



EMPLOYMENT TRIBUNALS

Claimant: Miss Rehana Patel

Respondent: East Lancashire Hospitals NHS Trust

Heard at: Manchester Employment Tribunal

On: 5 May 2021

Before: Employment Judge Dunlop (sitting alone)

Representation

Claimant: In person

Respondent: Mr R Dunn (Counsel)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal was not presented in time, in accordance with s111(2) Employment Rights Act 1996. The tribunal therefore has no jurisdiction to consider the claim, and it is dismissed.
2. The claimant's claims under the Equality Act 2010 were not presented in time in accordance with s123(1) Equality Act 2010. The tribunal therefore has no jurisdiction to consider the claims, and they are dismissed.

REASONS

Introduction

3. Miss Patel was employed by the respondent as a staff nurse from 21 September 2017. In 2003, she was seriously injured in a road traffic accident. That has left her with some long-standing physical injuries and pain, which she characterises as an invisible disability. For the purposes of this hearing, I shall refer to Miss Patel's disability, although I do not lose sight of the fact that it was not formally conceded by the respondent that Miss Patel is a disabled person within the meaning of the Equality Act 2010.

4. Miss Patel resigned from her position on 29 December 2018 and served four weeks' notice. Her employment terminated on 30 January 2019.
5. Miss Patel presented a claim to the Employment Tribunal on 25 July 2020. She claims both unfair dismissal and disability discrimination. There may also be a claim of discrimination/harassment on the grounds of sex, as explained further below. This hearing was convened to determine whether the claims should be permitted to proceed, having regard to the fact that they appeared to have been presented significantly outside the primary time limit of three months of the date of the act complained of.
6. The "Code V" in the heading indicates that this was a video hearing, undertaken using the Tribunal's Cloud Video Platform. Neither party objected to the hearing being conducted in this way and (save for a short delay in Miss Patel being able to access the hearing) the hearing was conducted successfully.

The Hearing

7. A number of specific issues arose during the hearing, which I shall briefly record here:
 - 7.1 Miss Patel was initially unable to access the CVP hearing. Although this was quickly resolved, I understand from my clerk that she was worried that I might be angry about this and it might affect her prospects in the hearing. I reassured Miss Patel, when she did join, that problems with getting hearings started using CVP are fairly common, and that this would in no way count against her.
 - 7.2 The respondent's solicitors had put together a paginated electronic bundle. However, they had omitted to add Miss Patel's documents to that bundle. I had a pdf of those documents, which was unpaginated (save for the pagination contained within the pdf reader itself). The parties had the documents printed out, and so had no page numbers to refer to. This was very unhelpful and led to some delay. Whilst I appreciate that there was not a formal case management order requiring the respondent to prepare a bundle, I would expect experienced and well-resourced representatives, such as those instructing Mr Dunn, to have taken the initiative in ensuring that all the documents were presented in a format which would assist the tribunal and the parties. CVP hearings using electronic bundles are no longer new, and specialist representatives should by now be aware of the sort of preparation that is required to ensure they run smoothly.
 - 7.3 Mr Dunn's argument was, to some extent, predicated on the fact that when Miss Patel had submitted her claim in July 2020, she had done so using a 'blank' claim form. It contained the names and addresses of the parties, and ticked boxes at question 8.2 indicating the claims were for unfair dismissal and disability discrimination, but gave no particulars of the claims at all. He argued that this meant the claim had not actually been presented until an even later date, when Miss Patel had provided some

further particulars. As it transpired, from examination of the Tribunal file, Miss Patel had somehow managed to submit a 'filled in' ET1 form as an attachment to the 'blank' one. (It appears that the 'blank' one may have been generated by Miss Patel completing the online application process.) It was clear from the tribunal's physical file that both had been received at the same time but that, unfortunately, only the 'blank' version appeared to have been copied to the respondent. Mr Dunn recognised that, in those circumstances, that particular limb of his argument could not be pursued and attention therefore focused on the period up to the presentation of the claim in July 2020.

