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EMPLOYMENT TRIBUNALS

Claimant: **Mrs Carol Jones**

Respondent: **Powys Teaching Health Board**

Heard at: **Cardiff via CVP** **On: 27 April 2021**

Before: **Employment Judge S Jenkins (sitting alone)**

Representation:
Claimant: In person
Respondent: Mr S Tibbitts (Counsel)

JUDGMENT having been sent to the parties on 28 April 2021 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider the matters identified by Employment Judge Povey in paragraph 7 of his Case Management Summary issued following a Preliminary Hearing on 13 January 2021; broadly, whether the Claimant's claim had been brought within the specified time limit, and, if it had not, whether time should be extended.

2. I heard evidence from the Claimant on her own behalf and from Ms Vicky Malcomson, Head of Resource, on behalf of the Respondent. I considered the documents in the hearing bundle to which my attention was drawn and I also considered the parties' submissions.

Issues and Law

3. The Claimant had brought a claim, under Section 47B of the Employment Rights Act 1996 ("ERA"), that she had been subjected to a detriment by an act or a deliberate failure to act by the Respondent on the ground that she had made a protected disclosure. With regard to those claims, section 48(3) of the Act provides that claims under Section 47B shall not be considered by an Employment Tribunal unless presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. Section 48(4) then provides further direction as to when an act is to be taken to have taken place, particularly where it involves a failure to act.

4. My key focus therefore was on when the detriments were said to have occurred, not on whether the Claimant was an employee or worker, or whether or when the Claimant's employment had ended, both of which were matters of dispute between the parties. I was also not focusing on the how or why the Claimant was treated in the way alleged, but on when the detrimental treatment was alleged to have taken place.

5. If the claim was brought within the relevant time period, extended by ACAS early conciliation, then the claim would proceed further to a full hearing. However, if not, I needed to consider the reasonable practicability test outlined in Section 48(3)(b). That essentially involves two matters, first consideration of whether it had been reasonably practicable for the claim to have been brought in time; if my decision was that it was, then the claim would be dismissed. Secondly, if I decided that it had not been reasonably practicable for the claim to have been brought in time, I then needed to consider whether the claim was brought within a further reasonable period. If I considered that it was, it would be allowed to proceed; if not, it would be dismissed.

6. In terms of guidance from case authorities, they have confirmed that the test of reasonable practicability is a high one, and that the burden of proving it was not reasonably practicable for a claim to have been submitted lies on a claimant. Considering whether it was reasonably practicable for a claim to have been brought in time involves not just looking at what was possible, but in looking at whether it was reasonable to expect that which was possible to have been done. The cases have made clear that a number of reasons can arise in assessing the reasonable practicability question, including a Claimant's health and the

fact that a Claimant may have been unaware of factual matters which might justify a claim, and both of those arose in this case.

7. In terms of ignorance of fact, the Court of Appeal, in ***Machine Tool Industry Research Association -v- Simpson*** **[1988] ICR 558**, noted that a claimant must establish three things; that their ignorance of the fact relied upon was reasonable, that they reasonably gained knowledge outside the time limit that they reasonably and genuinely believed to be crucial to the case and to amount to grounds for a claim, and that the acquisition of this knowledge was in fact crucial to the decision to bring the claim.

8. Underhill P, as he then was, in the EAT in ***Cambridge and Peterborough NHS Trust -v- Crouchman*** **[2009] ICR 1306**, further distilled the relevant principles to be taken into account in assessing the issue of reasonable practicability where a Claimant initially believes they have no viable claim but changes their mind when presented with new information after the expiry of the primary time limit. These include; (i) that ignorance of a fact that is crucial or fundamental to a claim will in principle be a circumstance rendering it impracticable for a Claimant to present that claim, (ii) that a fact will be crucial or fundamental if it is such that when the Claimant learns of it their state of mind genuinely and reasonably changes from one where they do not believe they have grounds for the claim to one where they believe that the claim is viable, and (iii) the ignorance of the fact in question will not render it not reasonably practicable to present a claim unless the ignorance is reasonable and the change of belief in light of the new knowledge is reasonable.

