referral to the GMC.

39. Additionally, time for the notice claim would commence from the point the claimant was no longer engaged by the first respondent namely 5 October 2018.

40. It was clear that the claimant knew there was a referral made on 18 October 2018. It was submitted that his position appeared to be that because he had no detail of the allegations being made, he had not taken the matter further at that time.

41. However, comparing the pre-action legal notice of 24 October 2018 and the statement of claim, he made the position very clear. It was submitted that the claimant had alleged unlawful and unreasonable acts, abuse of process, discrimination and victimisation in the email of 24 October 2018 and these were the very grounds of complaint in the ET1.

42. In the letter to Dr Donaldson, he had stated that his actions were separate from what the GMC decided to do. Reference was made to **Virdi v Commissioners of Police of the Metropolis and Central Police Training and Development Authority UKEAT/0373/06/RN** for the proposition that time would begin to run on the date the decision was made and not the communication of that decision. In this case, the claimant clearly knew he had been referred to GMC on 18 October 2018 and thereafter there was nothing stated to indicate that the referral had been withdrawn.

43. It was submitted under reference to **Robertson v Bexley Community Centre [2003] IRLR 434** that while an employment tribunal had a wide discretion in

determining whether or not it was just and equitable to extend time, such limits are exercised strictly and there is no presumption that discretion should be exercised. A tribunal should hear evidence to convince it that it is just and equitable to extend time which is the exception rather than the rule.

44. It was further submitted under reference to **British Coal Corporation v Keeble & others [1997] IRLR 336** that various factors were to be given consideration on whether discretion to extend time should be exercised. In particular, regard should be had to:

(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 delay;

(iii) the extent to which the parties sued had cooperated 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; and

(v) the steps taken by the plaintiff to obtain appropriate professional advice".

45. In the **Mensah v Royal College of Wood Midwives UKEAT/124/94,** it was noted by the EAT that the date on which a discriminatory act occurs is when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory. Knowledge was not a pre-condition of the commission of an act which could be relied on as an act of discrimination.

46. In this case, it was submitted that there was a clear correlation between the letter of 24 October 2018 and the statement of claim within the ET1 lodged in July 2019. It was clear that the claimant considered he had a claim. He had stated in his evidence that the referral was discriminatory. It was that act of which complaint was made.

47. It would be a different matter if the claimant was ignorant of the act complained of **(London Borough of Southwark Afolabi [2003] UWCA Civ15)** but here

the claimant was clearly aware of the fact of the referral as he had been told of it.

48. In further reference to the case of **Virdi,** it was stated that fault of the claimant was a relevant consideration. In that case, the claimant had put the matter at the hands of solicitors who had apparently failed in their duty but in this case, the claimant had not instructed solicitors or other specialist advisors. The failure to make the claim in time was his.

49. It was submitted that there was no good reason for the delay. There was no satisfactory explanation from the claimant as to why he had delayed making the claim. He had taken all the steps to get receipt of the ACAS certificates and was in a position to make the claim but did not do so. He had not taken advice on his position. Going to ACAS was an indication that he was aware of time limits. He could easily have made enquiry as to when he should have presented his claim.

50. In this case, there was a claim against the second respondent personally and so particularly serious. The complaint was six weeks out of time. It was not just and equitable to go to extend time in that case.

51. So far as notice pay was concerned, the test was whether it was reasonably practicable to present the claim within the three month time limit and that was clearly the case. There was simply no explanation as to why it was not reasonably practicable to present the case in time.

For the claimant

52. The claimant submitted that there were two different stages in this matter and that the respondents had tried to put them together in their submission.

53. What had happened in October by way of referral to the GMC was dealt with by the generic letter of 24 October 2020. Had he brought a claim at that time, then the tribunal would have wanted the particulars of the claim and the grounds. He had to have the facts before making such a claim. It was common sense that he had to be able to have the facts before he could make a claim.

54. The two emails from the second respondent had given no information to the claimant about the reasons for referral to GMC. There was no information provided by which he could judge whether he had a claim either by his intimation of referral of 18 October 2018 or further letter of 31 October 2018.

55. It was stressed that the letter of 24 October 2018 to the second respondent contained generic allegations and not those he was 'able to put a finger on' and no reasonable judge or court would expect him to make a claim in those circumstances.

56. He considered that in the statement of claim in the ET1, he had given further and more specific information. He had only known of certain specific grounds after he had received the letter of 1 May 2019. To raise a claim would need at least a summary of the grounds of complaint to GMC.

