



# EMPLOYMENT TRIBUNALS

**Between:**

Ms Angela Unufe                      **and**                      Elysium Healthcare Limited

**Claimant**

**Respondents**

**Record of an Open Preliminary Hearing by CVP  
at the Employment Tribunal**

**Held at:**            Nottingham                                      **On:**        8 April 2022

**Before:**            Employment Judge P Britton (sitting alone)

**Representation**

**For the Claimant:**                      **Mr R Kohanzad, Counsel**  
**For the Respondent:**                      **Miss S Lawrence, In-house Solicitor**

## JUDGMENT

1. The claim of direct race discrimination pursuant to s13 of the Equality Act 2010 will proceed it being just and equitable to extend time.
2. The claim based upon unfair dismissal is dismissed upon withdrawal.
3. The claim based upon unlawful deduction from wages/breach of contract is also dismissed upon withdrawal.
4. Directions for the future conduct of these proceedings are hereinafter set out.

## **CASE MANAGEMENT SUMMARY**

### **Introduction**

1. Following upon the directions of Employment Judge Robert Clark sitting at a Case Management Hearing on 26 January 2022 this case was listed today to determine various issues as follows;

1.1 As to whether, even if it was in time, the claim for unfair dismissal pursuant to section 95 and 98 of the Employment Rights Act 1996 could proceed the Claimant lacking the necessary two years qualifying service. As it is that claim has been withdrawn today and therefore is dismissed upon withdrawal.

1.2 As to whether the claim based upon non-payment of wages, including holiday pay, in the alternative breach of contract, requires leave to amend and is so as to whether it is out of time. This claim is also withdrawn and is therefore dismissed.

1.3 Left therefore is the claim based upon direct race discrimination pursuant to s13 of the Equality Act 2020 (the EqA). I have to decide whether it is just and equitable to extend time for the purposes of that claim it having been presented outside the stipulated three month time limit.

### **The out of time issue**

2. The claim (ET1) was presented to the Tribunal by the Claimant on 29 September 2021. She had prepared it herself. She gave the last date of the employment as 14 April 2021 (the EDT). If so for reasons set out below and applying the extension of time provisions, the Claim was presented 14 days out of time. By its response the Respondent gave the date of the EDT as being the dismissal letter dated 23 April 2021. Stopping there, it is quite clear that both these dates are wrong because on the face of the papers in the bundle before me, the Claimant was not informed that she was dismissed at the disciplinary hearing in this matter which took place on 14 April 2021. In fact the decision was clearly stated to be reserved in the minutes of that meeting. The letter dismissing her for alleged gross misconduct was written on 23 April 2021. It gave a date for the end of the employment of 24 April. Assuming the ordinary course of posting the Claimant must have received it by latest assume 27 April because she put her appeal in the following day. The parties do not challenge my analysis.

3. Thus for my purposes the EDT was 27 April 2021. That meant that the three month time limit for bringing the claim expired on 26 July 2021. But she of course is required to go to ACAS early conciliation before she can bring a claim. The period of that conciliation as per the ACAS certificate provided was

16 July to 28 August 2021. As to its effect on the time limit engaged is s140B of the EqA. Thus applying the ACAS extension of time provision, It means that the period between the day after day A (16 July) and ending with day B (27 August) is excluded in calculating time. Furthermore, as day B was after the expiry of the primary time limit, the effect is that she is given a further month in which to bring the claim from the day after B (so 28 September). Thus the deadline for presenting the claim meant she should have submitted it by 28 September. As it was submitted the following day it is one day out of time. This analysis has not been challenged before me. I stress that it only became engaged because both parties had the EDT wrong.

2. In terms of my jurisdiction the claim therefore being out of time engaged is section 123 of the Equality Act 2010. I can exercise my judicial discretion to extend time if I find that it is just and equitable so to do. I don't intend to rehearse the jurisprudence on the topic as the parties advocates are fully conversant other than to observe that it is encapsulated in the decision of The Court of Appeal per Lord Justice Underhill in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** (2021) EWCA Civ 23. Reaffirmed at paragraph 38 is and having referred to factors to be considered is:

*“ That said, factors which are almost always relevant to consider when exercising any discretion to extend time are: (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the Respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). The following is a summary of my findings in this matter.”<sup>1</sup>*

3. I will accept on her evidence that the Claimant had no previous knowledge of Employment Tribunals or how to proceed to bring a claim before them. When she was dismissed for what were professionally serious misconduct allegations with obviously therefore the potential impact on her career as a Senior Nurse, she was supported during the internal disciplinary process by the Royal College of Nursing. That continued up and until the outcome of the appeal at which she was unsuccessful and which decision was communicated to her on 7 June 2021 by the Respondent following an appeal hearing on 19 May.

4. What then happened is that she was waiting to see whether or not the RCN would assist her further and in taking a claim to the employment tribunal. She was then informed by the RCN rep that it would no longer support her on the Employment Tribunal claim. This I gather was shortly before she entered into ACAS early conciliation on 16 July. It was an extensive period of conciliation with the ACAS conciliator Mr Reece clearly undertaking negotiations. And what one can see in that respect is that the Respondent had agreed to pay the Claimant outstanding holiday pay by 9 September 2021 but that it was not going pay the

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<sup>1</sup> Cited with approval from *Abertawe Bro Morgannwg University Local Health Board v Morgan* (2018) EWCA Civ 640 per Leggatt LJ.

other amount of money being claimed for out of hours roster and things of that nature or otherwise. Therefore, the matter was closed in terms of ACAS early conciliation.