9. With regard to illness the cases make clear that a debilitating illness may prevent a claimant from submitting a claim in time, but usually that will only constitute a valid reason for extending time if supported by medical evidence which demonstrates not only the illness but the fact that the illness prevented the Claimant from submitting the claim in time, although equally the cases do confirm that medical evidence is not absolutely essential. If the decision is that it was not reasonably practicable for the claim to have been brought in time then the EAT confirmed, in ***Cullinane -v- Balfour Beatty*** **(UK EAT 0537/10)**, that consideration of whether the claim is brought within a further reasonable period will require an objective consideration of the relevant factors causing the delay and what period should reasonably be allowed in the circumstances having regard to the strong public interest in claims being brought in time.

Findings of fact

10. Turning to the facts of the matter, I only made findings relevant to my decision. In that regard, I noted the concession by the Respondent, purely for the purposes of this hearing, that we could proceed on the assumptions that there was a protected disclosure made by the Claimant and that there were acts amounting to detriments as she alleged.

11. With regard to those matters, the Claimant, having been engaged at the time by the Respondent as a bank nurse, contended that she made a protected disclosure in November or December 2018, following the death of a patient, to one of the Respondent's managers and, as a result of that, that she suffered two detriments; first the closure of her NADEX account, that is a Health Board IT account which provides access to a Health Board email address and enables the Board to provide access to certain files and its network; and second, the failure by the Respondent to investigate her complaints arising from the patient death in November 2018.

12. My specific findings relevant to the issues I needed to consider, on the balance of probabilities where there was any dispute, were as follows.

13. On 21 December 2018, the Claimant emailed several of the Respondent's managers alluding to her disclosure and saying that she was no longer going to work at the particular location. Later that day, albeit not known at the time to the Claimant, one of the Respondent's managers completed an internal form to delete the Claimant's email account and network access on the basis that the Claimant had left the organisation. This was the NADEX account, which was then closed. The Claimant was informed of that by letter dated 28 December 2018, which I presumed, due to the bank holiday that would have intervened and taking account of normal timings of post, would have been received by the Claimant by no later than 2 January 2019.

14. The letter made clear that the Claimant's email account had been deleted as well as her access to the Welsh Community Care Information System ("WCCIS"), a clinical information system used to electronically record patient information. She was told that, for future bank work with the Respondent, she would be required to make a new application for emails and WCCIS access.

15. In late September 2019 the Claimant wrote to one of the Respondent's managers to raise a grievance. In this she said, "*Now I am in a better place I am perusing* [I think that should have meant pursuing] *my treatment/victimisation when I did my job by the policies/procedures of Pthb. I am not prepared to be bullied for telling the truth*". She noted in the

email that she had an appointment with a solicitor the following week although ultimately it appears that she did not attend that appointment.

16. On 3 October the Claimant then sent an email to the Respondent's Chief Executive, Ms Carol Shillabeer with a subject heading "Constructive Dismissal – Whistleblowing has" (there appears to be a slight error at the end of that). In this, the Claimant raised her concerns about the events at the end of 2018, that she had found that she was unable to contact the Respondent's staff about bank shifts, and that her calls were not being answered. She said specifically, "*I have been bullied and victimised for carrying out my duties as per policies and procedures of the trust*".

17. Later the same day, the Claimant sent a further email to Ms Shillabeer saying "*After speaking with ACAS Advised I need to set a deadline for outcome/response. Thus I request this is completed and responded to in one week from the date of this email. Does come under whistleblowing and will be persueing* [sic] *an employment tribunal*".

18. Shortly after that, the Claimant spoke to Ms Malcomson, then in charge of the Respondent's Temporary Support Unit, on 8 October 2019 by telephone, outlining her concerns about not being contacted for bank work. Ms Malcomson summarised those concerns in an email that she sent to the Claimant later that day, which stated in summary, "*You describe that the issues you were raising were not around the TSU specifically but felt the issues you had experienced in relation to being contacted for bank work were as a result of an individual/s from the Mental Health Department asking the TSU to prevent you from covering shifts.*"

19. Ms Malcomson also recorded the Claimant in this email as saying, "*You highlighted to me that you did not feel this issue was specifically with the TSU and that you were pursuing an external route with ACAS to pursue the separate matters you have raised through a Tribunal. You described a situation to me whereby you felt that you would not feel safe working for the Mental Health team within Powys and therefore, your intention was to no longer work on a bank basis and believe you have been forced into this position.*"

20. The Claimant then replied to Ms Malcolmson later that day saying, "*My options for working have been taken away by the treatment I have received. This has been done to me on two occasions and I have no confidence that working to the policies and procedures of pthb is enough. I have nothing to lose now therefore my intent is an employment tribunal where the details will be on record*." Ms Malcolmson did then undertake an investigation into the allocation of bank work to the Claimant but did not conclude it due to the fact that the Claimant wished the matter to be addressed as part of her broader complaints.