57. The GMC had not got in touch with him regarding any referral. They should have done so within two weeks. They had 'sat on matter for five and a half months' and the mere fact that nothing had happened was good reason to think that nothing would happen. The correspondence from his managers at the hospital suggested that the matter would be withdrawn.

58. In any case presented to the tribunal, a reasonable question would have been what the claim was and what detriment was being suffered and he could not say that as he did not know the case against him to ascertain the detriment. Saying that he was taking legal action was 'sounding off' and not a serious matter. He was wanting to get a reaction. He had been hurt and his e mail of 24 October 2018 was a reaction to the email of 18 October 2018. Thereafter, there was nothing to indicate that the matter was ongoing either from the first or second respondent.

59. While the respondents said that it was the exception to the rule to allow an extension of time, the claimant submitted that the opposite was the case and that the circumstances engaged discretion. He had tried to engage with the second respondent but had been met with a wall of silence. The GMC had also been silent and he did not deserve to lose this claim. It would not be reasonable in the circumstances not to extend time or fair to be excluded from

the claim. There was no fault that could be attributed to him for the silence from the first and second respondent and GMC. The matter only became apparent when he knew of the terms of the complaint outlined in the letter of 1 May 2019 and he had acted promptly thereafter.

Conclusions

60. Complaints of unlawful discrimination must be presented to an Employment Tribunal before the end of the period of three months beginning with the date of the act complained of – s.123 (1) (a) of the Equality Act 2010 (EqA). This time limit applies to all work related discrimination complaints brought under part 5 of the EqA (other than equal pay claims) which covers discrimination because of race, religion or belief (amongst others). There is however an escape clause which allows a tribunal to consider any such complaint which is out of time provided that is presented within 'such other period as the employment tribunal thinks just and equitable' – s.123 (1) (b) of the EqA.

61. In order to establish whether a complaint of discrimination has been presented in time, it is necessary to determine the date of the act complained of, as this sets the time limit running for the purpose of section 123 EqA. Where the act complained of is a single act of discrimination, this will not usually give rise to any problems. A dismissal for example is considered to be a single act and the relevant date in which the employer's contract of employment is terminated.

Date of acts complained of

62. In the particulars of claim lodged by the claimant (44 – 49), he makes various claims of discrimination under sections 13,14,26 and 27 of EqA. These claims can be separated as follows:

Direct discrimination on basis of race and religion in contravention of section 13 and 14 of EqA.

63. The claimant says he has been discriminated in respect of four matters:

(i) Requesting that he obey and be inferior to his juniors' contrary to the hierarchy in the NHS for no apparent reason but that his juniors were 'white persons' and he is not;

(ii) Dismissing him with immediate effect on 5 October 2018 for no apparent reason but that performing his professional duties, he unintentionally upset a white junior doctor;

(iii) Dismissing the claimant with immediate effect on 5 October 2018 without following the NHS internal policies and common practice procedures and without undertaking any preliminary checks;

(iv) Referring the claimant to the GMC without justification. In this claim, the claimant gives further particulars as to why he considers the referral was discriminatory in respect of various matters but they all relate to the referral to GMC.

64. In respect of (i) – (iii) above, the latest time at which the acts complained of could have arisen was 5 October 2018 being the date when the engagement of the claimant ended with the respondent. He maintains that there was a dismissal at that time '*for no apparent reason'*. The claimant's dismissal is not easily borne out by the terms of his email to the locum provider (73) dated 4 October 2018. However, there is no dispute that he completed his time with the respondent on Friday 5 October 2018.

65. At that time, any instruction to '*obey and be inferior to his juniors'* or '*dismissing the claimant with immediate effect on 5 October 2018 for no apparent reason'* or dismissing '*without following the NHS internal policies'* would have taken place. In that respect therefore, a claim should have been made to the Employment Tribunal by 12 January 2019 (taking into account early conciliation procedure) but his claim was not lodged until 16 July 2019.

66. The concentration in the hearing related to claim (iv) above namely that the claimant was discriminated against by the referral to GMC.

67. The position of the respondents in this respect was that the claimant was aware of the referral to the GMC on 18 October 2018 being the date of the

email from the second respondent; that was the date of the act complained of; and time started running from that date. The claimant's position was that time started running from 3 May 2018 being the date when he was advised by GMC of the nature of the complaint against him by the respondents.