8. During the course of the hearing I heard evidence from Miss Patel, who was also cross examined. Miss Patel sought to introduce a statement from her daughter, which I read. However, I did not admit the statement into evidence nor did it play any part in my decision. This was on the grounds that I considered it did not add anything to Miss Patel's own evidence on the time limit issues (and was therefore not relevant) and Miss Patel's daughter was not present to attest to the truth of the statement. I heard submissions from Mr Dunn, and had regard to a written skeleton argument he had prepared. I also heard submissions from Miss Patel.

The Issues

9. This matter was listed for a preliminary hearing in view of the fact that the claim appeared to be entirely out of time. The notice of hearing did not specify precisely the issue which would be considered at the preliminary hearing, although it did include a direction that Miss Patel produce evidence in support of any application she might be making for an extension of time.
10. Having regard to the recent EAT authorities **Caterham School Limited v Rose UKEAT/0149/19** and **E v X, L & Z UKEAT/0079/20 and UKEAT/0080/20**. I explained to the parties at the outset that I considered it was appropriate to determine the matter as a preliminary issue (under Rule 53(1)(b) Employment Tribunal Rules of Procedure 2013) rather than as a strike out application (under Rule 53(1)(c)). However, to do so I proposed to assume (for the purposes of this hearing only) that the claimant would be able to establish that the earlier parts of her complaint formed a continuing act with the later parts, and that the date of termination could therefore be taken as the last possible date from which time should run. If I had determined that time should be extended, this would leave it open to the respondent to argue, at the final hearing, that certain earlier matters were nonetheless out of time. That question could only properly be determined, in my view, by considering the full evidence and argument from both parties.

Findings of Fact

11. These are findings of fact which I considered relevant to reach and explain my decision. I have also recorded assertions of the parties, where those are matters which would fall to be determined at the final hearing, but where I need to set out those assertions to explain my decision.

12. As noted above, Miss Patel was employed as a staff nurse from September 2017. She worked at the Royal Blackburn Hospital, in the patient discharge lounge. She began this role after a lengthy period of unemployment as a result of her accident and her responsibilities in bringing up her four children. She wanted to resume employment to be a role model to her children.
13. Miss Patel asserts that she informed her employers about her disability at her interview, and noted that she was only able to work short shifts of 4-6 hours. She complains that she was regularly required to work in excess of this. She also asserts that she required a 'disability chair' i.e. a supportive, adjustable, chair which could be set to appropriate settings for her and which would remain reserved for her use. It appears from documentation provided in her bundle that she was requesting this chair from autumn 2017 and that, at least by March 2018, the respondent's occupational health providers were involved and had identified an appropriate chair which it was recommended the department purchase for her. Miss Patel says that between that date and her resignation, the chair was never provided. This was due, she believes to the 'tight budget' of the department.
14. Alongside these matters, Miss Patel makes wide-ranging complaints of 'bullying, belittling and harassment' on the grounds of her disability against managers and staff. She asserts that she was called incompetent, that she was criticized for spending too long with patients and that she was ostracized by other staff. There was an incident in June 2018 which the claimant says a male colleague touched her inappropriately and then complained that she had sexually harassed him. Although the allegation against her was dropped, the claimant's suspension and subsequent sickness absence due to stress meant that she never actually returned to work before her resignation. She does complain about the respondent's conduct in various meetings whilst she was off, including attempts to 'force' her to move from the discharge lounge to work on a ward (work which was unsuitable due to her disability).
15. In August 2018 Miss Patel attended a pain clinic at Royal Preston Hospital run by a Dr Hacking. She had been seeing Dr Hacking for many years as a result of the injuries sustained in the road traffic accident and his clinic is evidently a great support to her. Miss Patel disclosed to Dr Hacking the allegations made against her at work and he noted that this had made her stressed and that the pain and stress had a mutually exacerbating effect. He encouraged her to seek referral to occupational health, as well as arranging for her to see a consultant clinical psychologist within his own team.
16. Two occupational health reports prepared in September and November 2018 rehearse the history of the case and support Miss Patel's need for adjustments in relation to a chair and shift times. The September report characterises the stress she experienced at the time of being informed of her colleague's grievance as being short-lived and notes that she is "not in low mood" with "no panic attacks or abnormal anxiety...sleep disturbance has resolved...motivation and concentration are normal... [no] other concerning features". The November report records that Miss Patel advised

her mental and physical health had both worsened from September. She was now suffering “moderate to severe range of stress and anxiety”, although the report concluded that she was fit for work with appropriate adjustments.