5. The issue becomes as to what did the Claimant then do. Having heard her evidence, and it fits with the reply that she wrote to the Respondent on 11 September, she thought that in fact that ACAS was still dealing with the matters hence why she said in her reply in essence "don't contact me about this outstanding issue go to my ACAS rep". Now of course Mr Reece, the ACAS conciliator is not her rep, he is a neutral conciliator, But I accept that she misunderstood his role.

6. What then happened is that she became understandably preoccupied with preparing her defence for the (NMWC) post the referral of the Respondent following its summary dismissal of the Claimant. The interim hearing before the NMWC was scheduled for 6 October 2021. The RCN was helping her in that respect and had provided Solicitors. She was so prioritising because the NMWC could at the interim hearing have suspended her from practice pending completion of its investigation and a final hearing. Or it could of course decide for the time being to take no steps and which would require it to consider whatever evidence she was putting forward to counter that of the Respondent.

7. And of course, I have already referred to that she thought that Mr Reece was still handling matters via ACAS although she had not heard from him from

8. Finally, I factor in that under the stress of everything ie the dismissal and these pending proceedings before the NMWC that her health deteriorated. She was already a sufferer from fibromyalgia. And she began to fear that she was suffering from depression. I found the evidence as to her state of mind convincing. And so, what happened is that on 29 September she got another letter from the Respondent to the effect that they were confirming that they had now paid the outstanding holiday pay and therefore as far as they were concerned matters were closed. And at that stage she phoned up ACAS wanting to speak to Mr Reece, learnt that he been on leave and had yet to return to work and was advised to immediately bring a claim to the Tribunal which she did that day.

## **Conclusions**

9. It follows that as per the dicta that I referred to I have first considered the reasons for the delay. I find the explanation of the Claimant to be credible. As to the length of the delay it is one day. I appreciate that one starts from the standpoint that these time limits are to be observed strictly but of course that has to be seen within the compass of my discretion in terms of just and equitability in all the circumstances.

10. That brings me on to prejudice. The Respondent does not advance an argument that it is prejudiced. It can defend the case. The evidence has not gone

stale, so to speak. Its witnesses remain available, and of course the compass of events is short.

11. Accordingly, in all the circumstances I have decided that it is just and equitable to extend time.

## **ORDERS**

### **Made pursuant to the Employment Tribunal Rules 2013**

#### **Order for Directions**

1. The Claimant will now provide further and fuller particulars of her case, particularly in the light of some of the elements in her witness statement for the purposes of today, and she will do this and send it to the Respondent and the Tribunal **by Friday 29 April 2022**. When so doing she will **also send her schedule of loss**.
2. The Respondent will reply **by 13 May 2022**, again copying the Tribunal.

#### **Preparation of the Trial Bundle**

3. The Respondent will send the Claimant by way of first stage discovery its proposed trial bundle index. It will be doubled spaced. It will do this **by Friday 27 May 2022**.
4. The Claimant will then consider the same. If she considers there are additional documents relevant to the issues that should be in that bundle, she will at the appropriate space in the trial bundle index by brief description set out the document; and when she sends back the completed trial bundle index to the Respondent she will send a copy of any such document for insertion in the trial bundle. If she doesn't have the document but believes it to be in the Respondent's custody or control, she will make that plain.
5. The Respondent is fully familiar with how to prepare a trial bundle; suffice it to say, that it will complete the same and send a copy to the Claimant **by Friday 22 July 2022**.
6. The parties will exchange witness statements. Both sides know what is required. This will take place **by Friday 6 February 2023**.

#### **The Main Hearing**

7. Initially this was listed at the Case Management Hearing by Employment Judge Clark on a provisional basis only for the 3 days commencing 7 November 2022. Following the discussion today it is clear that will not be sufficient time, and given the number of witnesses to be deployed, the likely size of the trial bundle

and the issues. Therefore, it is agreed that it is relisted for 7 days. Thus the current listing is cancelled, and the hearing is **hereby relisted to take place at Nottingham for the 7 days working days commencing Monday 20 March 2023. The first morning of that main hearing will be a reading in period for the Tribunal panel. The live hearing will start at 2.00pm and the parties must be in attendance for a prompt start.**

8. For the purposes of the reading in via the Respondent there will be provided to the Tribunal at Nottingham **not later than 3 working days before the first day of this hearing 4 copies** of the following;

- 8.1 Trial bundle.
- 8.2 Combined indexed witness statement bundle.
- 8.3 Agreed Cast list.
- 8.4 Agreed Chronology.

### **Judicial Mediation**

9. I have explained the process to the parties. They will let the Tribunal know within **14 days of the issue of these orders** as to whether or not they are prepared to enter into Judicial Mediation. If they both are, then there will be a short Case Management Hearing listed by telephone to give directions for that Judicial Mediation and list the same.

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Employment Judge P Britton

Date: 28 April 2022

### **Notes**

(i) **The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.**

(ii) **Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.**

**(iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.**

**(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:**

**<https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>**

**(v) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so*”. If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.**