68. I concluded that the act complained of was referral to the GMC on 18 October 2018 for the following reasons.

69. The claimant sent to the second respondent a 'pre-legal action notice' on 24 October 2018 indicating that he had acted '*utterly unlawfully, unreasonably and abusive of process by referring me to the GMC'* and that he had also '*committed an act of discrimination, and an act of victimisation by doing what you have done'*. The claimant went onto give more particulars of his belief why he considered that to be the case by indicating that the referral was based on '*no true grounds and on no sufficient grounds at all'* that the referral had been made against the initial advice given by GMC; that no contact had been made with him prior to the referral; that no consideration was given to the very positive feedback received from colleagues and no consultation had taken place with the managers. He also indicated that he had been victimised for raising concerns about staffing issues within the hospital and ends by saying that he asks for an urgent response and if the second respondent did '*the right thing, I may well let everything go, otherwise legal action would be launched'*.

70. The claimant is very clearly identifying an act which he considers to be discriminatory namely the referral to GMC on 18 October 2018. His email of 24 October 2018 goes to some length to elaborate on why he considers that to be the case. I accept that at that stage, he did not know the grounds upon which that complaint had been made but it is clear that the very fact of the referral being made was the act that he considered to be discriminatory of him.

71. The case of **Virdi** (cited above) confirmed that an act is 'done' when it is completed and the act is complete for the purpose of time limitation when a decision is taken rather than when it is communicated. In this case, the decision to refer the claimant to GMC was taken by the second respondent

on 18 October 2018 being the same date he communicated that to the claimant. I did not consider that the letter from GMC confirming that it had accepted the referral and confirmed the grounds upon which that referral had been made was the act of which the claimant complained. The act complained of was the fact of referral which had been made and communicated to the claimant on 18 October 2018.

72. Also, **Mensah v Royal College of Midwives** (cited above) confirmed that an act occurs when it is 'done' not when you acquire knowledge of the means of proving that the act done was discriminatory. Knowledge is a factor relevant to the discretion to extend time. It is not a pre-condition of the commission of an act which can be relied on as an act or discrimination. The claimant in this case may not have had full information on the reasons for the referral to GMC on 18 October 2018 but he certainly knew that the act which he maintains is discriminatory was 'done'. His pre-legal action letter makes that clear.

73. In my view therefore, time started running from 18 October 2018 in relation to (iv) above being the claim arising out of the referral to the GMC. To be in time it should have been presented to the Employment Tribunal by 25 January 2019 (taking into account the effect of early conciliation).

74. For these claims (i) –(iv) above to survive therefore it is necessary to consider whether it would be 'just and equitable' to extend time. While Employment Tribunals have a wide discretion to allow extension of time under the "just and equitable" test it does not follow that the exercise of discretion is a foregone conclusion in a discrimination case. As was said **Robertson v Bexley Community Centre** when Employment Tribunals consider exercising discretion there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal should not hear the case unless the applicant can demonstrate that it is just and equitable to extend time which is the exception rather than the rule. The onus is therefore on the claimant to convince a tribunal that discretion should be exercised. At the same time the Court of Appeal in **Chief Constable of Lincolnshire Police v Caston (2010) IRLR 327** stated (para31):

"… there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge time for bringing ET proceedings, and Auld LJ is not to be read as having said in ***Robertson*** *that it either had or should "*

75. In determining whether to exercise that discretion the EAT in **British Coal Corporation v Keeble** suggested that Tribunals would be assisted by considering certain factors. Those would be to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties have co-operated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. That check list provides a useful guide but need not be adhered to slavishly. In **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) ICR 1194** Legatt LJ said (page 1201):

"*First it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of The Limitation Act, s123(1), the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33 (3) of the Limitation Act (see* ***British Coal Corporation v Keeble****) the Court of Appeal has made it clear that the tribunal is not required to go through such a list the only requirement being that it does not leave a significant factor out of account (****see Southwark London Borough Council v Alofabi (2003) ICR 800****)…"*

That said factors which are almost always relevant to consider when exercising any discretion whether to extend time are (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh)"