17. Throughout this period Miss Patel had the support of her GP and continued to take prescription anti-depressant medication and sleeping medication, which has been prescribed on a long-running basis following the road accident.
18. Miss Patel took no steps to commence Early Conciliation or bring a claim following the termination of her employment. I find that she is an intelligent and articulate woman, who also has the support of two grown-up children (particularly her daughter) who have impressive academic and professional qualifications. There is no particular impediment to her accessing technology and, for over a year after her employment ended, there was no issue in relation to the covid-19 pandemic and associated lockdowns which have, in some cases, made it harder for employees to access advice or lodge claims. The only impediment which Miss Patel relies on is her poor mental health throughout that period.
19. As to her health, she relies on a psychiatric report prepared by Dr Hussain Farooq, consultant psychiatrist, based on an assessment which took place on 13 April 2021, for the purposes of these proceedings. Dr Farooq had access to, and summarised within his report, the pertinent parts of Miss Patel’s medical records. The report was not challenged, although Mr Dunn asks me to note that it is, of course, based on Miss Patel’s own account to Dr Farooq. The account in Dr Farooq’s report is considerably more detailed than any account given in Miss Patel’s witness statement, and it helpful to summarise it below.
20. Dr Farooq describes that prior to the alleged bullying during this employment, Miss Patel was taking anti-depressants and experienced “mild and intermittent low mood”, stemming back to her road traffic accident. However, in that period she was able to function reasonably well in day to day activities.
21. He describes that in the period following termination of employment Miss Patel was “very low in mood and even felt suicidal”. She was having nightmares and neglecting to look after herself. She had to rely on others to drop off and collect her younger children from school. She was experiencing physical symptoms which she described to Dr Farooq as panic attacks. She veered from being uninterested in eating to over-eating unhealthy foods and gaining weight. She had disturbed sleep. She was experiencing increased pain which she addressed with morphine and sleeping tablets. She was referred for psychological therapy by her GP, but there was a lengthy waiting list.
22. Dr Farooq’s account of this period, based on the history given by Miss Patel, contains no dates and little indication of time frame. It is merely said that this went on for “months and months”.

23. The report records that Miss Patel commenced psychological therapy in December 2019, that being six sessions of telephone counselling with an organization called Mind Matters. Her therapist encouraged her to get legal advice and to seek “closure” in respect of her employment issues. The report records that Miss Patel sought advice from various avenues, but was unable to secure advice without paying for it. It then states “she eventually found someone who was able to support her in March/April 2020.”
24. During the hearing, Miss Patel disputed this part of Dr Farooq’s account. She said that he had made an error, and that she was only able to find someone to assist with the claim in March/April 2021. Although they had initially provided some assistance, the individual involved had then left the firm. But all that happened after the claim had been presented, and involved the preparation for the hearing.
25. I found Miss Patel’s evidence on this point very confused. She seems consistent in her case that she was only ‘able’ to proceed with the claim once she embarked on the counselling (which there was a long wait for), but her evidence about the steps she had taken in the period between obtaining counselling (around December 2019) and presenting the claim (25 July 2020) was vague and contradictory. Unfortunately, it did at times appear that Miss Patel was seeking to answer in the way which she considered most likely to advance her argument, rather than simply attempting to give her best recollection. Although it is possible that there is a mistake in the account given in Dr Farooq’s report (whether it came from Dr Farooq or Miss Patel herself) I find, on the balance of probabilities, that the account is correct, and that Miss Patel had been able to seek some legal advice in March/April 2020.
26. Mr Dunn contended that the contemporaneous medical records summarised in Dr Farooq’s in the report did not support the history given by Miss Patel. I note that those records demonstrate that Miss Patel was regularly prescribed citalopram (anti-depressant) and zopiclone (sleep medication), along with other drugs, for many years prior to these events. There was a record of a GP visit on 24th August 2018, recorded as a “stress related issue” which corresponds to the incident leading to her suspension from work. There is a further entry on 12th October 2018, relating to the same “stress related problem”. Citalopam and Zopiclone continue to be prescribed. The next entry is 23 January 2019, and it recorded that Miss Patel is suffering from stress, anxiety and chronic pain. It records that the GP advised going to hospital but that Miss Patel declined due to “childcare reasons”.
27. Mr Dunn said that this demonstrated that Miss Patel was continuing to undertake childcare in this period, contradicting the account given to Dr Farooq and the Tribunal. I found Miss Patel’s explanation of this unconvincing, she refused to acknowledge that Mr Dunn’s inference from the GP record was reasonable. She said she was not undertaking any childcare but nonetheless did not want to leave her children, even for a hospital appointment. There are other entries on 30th January 2019, 3rd April 2019, 29th April 2019, 7th and 18th June 2019 and 2nd August 2019. These