21. With regard to that, Ms Shillabeer allocated Julie Rowles, Director of Workforce and Organisational Development, as the Claimant's contact, and informed the Claimant of that on 4 October 2019. There was then email contact between the Claimant and Ms Rowles between 7 October and 6 October 2019 about the investigation. The Claimant wanted an external investigator appointed and was reluctant to provide information about her complaint to Ms Rowles, being, as she was, an employee of the Respondent. Ms Rowles confirmed on 16 October 2019 that she could not appoint an external investigator until she could develop the terms of reference, and the Claimant replied the same day saying that, from that point, she would take things forward herself. The Claimant confirmed in her evidence that what she meant by that was that she subsequently contacted the Coroner, the Nursing and Midwifery Council, and made a statement to Dyfed Powys Police.

22. Notwithstanding that exchange, Ms Rowles wrote to the Claimant, on 28 October, suggesting that the Claimant meet the external investigator to discuss her specific allegations. The Claimant did not respond to that email, confirming in her evidence, although it was not included in her witness statement, that her mother had died in October 2019, which impacted on her significantly, particularly when a greater caring responsibility for her father arose.

23. Ms Rowles then wrote to the Claimant again on 24 December 2019, noting that there had been no response to her 28 October 2019 email, but noting also that she had arranged for the Claimant to meet the external investigator, a named barrister, on 3 January 2020. She confirmed that if the Claimant did not confirm she was happy to proceed with the meeting by 31 December they would not be in a position to proceed with any investigation. As there was no further contact Ms Rowles wrote to the Claimant on 31 December 2019 confirming that the meeting with the external investigator was cancelled.

24. There was then no further contact with the Respondent from the Claimant until 10 June 2020 when she emailed Ms Malcomson. The email was headed "The activation of NADEX and email" and referenced the Claimant not having heard anything for a while and wondering how the investigation was progressing. Ms Malcomson responded on 2 July 2020, following her return from sickness absence, noting that the Claimant had not worked for the Health Board since December 2018 and she was therefore out of time to submit a grievance.

25. On 8 August 2020, the Claimant then learned from a former colleague, Deborah Mansfield, that she, i.e. Ms Mansfield, had overheard a conversation in January 2019 with the manager to whom the Claimant

alleged she had made a disclosure, in which the manager had said that the Claimant had been "blackballed" and would not be given any more shifts after the Claimant had sent her complaint to senior managers.

26. The Claimant then contacted ACAS for the purposes of early conciliation on 11 August 2020, with the early conciliation Certificate being issued on 12 August. She did not however submit her claim to the Tribunal until 6 October 2020, noting that she had taken about a week to type it up, had then lost the document on her computer, and had then taken a further week to retype it.

Conclusions

27. The first issue for me to consider was when the acts or failures to act complained of had taken place. With regard to the Claimant's first claimed detriment, the NADEX account closure, that clearly had happened at the end of December 2018 although I found that the Claimant would not necessarily have been aware of that until 2 January 2019. However, the primary time limit to pursue a claim in respect of that as a detriment expired on 1 April 2019.

28. With regard to the Claimant's second claimed detriment, the failure to investigate her complaints, the Claimant herself ceased to engage with Ms Rowles on 16 October 2019, indicating she was going to take matters forward herself. On that basis I did not think that the Claimant could reasonably have concluded that, after that time, there was any ongoing failure by the Respondent to investigate her complaints, in which case the primary time limit would have expired on 15 January 2020.