76. In this case as regards the claims of discrimination at (i) – (iii) being claims of "*requesting the claimant to obey and to be inferior to his juniors for no apparent reason but that his juniors were white and the claimant is not";* dismissing on 5 October 2018 for no apparent reason but that he "*unintentionally upset a white junior doctor*"; and dismissing the claimant on 5 October 2018 "*without following the NHS internal policies and undertaking preliminary checks*" there would not appear to be any explanation as to why these claims could not have been raised within the time limit running from 5 October 2018. They are separate and distinct from the claim that it was discriminatory for a fitness and practice referral to be made to GMC. The claimant had proceeded to obtain early conciliation certificates on 14 November 2018 well within the time limits. It did not appear he had taken legal or other advice in relation to those claims and it seemed that he was aware of the application of time limits in general terms to claims to an employment tribunal. There were no identifiable reasons for the delay in presenting a tribunal application in respect of these claims. The claimant knew of the causes of action by 5 October 2018 and acted promptly in obtaining the early conciliation certificates but took no action to promote those claims before the tribunal. I consider that these claims are separate and severable from the matters contained in the referral documents to GMC. All the constituent acts within these claims had been complete and known to the claimant by 5 October 2018. They are not dependant on the claimant receiving information on 3 May 2019 of the particular grounds of referral to GMC. There is no suggestion in respect of these claims that clarification of the grounds of referral to the GMC had a bearing on these matters, somehow added to these claims, or that withdrawal of the claim to the GMC would resolve these claims. While the submission by the claimant was that these claims only came to his notice after the grounds of referral to GMC became

known to him on 3 May 2019 I do not consider that could be the case. The letter makes reference to "*attitudinal and behavioural conduct towards junior colleagues"* which is a very different issue than the claims made of the respondents requiring him to be inferior to his juniors for no other reason than they were white and he was not; or being dismissed for no apparent reason but that he unintentionally upset a white junior doctor who he names; or being dismissed without following NHS procedures.

77. It is accepted that an application having been lodged on 16 July 2020 there would not be any adverse effect on the cogency of evidence in respect of these claims or in hampering investigation. That balance on any prejudice is likely to fall in favour of the claimant. However, given the lack of identifiable reasons for presenting those claims to the employment tribunal within the time limit it is my view that it would not be just and equitable to extend time in respect of these claims. These were claims which arose out of the engagement terminating as at 5 October 2018 and which stood alone, separate and distinct from any referral to GMC.

78. In respect of the claim (iv) above namely that the claimant has been discriminated against by the referral to GMC I take the view that different considerations apply. The position of the claimant was that he was irate that a referral had been made to GMC and that his "pre-legal action notice" had been sent in anger and frustration with the object of seeking to have that referral withdrawn. He stated that he received no response and so then made referral to ACAS for early conciliation and received the necessary certificates to enable him to pursue a claim.

79. In the meantime, he was aware of previous experience with GMC that a referral to GMC would be responded to within two weeks if they were to proceed with an investigation. There is support for that in the e-mail of acknowledgement of the referral from GMC (80/81) where it is advised that the referral would be reviewed and the GMC would say *"within two weeks whether we will be investigating it further"* and "*if we were unable to investigate we will explain why".* If the matter was to be investigated further

then clearly the claimant would then be told of the steps that GMC were to take.

80. However, no such information was made available to the claimant until 3 May 2019 some six months after the claimant might have expected to know if the matter was to be pursued by GMC.

81. In the meantime, the claimant had received encouraging reports from his colleagues as regards the referral to the GMC. He was aware that an individual within GMC had advised on 4 October 2018 that it was not thought a fitness to practice referral was appropriate and was to be contacted by Dr Holden (77). He was aware that Sian Finley and Alexander McDonald were making representation on his behalf (B2/3). He was aware that Roger Holden holding the senior position of Clinical Director considered that there had been some "*unintended escalation at this end perhaps due to a communication error*" and that he will "*recommend that he (the second respondent) formally withdraw the fitness to practice concern"* (B1) and that Dr Roger Holden had also been in communication with the second respondent to say that he was "*disappointed and surprised*" that a reference had been made to GMC which he did not feel was "*necessary or appropriate at the present time…"(*78)

82. I accepted from the claimant that his desire was to have the referral to GMC withdrawn and that "pre-legal action notice" and subsequent application to ACAS were measures taken to seek to demonstrate his anger and frustration in the hope that the referral would be withdrawn and any claim unnecessary.

83. The e-mail from the second respondent simply indicating that he did not wish to respond to the claimant on this matter did not of course indicate that the referral had been withdrawn. The claimant could not say he was misled. It was clearly possible for the claimant to have lodged his claim and later withdrawn it from the tribunal if no action was to be taken on the referral. However, the encouraging content of the emails from colleagues and crucially the lack of any follow up from GMC within the expected timescale gives me reason to believe the claimant that he considered that the referral had either

been withdrawn or was not to be proceeded with by GMC and so did not pursue his claim at that point.

