EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4105343/2017

Preliminary Hearing held in Glasgow on 26th June 2018

Employment Judge M Whitcombe

Mr Francis Binamungu	**Claimant** **Represented by:** **Ms J Merchant** **(Solicitor)**
Greater Glasgow Health Board	**First Respondent** **(Not present)**
Independent Clinical Services Limited trading as Scottish Nursing Guild	**Second Respondent** **Represented by:** **Mr K McGuire** **(Counsel)**

PRELIMINARY HEARING

The judgment of the Tribunal is as follows.

(1) To the extent that formal amendments are necessary in order for the Claimant to proceed with all of the allegations against the Second Respondent, those amendments are allowed.

(2) While all of those complaints were presented outside the period specified in section 123(1)(a) of the Equality Act 2010 they were presented within a just and equitable further period in accordance with section 123(1)(b) of the Equality Act 2010. The Tribunal therefore has jurisdiction to hear them.

REASONS

Introduction

1. This is the third Preliminary Hearing in this litigation. The first was conducted by EJ Doherty on 23rd February 2018 and the second was conducted by me on 18th May 2018. Both of those Preliminary Hearings dealt with case management.

2. One consequence of the order made on 18th May 2018 was that a third Preliminary Hearing would be arranged to consider jurisdictional time limits and amendment issues so far as the claims against the Second Respondent are concerned. That is how matters came before me again today. The First Respondent was not directly concerned with those issues and did not attend this Preliminary Hearing.

3. The claims under consideration for present purposes are all claims of direct race discrimination and they are summarised in a table prepared by the Claimant. The most recent version of that table was provided on 23rd May 2018 and it lists the claims made against each of the Respondents.

4. I am very grateful to Ms Merchant and Mr McGuire for their careful written submissions, which I read in advance, and also for their oral submissions at the hearing. Since the bulk of those submissions are set out in writing I will not set them out in full in these reasons, but I will deal with particular points raised in the course of my own reasoning.

5. Neither side called witness evidence and the issues were dealt with on the basis of submissions.

12. On 29th May 2017 the Claimant was informed by the Second Respondent's complaints team that he was now excluded from nursing in Ward 4 at the Royal Alexandra Hospital. The explanation subsequently provided by email on 31st May 2018 was that the patient's wife had alleged that the Claimant had caused the patient to become agitated, and although there was no concern about the care provided by the Claimant in difficult circumstances or the Claimant's general approach as a nurse, it would be helpful if he did not return to Ward 4.

13. For present purposes I can leave matters there, although the case against the First Respondent is more detailed. The Claimant ultimately resigned from the First Respondent's employment by a letter dated 22nd June 2017. The First Respondent does not take any limitation points.

Facts

14. For the purposes of this Preliminary Hearing, it is possible to record some agreed facts.

a. All of the claims with which I am concerned today (including those which are said by the Second Respondent to require a successful application to amend if they are now to proceed) are alleged to have arisen on 29th May 2017.

b. On that basis, the standard three month period within which claims should be presented in accordance with section 123(1) (a) of the Equality Act 2010, and the date by which ACAS should have been contacted in order to benefit from any extension of that limitation period, was 28th August 2017.

c. As far as claims against the Second Respondent are concerned, Unison contacted ACAS on the Claimant's behalf on 31st August 2017, outside the 3 month primary limitation period referred to above.

Background

6. I take the following background facts from the narrative sections of the claim, the responses and the further details subsequently supplied. I have not made findings of fact on these matters and they are Set out in order to explain the context of the issues I have to decide.

7. The Claimant is a nurse formerly employed by the First Respondent as a Band 5 Staff Nurse- Mental Health. The First Respondent's functions and activities are well-known.

8. The Second Respondent specialises in the supply of recruitment services to the healthcare sector and in that capacity supplies temporary staff to the First Respondent.

9. The Claimant sometimes also worked for the First Respondent as an agency worker. When he did so, he was supplied to the First Respondent by the Second Respondent but was not employed by the Second Respondent on those occasions.

10. The complaints against both Respondents arise from an incident on 28th May 2017. On that day the Claimant was working for the First Respondent as an agency worker supplied by the Second Respondent. The claims against the Second Respondent are therefore brought under section 55(2) (b) and/or (d) of the Equality Act 2010.

11. On 28th May 2017 the Claimant was working on Ward 4 at the Royal Alexandra Hospital in Paisley caring for a patient with challenging behaviour. The patient was verbally abusive to the Claimant and some of that abuse was racist. The Claimant reported matters to the charge nurse on duty. She and other nurses witnessed the behaviour, which became violent. The patient's son requested that only "white skinned" nurses should care for his father since his father did not like "black skinned nurses".

Consequently, that period was not extended by virtue of early conciliation.

d. The ET 1 was presented to the Tribunal on 23rd October 201 7, 56 days out of time.

15. It is accepted on behalf of the Claimant that the claims against the Second Respondent were therefore submitted out of time. The Claimant therefore seeks a ruling under section 123(1)(b) of the Equality Act 2010 that those claims were nevertheless presented within "such other period as the employment tribunal thinks just and equitable", and that on that basis the ET has jurisdiction to hear it.

16. There are also some unchallenged facts, put forward in the form of the Claimant's written submissions. I am prepared to accept that they are true on the balance of probabilities given the care with which Ms Merchant can be assumed to have taken her instructions, given her professional obligations.

a. The Claimant's trade union (Unison) sent papers to the Claimant's solicitors (Thompsons) on 17th August 2017.

b. In accordance with the service level agreement between Unison and Thompsons, the union have responsibility for the initiation of ACAS Early Conciliation ("EC"). Thompsons requested on 22nd August 2017 (within the 3 month period) that Unison should do so.

c. Unison initiated EC in relation to claims against the *First* Respondent on 24th August 2017. EC was not initiated against the *Second* Respondent at that stage.

xf. On TP August 2017 a review of Thepapers carried ouTbyThompsons noted the possibility of a claim against the Second Respondent since the Claimant was working through that agency on the relevant dates. On those dates the Claimant was working at the premises of the First

Respondent and under the First Respondent's control. The First Respondent was also of course the Claimant's employer and I find that the Second Respondent's involvement was not immediately obvious. EC was initiated against the Second Respondent on the same date, 31st August 2017, as already outlined above.

e. EC Certificates were issued in relation to the First Respondent on 24th September 2017 and in relation to the Second Respondent on 1st October 2017. As already set out above, the ET1 was presented (against both Respondents) on 23rd October 2017.

Applicable Law on Limitation

17. I have already referred to the central issue, which is whether in accordance with section 123(1)(b) of the Equality Act 2010 the claim was presented within "such other period as the employment tribunal considers just and equitable".

18. It is well-known that this is a broader discretion than the "not reasonably practicable" test applicable to many other types of claim, including unfair dismissal and unlawful deductions from wages.

19. There is no presumption in favour of an extension of time and the burden is on the Claimant to convince the tribunal that it would be just and equitable to do so. Time limits in employment tribunals are intended to be applied strictly ***(Robertson v Bexley Community Centre*** [2003] IRLR 434, CA). However, that case must be read with some caution. There is no principle of law which indicates how generously or sparingly the power to enlarge time is to be exercised and the comments of Auld LJ in ***Robertson*** merely indicate that the question is one of fact and judgment for the tribunal of first instance rather than a question of policy or law (see Sedley LJ in ***Chief Constable of Lincolnshire Police v Caston*** [2010] IRLR 327, CA). Sedley LJ went on to explain that Auld LJ had simply meant that limitation is not "at large" and that there are time limits which will shut out an otherwise valid claim unless a

claimant can displace them.

20. It is not a precondition of an extension of time that there should be evidence from the claimant. Other material before the tribunal ***may*** be sufficient to establish a balance in favour of the claimant ***(Accurist Watches Ltd v Wadher*** [2009] All ER (D) 189 (Apr)).

21. The factors which a tribunal should take into account in the exercise of its discretion will depend on the facts of each case and are not capable of exhaustive definition. They will normally include the reason for the delay, whether the claimant was aware of his or her rights to claim and/or the time limit, the conduct of the employer, the length of the extension sought and the prejudice which would be suffered by the employer if the claim were permitted to proceed. The latter must be balanced against the prejudice to the employee if the claim is dismissed on the basis that it has been presented outside the applicable time limit. It may also be necessary to consider whether a fair trial is still possible ***(DPP v Marshall*** [1998] ICR 518).