29. Even, however, if I applied a more generous interpretation to the Claimant's actions on the basis that the reason that she did not wish to engage with the investigation and wanted to take matters forward herself was because the Respondent was refusing to appoint an external investigator, which for the avoidance of doubt I do not consider had been the case, then later in October Ms Rowles confirmed that she would arrange for the Claimant to meet the external investigator. She repeated that in December, and even provided the name of the investigator at that time, giving a deadline of 31 December 2019 for the Claimant to confirm that she would meet the investigator.

30. At that point the Claimant could have been in no doubt that any investigation of her complaint was not being progressed, and therefore the very last date the failure to act could be said to have arisen would have been 31 December 2019, which would have given rise to a primary time limit of 30 March 2020. However in relation to the Claimant's claims, she only made contact with ACAS on 11 August 2020 and therefore on the

face of the claims they were brought, or progressed with ACAS, outside the primary time limit.

31. The next question for me to consider was whether it had been reasonably practicable for the claims to have been brought in time. With regard to the Claimant's health, taking her evidence at its highest, I concluded that it may have been a factor, however even taking the Claimant's evidence at its highest she confirmed that her health was only impacted until April 2020, and even if it is accepted that the Claimant was not capable of reacting to matters until then, a further period of over three months elapsed before she contacted ACAS.

32. I concluded that there was no question of the Claimant's health having any impact on her first detriment, the closure of the NADEX account, as time in relation to that had expired much earlier in 2019, but it could have had some relevance to the second claimed detriment, as the Claimant had indicated she was unwell during the period October 2019 to April 2020 which was the period when the primary time limit in respect of the second claimed detriment expired.

33. With regard to the subsequently discovered information in the call on 8 August this may potentially have meant that it was not reasonably practicable for the claim to have been brought before then. However, applying the principles outlined in the ***Crouchman*** case, I was not convinced that the fact of which the Claimant was ignorant could be said to have been crucial or fundamental to her decision to pursue her claim.

34. She herself had made it very clear to the Respondent in October 2019 that she was unhappy at the way she had been treated, that she had made a protected disclosure, and had been victimised as a result. She also confirmed that she was considering pursuing a Tribunal claim and intended to take legal advice, although had not done so, but had contacted ACAS at the time. I did not therefore consider that the Claimant's discovery of Ms Mansfield's evidence in August 2020 changed her mind, or certainly could reasonably be said to have changed her mind, from a situation where she did not consider she had a viable claim to one where she did, as I considered that she did feel she had a viable claim at all times.

35. I did not therefore consider that the information the Claimant acquired in her conversation with Ms Mansfield on 8 August meant that it had not been reasonably practicable for her to have brought her claim in time. However, even if I had, I would still have needed to consider whether the Claimant had brought the claim within a further reasonable period. Also, as I have indicated, I needed to consider whether, in relation to the Claimant's second claimed detriment, in relation to which I concluded that

potentially it had not been reasonably practicable to have been submitted due to her health, it had been brought within a further reasonable period. In both cases I considered that it was not.

36. With regard to the Claimant's health, the Claimant had been able to address matters from April 2020, and yet had not contacted ACAS until August, well over three months later, with no evidence to demonstrate any compelling reason for not doing so during that period.

37. With regard to the knowledge acquired from Ms Mansfield, the Claimant made fairly prompt contact with ACAS, only two working days later, and indeed the ACAS Certificate was issued promptly, the very next working day. However, the Claimant did not submit her claim for a further nine weeks.

38. The Claimant's own evidence suggested that, at most, it took her two weeks to prepare her Claim Form. There was no evidence from her of any other reason impacting on her ability to prepare it, and I therefore considered that, even if it had not been reasonably practicable for the Claimant to have submitted her claim in time due to her acquisition of knowledge from Ms Mansfield in August, I would still have dismissed the claim, as it was not submitted within a further reasonable period.

39. On all those bases therefore, I considered that the Claimant's claim had not been brought within time, that it had been reasonably practicable for part of it to have been brought within time, but even if I had not reached that conclusion, and in respect of the part of the claim where it was potentially not reasonably practicable for the claim to have been brought in time, I was not satisfied that it had been brought within a further reasonable period. Therefore the claim fell to be dismissed as having been brought out of time.

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Employment Judge S Jenkins
Dated: 21 May 2021

REASONS SENT TO THE PARTIES ON 24 May 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche