EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107734/2019

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 that the original decision is confirmed.

REASONS

Introduction

1. In this case a Judgment was issued extending time on a just and equitable basis in respect of the complaint that the respondents referral to the General Medical Council (GMC) was discriminatory of the claimant under s 13 and 14 of the Equality Act 2010. All other complaints under s13,14 26 and 27 of that Act were dismissed as time barred.

2. The respondents made a timeous request for reconsideration of that Judgment on the basis that (First) the claimant in his evidence had not been honest as to his knowledge of the time limit for presenting a claim to the Employment Tribunal; and (Second) that there was insufficient evidence/reasoning to find that the claimant had acted within a reasonable time once he became aware for the referral to the GMC.

3. In support of the First matter there was recited what had been noted by Ms Craik as the claimant's evidence in this respect and reference to Judgments involving the claimant in "*A Razoq v GMC and North West Anglia NHS Foundation Trust (case No 1304444//2017)".* It was stated that this information had come to light following the hearing. The Judgments concerned (1) a preliminary hearing on (a) applications to amend made by the claimant to bring in claims of religious and race discrimination and (b) time bar on the claim of unfair dismissal which applications and claim were dismissed as being "significantly out of time"; and (2) reconsideration of that Judgment which was refused. No written reasons were given. It was stated that the claimant must have been aware of time limits given his involvement in the referenced case and "if the claimant is not honest to the Tribunal on the core issue to be determined by it then a fair trial of the issues is not possible"

4. On the Second matter reference was made to the finding that once the claimant was aware the referral to the GMC was being pursued he took steps within a reasonable time to restore his EC application and proceed with his claim. It was stated that the Judgment did not break down the extent of the delays between knowledge of pursuit of referral to EC application for each respondent; or delay between ACAS issuing certificates and raising the claim; and why it was considered such delays were reasonable. Reference was made to *Harden v Wootlif Group Ltd UKEAT/0448/14* and that this finding was "despite reference by the Tribunal" to cases which indicated it was always relevant to consider the length of and reasons for the delay in presenting a claim where discretion to extend time is being considered.

5. In response the claimant advised that (First) he had never stated that he did not start his claim earlier "because he did not know the time limit" and in any event that was not a material factor in the Judgment on time bar. His answer in cross examination that time limits of 3 and 6 months operated was true as "most claims have time limits of 3 months and one breed or so has it at 6 months". He also advised that the referenced case dismissed on time bar was made over "3 years from the relevant date and thus did not serve to emphasise certain time limit".

6. He also advised on (Second) that this was a new argument not raised at the preliminary hearing albeit the facts were all there for the argument to be raised and it was too late to be utilised in reconsideration. In any event he advised that he did act in a reasonable time by making application within days of receipt of the letter form the GMC. Not being legally qualified he was not to know that referral to ACAS was not again needed. He also indicated that he raised the claim in a reasonable time from getting the ACAS certificates as (a) the time period for a party litigant was reasonable; (b) he is a busy working doctor and "was stretched in another long case, the case against GMC and East Anglia Deanery. The Tribunal likely took these facts known to them from the hearing into consideration…" or at least should now do so; (c) he needed to prepare

his defence to the GMC letter in a certain timescale which was known to the Tribunal; (d) he was "crippled with distress and psychiatric suffering " and to start the claim with immediate effect was not possible; and (e) he did not consider he was making an out of time claim, rather he considered the relevant date to be 3 May 2019 when he received the GMC letter and considered time started from then.

7. The parties were asked it they wished a hearing on the application and apologies were extended to them by the administration for the delay in the correspondence at that time. The parties indicated they did not consider a hearing necessary and were content to rely on the written submissions summarised above. I consider in those circumstances a hearing is not necessary in the interest of justice.

8. On the (First) issue I accept the accuracy of the exchange noted by Ms Craik of my exchange with the claimant in his evidence in chief namely that on being asked if he had knew "there was a time limit" he indicated he "expected there would be, 6 or 3 months" and being asked if he had made any enquiry stated:

> "I did not as such ,I didn't know for sure, -not in my mind…"
>
> The issue was returned to in cross examination and my note of that evidence is:-
>
> "Q – Aware claims had to be raised?
>
> A – not sure of time but aware that there are time limits and could be stringent but not know of particular time limit of 3 months"
>
> Q- Research?
>
> A – no trying to get claim by GMC withdrawn.

9. This evidence was essentially reflected in the Judgment stating:-

> "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."

10. I accept that the claimant in this exchange on his knowledge of time limits can be criticised for a lack of candour. He made no reference to any involvement in cases involving time bar. At the same time the referenced Judgments give no reasons for the decision and the claim found to be out of time was one of unfair dismissal and not discrimination. The other issues concerned applications to bring in discrimination complaints and the referenced Judgment states that as these claims were not "pleaded adequately or at all" in the initiating ET1 it would be "necessary for him to apply to amend his claim form. That application to amend is made significantly out of time and I dismiss it". The claimant advises that this application was 3 years from the relevant event. It is not clear just what discussion there was on time limit in discrimination cases as such rather than on the general ground that an application to amend made 3 years after the event could not lead to a fair disposal of the case. Also as the claimant indicated in his evidence time limits can vary for certain claims.

11. My Judgment did not consider that the claimant's knowledge of time limits was central to the outcome. If the test had been one of "reasonable practicability" I would have found against the claimant on the basis that he had an awareness of time limits being stringent and could easily have clarified the matter. So, I would not characterise the matter as put namely that "if the claimant is not honest to the Tribunal on the core issue to be determined by it, than a fair trial of the issues is not possible". I did not regard his knowledge of time limits as "the core issue". For me the "core issue" was whether I could accept that he did not raise his claim on a belief, based on the surrounding circumstances, that the complaint to the GMC was not proceeding and only when he received the letter of 1 May 2019 did that become clear. However acceptance of that position does carry an issue of credibility and so I consider the essential questions on this part of the reconsideration are whether the lack of candour is

such that (a) lack of candour on any matter (core or not) means that the complaint cannot lead to a fair disposal or (b) that the lack of candour means I should reverse the finding that there was a belief in the claimant's position that the compliant to the GMC had been withdrawn.

12. On (a) I do not consider that the lack of candour on a non core issue is fatal to the claim proceeding. An assessment of credibility will be for the full Tribunal and they will need to take into account all circumstances. It does not follow that a refusal to accept some evidence from a claimant or witness means that a Tribunal should reject all his/her evidence. A Tribunal can believe parts of evidence and disbelieve other parts of evidence.

13. On (b) the credibility of the claimant was in mind in dealing with matter and I did rely on the surrounding circumstances in the conclusion reached in paragraphs 82 and 83 of the Judgment indicating:-

"82. 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.

83. 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."

14. While the lack of candour is damaging to the claimant I do not consider it is sufficient to reverse that finding. The surrounding circumstances are not affected. It is also pertinent to note that in *Radhakrishnan v Pizza Express (Restaurants) Ltd UK EAT/73/15* it was stated that even if an explanation for delay put forward by a claimant is rejected by a Tribunal it should still go on to assess the exercise of discretion on the multi factorial approach. I found those factors to be in favour of the claimant at paragraph 104 of the Judgment.

15. On (Second) it is correct for the claimant to note that no submission was made for the respondent that delay in presentation of the claim beyond 3 May 2019 was unreasonable. There was nothing said on that aspect of matters and no response was required of the claimant. I did not consider that there was any issue for the respondent in that respect. Unlike (First) it is not a new matter that has arisen after the hearing or dependent on any evidence which was not known to the respondent at the time of the hearing and could have been addressed. Unlike the test on practicability there is no assessment required here on whether the claim was presented "within such further period as the tribunal considers reasonable" where it is satisfied that presentation of the claim within 3 months was not reasonably practicable.

16. Delay beyond 3 May 2019 was a consideration on the strength of the claimant's claim that only when he received the letter from GMC on 3 May 2019 did he realise that he should take steps in respect of his claim. If there had been unreasonable delay that would have affected credibility on that issue. However, within 5 days he had contacted ACAS in respect of the claim against the first respondent and then followed that with contact in respect of the second respondent. It may not have been necessary for him to make that approach but I did not consider that affected credibility in taking action to progress his claim. The case of *Treska v The Master and Fellows of Oxford UKEAT/0298/16/BA* cited for the respondent has no bearing on the matter. It was a case where time limit on the claim of unfair dismissal was in issue and whether second referral to ACAS meant the 3 month period was extended and

so the claim was in time. Here it was found that the claim was not in time and the second referral was of no consequence in that respect.

17. Again, the period between receipt of the last ACAS certificate and presentation of the claim was not excessive (6 June -16 July 2019). It could have been shorter but the claimant was not professionally represented. In any event while the referral to ACAS in May 2019 may have been unnecessary, the claimant believed it was necessary and as was stated in the Judgment I did not consider that the overall length of delay meant that that the cogency of the evidence was likely to be affected or there would be other prejudice to a fair hearing. There was no submission made then or now that that would be the case. The case cited of *Harden v Wootlif Group Ltd UKEAT/0448/14* would not appear to assist as it concerned a failure to appreciate the different claims against the corporate and individual respondents in exercising discretion. The reason for extending time for the corporate respondent did not stand for the individual. Here the claims against each respondent are the same.

18. For those reasons I do not revoke the Judgment as requested and it is confirmed.

Employment Judge: J Young
Date of Judgement: 7 April 2021
Entered in register: 5 May 2021
and copied to parties