22. Tribunals have been encouraged by analogy to consider the list of factors applicable to extensions of the limitation period in personal injury cases in England and Wales under section 33 of the Limitation Act 1980 ***(British Coal Corporation v Keeble*** [1997] IRLR 336) but the process is not mandatory and those factors are not a check list required by law ***(Chohan v Derby Law Centre*** [2004]).

23. There was some suggestion in the Respondent's written submissions that the approach might be different in Scotland, although I understood Mr McGuire to accept in oral submissions that the approach should actually be the same. The provisional view I expressed at the time, and my concluded view now, is that there is little basis for thinking that a different approach should be taken in Scotland given that the authorities irv question have been-approved and applied for many years without qualification, and the fact that the reference to section 33 of the Limitation Act 1980 in ***Keeble*** was merely by way of a convenient summary of frequently relevant principles. It was not an instruction

that tribunals should rigidly apply the provisions of another statute dealing with limitation in other areas of law. The principles were never intended to be a formulaic checklist, as subsequent authorities have shown. If that had been the logic of ***Keeble,*** then it might be necessary to consider the equivalent Scottish legislation, but that was not the way in which ***Keeble*** encouraged tribunals to approach the considerations set out in section 33 of the Limitation Act 1980. On that basis I regard ***Keeble*** as good law, and would I follow it even if I were not bound to do so. In any event I am bound to follow ***Keeble*** unless and until the EAT or a superior court declares that the reasoning has no application to claims presented in Scotland.

24. Where delay is attributable to incorrect advice from legal advisers, it is often said that the delay should not be visited on a claimant by refusing an extension of time, even if the claimant has a valid claim for negligence against the solicitor ***(Chohan,*** above and ***Vlrdl v Commissioner of Police for the Metropolis*** [2007] IRLR 24). That does not mean that time necessarily *should* be extended in all such cases, but merely that all other factors must be considered. ***Wright v Wolverhampton City Council*** [2009] All ER (D) 179 (Feb) applied equivalent reasoning to poor advice by a trade union representative. A tribunal might be more likely to refuse an extension of time where the delay is entirely attributable to the claimant themselves ***(De Souza v Manpower UK Ltd*** [2013] All ER (D) 199 (Feb).

Applicable Law on Amendment

25. The power to allow an amendment is part of the general case management power in rule 29 of the 2013 Rules, but the principles are also governed by well-known authorities. In practice it is not uncommon for further information or clarification provided by one party to raise (or to be said to raise) a distinct claim requiring a successful application to amend in order to proceed. At the risk of stating the obvious, the Tribunal only has jurisdiction to adjudicate on the acts complained of and the claim and response define the issues which the Tribunal must determine (see e.g. ***Chapman v Simon*** [1994] IRLR 124 and ***Chandhok v Tlrkey*** [2015] IRLR 195).

26. The leading case on amendment is ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836. Ultimately, a tribunal must take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. As part of that overarching principle the following matters will normally be relevant:

    a. the nature of the amendment;
    b. the timing and manner of the application to amend;
    c. the applicability of time limits.

27. A distinction has often been drawn between amendments which add a new or different claim and amendments which merely amend the factual basis of an existing claim, for example by adding further facts. Sometimes the line between a new claim and a claim implicit in facts already pleaded can be a fine one. It is necessary to consider the entirety of the claim form.

28. As for time limits, I need not consider the recent authorities on whether or not it is possible to allow an amendment "subject to time-bar", since I am resolving issues of amendment and time-bar at the same hearing.

29. Amendments should not generally be refused punitively where no real prejudice will be caused by them being granted ***(Sefton v Hincks*** [2011] ICR 1357).

Reasoning and Conclusions

Amendment

30. It is convenient first of all to deal with the amendment points. I will take the allegations in the order in which they appear in the amended schedule of allegations. All of them are allegations of direct race discrimination arising from events on 29th May 2017.

31 J do not accept the Second Respondent's submission that the allegations are self-evidently weak and that their (allegedly) poor prospects are a matter which I can and should take into account when considering amendment. On the contrary, I find that the merits of the allegations are impossible to assess without hearing evidence.

32. The first allegation is *"executing the instruction from the First Respondent to exclude the Claimant from nursing ward 4 at the Royal Alexandra Hospital".* The Respondent's submissions took no issue with this allegation. This has already been raised, in slightly different words, in paragraph 28 of the original "Particulars of Complaint" attached to the ET1 . I see no material difference between "executing" and "complying with" instructions for present purposes. The same claim is already before the tribunal and no amendment is necessary.

33. The second allegation is *"failure to provide the Claimant with a reason for his exclusion from ward 4 at Royal Alexandra Hospital".* The Respondent correctly points out that this is absent from paragraphs 27 and 28 of the original "Particulars of Complaint" attached to the ET1 which appear under the heading [claims against the] "Second Respondent". However, looking at the whole of the claim form, I find that the *factual* basis of this claim is already clearly part of the case advanced. What is missing is the correct legal label. In paragraph 14 of the "Particulars of Complaint" attached to the ET1 the Claimant complained in relation to a telephone call from the Second Respondent on 29th May 2017 that "no reason was given to the Claimant for these actions". I find that this is in substance the same complaint, although it was not clearly identified as an allegation of direct discrimination in the original claim.

34. While I do not think it could be said that those facts had already been raised *as an allegation of direct race discrimination* such that no amendment were even necessary, I regard the amendment sought as a very minor one which I readily allow on ***Selkent*** principles because the balance of prejudice weighs in favour of allowing it.

a. The amendment essentially identifies an additional discrimination claim on the basis of existing alleged facts. It attaches a new legal label to existing factual allegations.

b. The claim is closely associated with a claim that is already before the Tribunal and does not take the case in an entirely new direction.

c. The prejudice to the Second Respondent in having to meet it at this stage is very modest. It is a very narrow allegation and the focus at the final hearing will simply be on (a) whether any reason was given to the Claimant by the Second Respondent on 29th May 2017, and if not (b) the reason for that omission. That will require little oral or documentary evidence and it will not be unduly onerous for the Second Respondent to have to prepare a defence on the merits.

d. While there is (as always) some prejudice to the Second Respondent in having to defend an additional allegation, that will not be a difficult or expensive forensic exercise. The prejudice to the Claimant in being denied a determination of the allegation on its merits is the weightier consideration.

e. I do not accept the Second Respondent's submission that there is no prejudice to the Claimant since he can pursue his other allegations, including allegations made against the First Respondent. That is simply not the point. The issue is the prejudice inherent in not being able to pursue this allegation against this respondent. There is prejudice in being denied the opportunity for a public and Article 6 compliant determination of discrimination claims on their merits, even before the issue of compensation arises.

f. The final hearing has not yet been fixed and there is plenty of time for both sides to prepare their cases. A fair hearing is clearly possible and

there was no suggestion to the contrary.

g. As for the timing and manner of the application to amend, I treat there as having been an implicit application to amend when the first schedule of allegations was produced on or about 20th March 2018. The Preliminary Hearing proceeded on that basis. As for the reason for not having brought the claim (or having made an application to amend) earlier than 20th March 2018, I find that the allegation emerged in the course of bringing clarity through additional particulars of the claims. There is no doubt that the application could and should have been made earlier and to that extent this factor weighs against allowing the amendment. However, I also recognise that this is sometimes one of the regrettable realities of litigation. Points can develop during the course of litigation and the issues can expand or shift. The case management challenge is to impose fair and appropriate limits on the permissible degree of drift, and to strike a fair balance between disciplined rigidity and flexibility. To return to the facts of this case, I bear in mind that the final hearing has not yet even been listed and the proceedings are not close to resolution. That mitigates the damage done by the delay in raising the allegation.

h. I set out my reasoning on jurisdictional time points separately below, but for present purposes I can say that since I would consider it just and equitable to extend time to 20th March 2018 time limits do not weigh in favour of refusing the amendment.

i. Having weighed all of those factors as part of an assessment of the balance of prejudice, I find that it favours allowing the amendment. The Claimant would be more prejudiced by a refusal of permission to amend than the Second Respondent would be by granting it.

35. The third allegation is *"failure to investigate the reasons for the Claimant's exclusion from nursing ward 4 at Royal Alexandra Hospital prior to executing the instruction of the First Respondent'.* I can find no hint of a similar factual

allegation in the original claim or the "Particulars of Complaint" attached to it and I regard this as an entirely new factual and legal allegation. I do not accept the Claimant's argument that it is implicit in the claim as originally set out and I therefore find that a successful application to amend is required in order for this allegation to proceed. I therefore regard this as a more significant amendment than that in the preceding paragraphs.

36. Having considered the ***Selkent*** principles once again in relation to this allegation I find that the balance of prejudice also tips in the Claimant's favour (though less strongly). The fact that the allegation is based on new rather than existing facts is a distinction which weighs against allowing the amendment, but the other factors listed above in relation to the second allegation also apply here. I will not repeat them. Having weighed those factors, the balance of prejudice still tips in favour of allowing the amendment.

Jurisdictional time limits

37. The claim advanced in the original claim form (or more properly its attachment) was 56 days out of time. The two other claims were raised by way of an implicit application to amend which 1 treat as having been made when further particulars were first supplied on or about 20th March 2018, around 7 months out of time.

38. I accept the Claimant's submission that the original allegation against the Second Respondent was presented a modest period out of time. The period of 56 days is certainly not trivial, but nor is it the sort of period that renders these claims "stale". However, the two allegations raised by way of amendment are clearly out of time by a more substantial period.

39. The reason put forward, which I accept, was error on the part of the Claimant's trade union and/or solicitor. There was art-error in relation to EC notification and the need to commence proceedings by the correct date, and a further error in that the need to amend was not spotted earlier. Those are important failings and are certainly not to be ignored. They weigh against the Claimant

in the assessment of justice and equity. However, they weigh less heavily against the Claimant than personal blame might do. These were the mistakes of skilled advisors in whose hands he had put his claims. There is no evidence before me to indicate that the Claimant bore any personal responsibility for those errors.

40. I also accept the Claimant's submission that there is no adverse effect on the cogency of the evidence. The Respondent did not argue otherwise. That is important, and I would add that a fair hearing remains entirely possible. While these matters can be shortly stated, I give them considerable weight. They go to the practical consequences of the delay.

41. I turn to the balance of prejudice. At a basic level of analysis, the prejudice to the Claimant in being denied the right to a determination of the claims on their merits is equal and opposite to the prejudice to the Second Respondent in having to defend them. However, that basic starting point must be adjusted in light of the following factors. First, there is a theoretical alternative claim against the Claimant's lawyers and/or union, although I do not accept that it is any real substitute. There would be additional costs, additional risks, and the only remedy would be financial, there would be no possibility of a finding of discrimination against the Second Respondent. Second, the Second Respondent argues that the claims against it are weak. In that sense I am balancing the prejudice to the Respondent in having to defend claims it expects to win without calling onerous volumes of evidence against the prejudice to the Claimant in being unable to pursue claims of direct race discrimination to a final determination on their merits. Overall, I find that the balance of prejudice favours an extension of time. The Claimant would be more prejudiced by a refusal than the Second Respondent would be prejudiced by an extension.

42. I do not accept the points made in the Claimant's submissions about the inevitable delay caused by the need to engage with ACAS. That process can be completed very speedily if it has to be, and the claims were not lodged immediately after completion of conciliation anyway. A further three weeks

went by, so far as the Second Respondent is concerned. The process was not especially dilatory once EC was completed, but nor was it as fast as it might have been.

43. That amounts to a long list of potentially relevant factors. If I have not mentioned a Keeb/e/section 33 factor it is because it was not relevant on the facts before me (for example, there is no criticism of the Respondent's own conduct). My assessment has been, to use a well-worn legal clichd, "holistic". I have not treated any one factor as conclusive.

44. Overall, I find that all of the claims were presented within a just and equitable further period after expiry of the primary limitation period, even those presented by way of an implicit application to amend around 7 months later.

Overall Conclusion

45. The upshot of those findings is that all of the Claimant's allegations against the Second Respondent recorded in the updated table will go forward to be determined on their merits at a final hearing.

46. As discussed and agreed at an earlier stage, a Preliminary Hearing by telephone will now take place to consider further necessary case management and listing of the final hearing.

Employment Judge: M Whitcombe
Date of Judgment: 28 June 2018
Entered in register: 04 July 2018
and copied to parties

NOTES

(1) If this Order is not complied with the Tribunal may: (a) make an Order for expenses (costs) or preparation time against the defaulting party under rule 76(2); or (b) strike out the whole or part of the Claim or the Response under rule 37(1)(c), in which case the Respondent will only be entitled to participate in any hearing to the extent permitted by the Judge.

(2) You may make an application under rule 29 for this Order to be varied, suspended or set aside. **You must confirm when making the application that you have copied it to the other party or parties and notified them that they should provide the Tribunal with any objections to the application as soon as possible.**