refer to stress and low mood, but appear to suggest that the predominant issue is on-going chronic pain and related issues.

28. The next entry is 27 November 2019: “referred to mindsmatter for CBT”. That appears to conflict with Miss Patel’s account to the Tribunal that the referral had been made shortly after the end of her employment, and that she had waited many months for it. The next entry is 13 December 2019, concerning haematology investigations. The next entry (save for repeat prescriptions) is 13 May 2020, which records a “long conversation about ongoing psychological issues”, notes that Miss Patel is “not working, looking for a new job” and “awaiting review with mindsmatter”.
29. On 30 June 2020 the GP conducted a depression interview and reported nightmares, low mood, increased appetite and stress at work. That is the last relevant entry before the claim was presented.
30. In late 2020 Miss Patel secured a job, but unfortunately that was shortlived. There was a suggestion by Mr Dunn, based on comments in the GP records, that she had in fact been in work earlier, but I accept Miss Patel’s evidence that that was not the case.
31. I find that Dr Farooq’s report, based on Miss Patels’ account, is not an accurate reflection of the degree of impairment that Miss Patel was suffering through 2019 and the first half of 2020. I consider that if she had been severely incapacitated as described for “months and months” there would have been more evidence of this in the GP records and other contemporaneous records. Rather, I find that this was a very difficult period for Miss Patel, that she was suffering from depression and anxiety in a clinical sense, that she remained a victim of chronic pain and that her physical and mental health problems each exacerbated the other. I find that she had difficulty in motivating herself to do things and did little beyond the minimum of looking after herself and children. I accept that she may have struggled with self-care and childcare from time to time, but I do not accept that that was a constant state of affairs. Further, and contrary to her account, I find that there was a gradual decline in her mental health through 2019 to November when the referral to MindsMatter was made, and again over spring and summer 2020 after that period of counselling came to an end.
32. I find that Miss Patel had no intention of bringing claims against her former employer until her counsellor suggested she seek ‘closure’ in around December 2019. She was able to formulate her complaints (albeit in non-technical language) in correspondence with her employer around the time of her termination. There would have been no bar to her formulating them in a claim form had she chosen to investigate and pursue that avenue. Not everyone who ends their employment unhappily choses to bring a claim about it, there are a whole variety of reasons why they might choose, instead, to draw a line and move on.
33. When the idea of seeking redress was suggested to Miss Patel, I accept that her persistent mental health problems contributed to the fact that it took her some months to formulate a claim, including time spent in fruitless pursuit of legal assistance. Miss Patel was assisted by her daughter, but

neither seem to have approached the task with any sense of urgency. The claim went in at the end of July 2020, not because anything in particular had changed, but simply because that was when Miss Patel was ready to put it in. In fact, I find that her mental health problems had become worse by that point, in comparison to some of the earlier periods, yet she was able to submit a claim notwithstanding those problems (and the additional problems presented by the covid 19 lockdown) once she had decided that that was what she needed to do.

Relevant Legal Principles

34. The time limit for a discrimination complaint appears in s123 Equality Act 2010:

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

35. The early conciliation provisions may operate to extend the limitation period, but only where early conciliation is commenced within the primary limitation period.

36. The burden falls on the claimant to show that the claims were brought within such other period as is “just and equitable”:

“When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.

Robertson v Bexley Community Centre [2003] IRLR 434

37. In considering whether to extend time on a just and equitable basis, tribunals have a much broader discretion than under the test of reasonable practicability. The factors set out in **British Coal Corporation v Keeble [1997] IRLR 336** may be relevant. Those include the length of, and reasons for, the delay; the extent to which cogency of evidence may be affected; the steps taken by the claimant to obtain advice. Ultimately, however, the **Keeble** factors are not a substitute for the statutory test. It is for the tribunal to weigh up the prejudice that would result to the claimant in not allowing the claim to proceed, against the prejudice to the respondent in allowing it. (**Southwark CC v Afolabi [2003] ICR 800**).

(1) The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996 :

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) 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.

38. This is a stricter test than the Equality Act test, and the question can also be expressed as whether it was “reasonably feasible” for the claimant to bring the claim within the primary period.

Submissions

39. Mr Dunn prepared helpful written submissions. He pointed out that the delay in bringing the claim is substantial, and that the allegations of discrimination dated back considerably earlier than the date of dismissal. He emphasised that the claims required particularisation and that the case was generally likely to require significant case management before it was ready for a hearing. There would be further delay which would impact on the quality of the evidence.

40. Mr Dunn explained his instructions were that three potential witnesses were no longer employed by the respondent. He was careful not to overstate his position on this point, and fairly informed the tribunal that, in his own estimate, two of those witnesses were unlikely to be needed. In relation to the third, Donna Worrall, there was a dispute both as to the relevance of her evidence and as to whether or she has relocated to Australia. It does not appear to me that Ms Worrall is a key witness in the case, although I accept that she would have some relevant evidence. I am satisfied that Mr Dunn is being entirely frank in his understanding of the circumstances and potential difficulties. Her lack of availability does give rise to some prejudice for the respondent going beyond the general prejudice of delay.

41. Mr Dunn made lengthy submissions about the reason for delay, and the extent to which I should reject Miss Patel’s account of her illness, these are reflected earlier in the judgment and I won’t rehearse them here.

42. Miss Patel emphasised that she had no legal experience and was doing her best in an unfamiliar and stressful environment. She highlighted the evidence of the severity of her mental health problems during the entirety of this period. She submitted that she had a strong claim and that it was in the interests of justice to allow it to proceed. She wanted to prevent the respondent from treating other disabled employees the way that she had been treated. She said that the respondent had failed to investigate properly at the time, and therefore they only had themselves to blame if they did not have evidence in relation to these matters. She had been unlucky with her attempts to take advice and had lost £500 to a solicitor who disappeared. She asked me to have regard to two authorities. The first was **Bozeat-Manzi v Telefonica UK Ltd UKEAT/0389/12/LA**, a case where a Tribunal erred in its approach to time limits. I have read and had regard to that case but do not consider that it has a particular bearing on this one. Unfortunately, the reference given for the second case must have been confused as I was unable to locate it after the hearing. Given that Miss Patel did not state any particular principle which was said to derive from the case, I considered it

was likely to have been advanced by way of an example and did not consider it proportionate to seek further submissions on the point from the parties.