84. When he then discovered six months beyond the time when he might have been alerted to GMC proceeding with the claim that there was to be some "provisional enquiry" he reinstated the ET proceedings and presented his claim. There were therefore understandable circumstances for a presentation to be made to the tribunal subsequent to the letter he received on 3 May 2019.

85. I also considered that there was some significance in the assessment of whether it was just and equitable to extend time that the claimant only knew of the precise grounds of the fitness to practice referral to GMC on 3 May 2018. As indicated the fact of referral was in my view "the act complained of" but at the same time the precise grounds were unknown. As was indicated earlier in **Mensah** that "knowledge" was a factor in a consideration on whether to extend time. While he claimant might have assumed an issue was his alleged confrontational attitude with junior doctors given he was aware of a complaint being made the separate grounds of demanding higher fees at short notice; threatening not to work on call shifts if his fees were not increased; receiving payment for time not worked; and arriving late for shifts were matters which were clearly not presaged. Only when communicated did he have particular knowledge of the grounds of referral.

86. If discretion was not exercised the claimant would suffer prejudice in not having his claim heard. The respondents clearly do not consider there has been any discrimination and will still be able to advance their reasons for referral to GMC which are recorded in the referral document. I do not consider that the cogency of the evidence will be affected by the delay. Each party has co-operated with any requests for information and once the claimant was aware of the referral having been accepted and pursued by GMC he took steps within a reasonable period of time to restore the EC application to ACAS and proceed with his claim. I did not consider that there was undue delay in that respect. While it is clear that the claimant was aware of time limits in a general sense and could easily have taken advice on the necessity to present his claim within three months of 18 October 2018 that does not outweigh my

view that the discretion should be exercised in this case. Accordingly, in respect of this claim (iv) I consider it just and equitable to extend time for presentation to 16 July 2019.

Indirect discrimination contrary to section 19 of EqA

87. In the particulars of claim the claimant alleges that the respondents treated "*white junior doctors disproportionately to the level of expertise and seniority"* and that they had a policy of attaching weight to a *"white junior doctors' words"* disproportionate to their "*limited level of clinical expertise*"; and to "*directly and indirectly encourage white junior doctors to feel and act superior to their seniors who were not white*" and that they "*stereotype the non-white doctors as less knowledgeable and less eligible and less presentable and more wrong than the white doctors".*

88. Again, it appears to me that these are complaints which would have been known to the claimant by the termination of his engagement with the respondents on 5 October 2018.

89. They are not matters which were new to the claimant as he would be aware of these incidences in the course of his engagement. He may say that he was unable to determine the position until such time as the letter of 3 May 2019 came his way but that letter identified that the complaint was against him because of his "*attitude and behaviour towards junior doctors"* and that the GMC wished to consider concerns in that respect. A claim of indirect discrimination is directed towards a provision criterion or practice which is discriminatory in relation to a protected characteristic such as race or religion. It is discriminatory if it puts "or would put persons such as the claimant at a particular disadvantage" when compared with persons with whom the claimant does not share that characteristic. That set of circumstances would be known to the claimant as at 5 October 2018. I do not consider that information being disclosed or becoming obvious within the referral to GMC such that the claimant would have thought that his claim only arose at that time.

90. Neither do I consider that the same circumstances relating to an extension of time prevailed in respect of this claim as in the claim of direct discrimination on the ground that there had been a fitness to practice referral to GMC. Accordingly, I consider that this claim of indirect discrimination is out of time and that there should be no extension on a just and equitable basis. The reasoning here is similar to those claims also found to be out of time in that the section dealing with direct discrimination.

Harassment in contravention of section 26 of the Act

91. In this section of the particulars of complaint (46) the claimant makes no reference to the referral to GMC. His complaint relates to him requiring to "*obey and be led by his junior white doctor";* being "*talked down to"* and *"bullied*"; being denied wages; payment to him being unreasonably delayed; the respondents inciting colleagues and juniors to make a complaint about him; the respondents creating a humiliating and degrading atmosphere; and the respondents refusing to answer phone calls and emails.

92. These are matters again which would prevail and be known to the claimant within the period of engagement by the first respondent ending 5 October 2018. All these acts complained of would have been completed by that time. He knew prior to his departure on 5 October 2018 that a complaint had been made about his behaviour from a "*junior white doctor*" and able to assess if "*unwarranted*" and would know if that was "*incited".* The issue of payments to him being delayed or not paid was something he would know by 5 October 2018 (barring notice payment which is dealt with separately); he would be aware of being talked down to by then; of any bullying and of any refusal to answer phone calls or emails. Thus, the time limit commences from 5 October 2018 and he should have presented his claim by 12 January 2019.

93. So far as the discretion on extension of time is concerned the same reasoning applies as that narrated on the claims of direct discrimination where time has not been extended. There is nothing within the GMC referral papers produced to the claimant on 3 May 2019 which would mean he became aware of the circumstances of this claim under s27 of EqA claim only at that time. No

reason is able to be found for delay in lodging a claim on these acts and I see no basis for a just and equitable extension of time.

The claim of victimisation under section 27 of EqA

94. In this respect the claimant states that he was victimised for "blowing the whistle". In his particulars of claim (47/48) he makes it clear that his whistleblowing claim is under section 43 of Employment Rights Act 1996. Section 27 of the EqA deals with victimisation under or in connection with "this Act" being the EqA and not the Employment Rights Act 1996. Accordingly, I do not see that there is a need to address within this preliminary hearing any claim for victimisation under EqA and the operation of time bar. Those matters will be dealt with within a further discussion yet to take place on the claim of whistleblowing under the Employment Rights Act 1996 namely whether amendment is necessary to make that case and if so whether amendment should be allowed. There is no jurisdiction to hear this claim.

Notice claim

95. This claim arises as a claim for breach of contract and requires to be dealt with under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 wherein Article 4 provides that proceedings can be brought before an Employment Tribunal for recovery of a sum due and which arises or is outstanding on the termination of the employment of the employee. Whether or not the claimant was an employee in his period of engagement is not decided but in any event, he cannot bring such a claim unless he does so *"within the period of three months beginning with the effective date of termination of the contract giving rise to the claim."* The escape clause in this instance is where the Tribunal is satisfied that it was "*not reasonably practicable for the complaint to be presented within the appropriate period".*

96. Given the claim is for notice which arose on termination of the contract on 5 October 2018 the complaint should have been presented to the Tribunal by 12 January 2019 (to take account of early conciliation). That was not done.

97. The question is whether or not it was "*reasonably practicable*" to do so and not whether it is "*just and equitable*" to extend time. What is "*reasonably practicable*" is a question of fact and a matter for the Tribunal to decide. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. Attempts have been made to establish a useful definition of *"reasonably practicable*". It does not mean "*reasonable"* and does not mean "*physically possible"* but means something like "*reasonably feasible".* As was explained in **Asda Stores Ltd v Kauser EAT 0165/07** *"the relevant test is not simply a matter of looking what was possible but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done".*

98. In this case it seemed abundantly clear that it was reasonably practicable for the claimant to have presented his claim for notice pay in time. This had nothing to do with the GMC referral. It was a standalone contractual claim.

99. He was aware in general of time limits affecting tribunal claims. He took no advice on the particular circumstances arising. He could have done so. He was aware of the need for early conciliation through ACAS. He had gone to ACAS on that process and had been in receipt of early conciliation certificates and demonstrably knew the ground rules.

100. In those circumstances it was clearly reasonably practicable for him to have presented the claim for notice pay but did not do so. In those circumstances I consider that this claim is out of time and the tribunal has no jurisdiction.

Summary

101. As a consequence of this decision therefore the tribunal:-

(i) has jurisdiction to proceed with the claimant's complaint of direct discrimination under s 13 and 14 of EqA only in so far as it relates to the respondents fitness to practice referral to the GMC

(ii) has no jurisdiction to hear the complaints of indirect discrimination and harassment and victimisation under s 19,26 and 27 of EqA or breach of contract on failure to make a payment for notice

(iii) reserves the claimant's claim of "whistleblowing" under the Employment Rights Act 1996 and any claim of victimisation as a consequence of "whistleblowing" meantime. A further preliminary hearing for case management purposes will be necessary to consider whether those claims should be allowed to proceed given the respondents' position that would require the claimant to make an application to amend his claim; and if so whether such amendment should be allowed.

Employment Judge: Jim Young
Date of Judgment: 03 November 2020
Entered in register: 19 November 2020
and copied to parties