Discussion and conclusions

43. The submissions, and my decision-making, focused on whether time should be extended for the discrimination claims on a just and equitable basis. I am satisfied that it should not be.
44. It appears to me that the claims fall into two different categories.
45. Firstly, there are fairly clearly made out claims of failures to make reasonable adjustments in relation to the chair and shift working. In relation to those claims, the evidence is likely to be well-documented and the case management required to clarify the claims would be minimal. There is prejudice to the respondent occasioned by the delay, but it is, in my view, limited. On the other hand, however, these were matters which were live during the course of Miss Patel's employment, almost from the outset. She chose not to pursue them as claims during her employment when she could easily have done so.
46. The second category of claims are, broadly, claims of disability-related bullying, including claims arising out of the incident in June 2018 and the claimant's subsequent suspension. There may also be claims of sex discrimination/harassment having regard to what Miss Patel has said about the alleged assault in June and the subsequent events. My experience suggests that these will be very difficult claims to particularise and will require significant case management. That general observation is borne out by my interactions with Miss Patel today. She finds it difficult to focus and to answer questions directly, without reverting into an emotive narrative account of her grievances against the respondent. That is not meant as a criticism of Miss Patel – I accept these matters are complex and that recollecting them is very emotional for her. In respect of these matters I fully accept Mr Dunn's submissions that they will turn mostly on undocumented incidents and that the respondent's witnesses will have difficulty recollecting matters which were less important to them at the time than they were for Miss Patel, and which will be, by the time they come to give statements, several years into the past. In respect of this category of claims, I consider that the prejudice to the respondent if they were allowed to go ahead would be much more substantial.
47. Is the just and equitable test satisfied? I am content that it is not satisfied, albeit that that is for slightly different reasons in respect of the two categories of claim. In respect of the second category, I am persuaded that the degree of prejudice to the respondent is such that it would not be just and equitable to extend time and, indeed, that Miss Patel falls short of that threshold by a considerable margin. Unusually, I consider her case is actually stronger in respect of the earlier claims, which are coherent and apparently well-documented. It would appear, on the basis of the limited material before me, that the respondent may well have considerable difficulty in answering the claims, certainly as regards the provision of the

chair. Overall, however, I do not consider it is just and equitable to extend time for these earlier claims when the later ones are not going to proceed. Deprived of any 'continuing act' argument, the claims are literally years out of time. As noted above, it would have been open to Miss Patel to bring these claims whilst she was in employment and in good mental health (although I have some sympathy with her not doing so, it is not an easy thing to pursue a claim in those circumstances). Turning to the later period, and looking at the matter in the round, I consider that Miss Patel's mental health difficulties provide her with some explanation for not bringing the claims earlier, but do not accept that she was virtually incapacitated to the extent and for the period that she would have had me believe. That explanation would have been sufficient to excuse a short delay, but not the very lengthy delay which we are faced with in this case.

48. In respect of the unfair dismissal claim, the respondent raised the issue that the claimant appeared to lack the two years' service necessary for that claim to proceed. I raised this point with Miss Patel, who agreed the dates of her employment and appeared to have no real answer to this point. Whilst that might have been a more straightforward way to determine the unfair dismissal point, I considered it appropriate to determine the time limit issue, as that was the issue that the parties had been informed was going to be determined at this hearing, and that was the issue that Miss Patel had prepared herself to deal with. Given that the "reasonably practicable" test is a stricter test than the "just and equitable" test it will come as little surprise that I also decline to extend time on this ground. I consider that it was reasonably practicable for Miss Patel to present her unfair dismissal claim within the primary time limit, as the mental health problems which she was suffering from at that time were not so severe as to make it not feasible for her to present the claim.
49. I informed the parties at the conclusion of the hearing that, if Miss Patel was successful, a further hearing would be listed for case management. Given my decision, that will not now happen and this is the end of the claim.
50. Finally (and for the benefit of Miss Patel) I note that in coming to this decision I have not overlooked the conclusion of Dr Farooq that it was "reasonable" that Miss Patel did not seek legal advice during 2019. I do not doubt the genuineness of that conclusion, but the tests which I must apply are legal tests, as described above, and the task of applying them falls to the Tribunal.

Final Note: whilst in the process of preparing this judgment an email from Miss Patel to the Tribunal was referred to me. It was not copied to the respondent. It related to the dispute at the hearing about whether Miss Patel may have obtained a job before submitting her claim. She was looking to put forward further evidence in support of her position that she had secured the job after submitting the claim. When I received the email, I had already formed the conclusion that that was the case, but had also concluded that the claimant had not succeeded in persuading me that an extension of time should be allowed. In those circumstances, I did not consider it to be in anyone's interests to have the email copied to the respondent and invite further comments, as that would have delayed this Judgment.

Employment Judge Dunlop

Date: 13 May 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
13 May 2021

FOR EMPLOYMENT TRIBUNALS