



EMPLOYMENT TRIBUNALS

Claimant

Mr T Mahenga

V

Respondent

Chelsea & Westminster Hospital
NHS Foundation Trust

Heard at: London South Employment Tribunal On: 1 August 2022

Before: Employment Judge Norris, sitting alone (via CVP)

Representation:

Claimant – In person

Respondent – Mr B Jones, Counsel

WRITTEN REASONS

Background to the claim

1. The Claimant worked for the Respondent between 2002 and 2021 as a member of bank staff and latterly as a Clinical Support Worker/HCA. He submitted his first claim (unfair dismissal, race and disability discrimination) to the Tribunal on 8 January 2021 and a second claim (redundancy and “other” payments) on 21 May 2021.
2. The Claimant entered ACAS early conciliation (EC) in November 2020 for a single day and the EC certificate was issued on 17 November 2020. His second period of EC was 25 March to 6 May 2021. So far as the first claim is concerned, on the face of it, the Tribunal does not have jurisdiction to consider complaints about alleged conduct that pre-dates 8 October 2020, and so far as the second claim is concerned, it does not have jurisdiction to hear complaints about alleged conduct that pre-dates 26 December 2020, though for the purposes of these reasons, I am concerned only with the former.

The proceedings to date

3. A PHCM took place on 28 April 2022 before EJ Corrigan, who listed the claim for an open PH to determine whether any of the complaints of race discrimination should be struck out because the Tribunal does not have jurisdiction to hear them or a deposit order made because they were presented out of time (“time point”). EJ Corrigan subsequently added to the list of PH issues (by order sent to the parties on 24 May 2022) consideration of whether the Tribunal has jurisdiction to hear the claim of unfair dismissal, if it was submitted prior to the Claimant’s termination date (“unfair dismissal

point"). The Respondent also asked for the Tribunal to consider whether it had jurisdiction to hear the complaint that the Claimant was entitled to contractual enhanced redundancy pay ("contractual redundancy pay point") and this was added as well.

4. The Preliminary Hearing took place before me by CVP on 1 August 2022. The Claimant had prepared a six-page document headed "Witness statement re: jurisdiction – time limits", dated 24 June 2022 that indicated he would be showing evidence that the conduct complained of extended over a period of time, starting with an incident in 2018. He also stated that his employment "effectively came to an end" on 22 October 2020 and that his filing of his complaint of unfair dismissal was timely and not premature.
5. The Respondent had produced a bundle of 225 pages for the PH and the Claimant had also sent in eight additional pages that he wanted the Tribunal to take into account. I heard submissions from both parties and then gave an oral decision at the time (and issued a written Judgment later that day). We then went on to list the Hearing and make directions to progress to that.
6. On 15 August 2022, the Claimant made a request for these reasons, which was referred to me later the same day.

The issues

7. There was a list of issues in EJ Corrigan's case management summary and orders. In relation to the complaints of direct race discrimination, the issues were whether the Respondent:
 - a. Varied the Claimant's employment contract in contradiction of his express wish to develop his role as a Clinical Support Worker;
 - b. Failed to investigate his grievance;
 - c. Failed to investigate an allegation made against a colleague Mr N Wright (mistakenly referred to as Mr White); and
 - d. Created a redundancy situation.
8. No dates were set out in the summary. In discussions before me, the Claimant initially said he had found out in or around February or March 2020 about the variation to his contract, when he made enquiries about returning to his former role. He said that this variation was done by Mr Wright "out of malice". He says that multiple people subsequently acted to protect Mr Wright because of race: Mr Turton (Head of Site Operations and Discharge), Ms La Roque (Deputy Head of Site Operations), Ms Sloane, Ms Judge, Mr Govinden and Deputy Director of Nursing, Ms Hill.
9. The Claimant says that in July 2020 he had raised with Ms Hill the issue of the variation to his contract, but she had told him that because of the pandemic, people were being redeployed; the Claimant says this was untrue. He told me later in the PH that he had found out in February 2020

or subsequently between March and April 2020 that his contract had been altered. He then said he did not know when Mr Wright had made the alteration in question but that he, the Claimant, found out “between the end of February and April [2020]”. He took the issue to Ms Hill and she said she would facilitate a dialogue. The Claimant waited but that did not take place. He made a formal verbal complaint in early July 2020 to Ms Hill.

10. The Claimant says on 31 July 2020 he made a formal request to Mr Turton to investigate his concerns. According to the documents in the bundle, there was a “feedback meeting” in this regard on 21 September 2020 at which the Claimant was accompanied by a union representative Ms McKinley. Mr Turton wrote a letter headed “Outcome of meeting to discuss formal concerns” to the Claimant on 27 October 2020, following a further meeting on 22 October 2020 at which they had planned the Claimant’s return to work. The Claimant says he received this letter the following day and that it did not accurately reflect the discussion they had had the previous month.
11. It appears to be common ground that the Respondent formally opened consultation in October 2020 as to the workforce structure of the Clinical Site Team; that consultation closed on 19 November 2020. A paper was produced by Mr Turton and Ms La Rocque in January 2021, summarising the chronology, feedback, proposals and redeployment process. Formal redeployment was not due to begin until 4 February 2021 and was scheduled to end on 1 April 2021 subject to review and extension as needed. The Claimant was offered a role effective 1 February 2021. He did not take it up. Formal notice of termination was given in writing by Mr Turton in a letter dated 12 April 2021, following a meeting on 31 March 2021. The Claimant was told in that letter that his last day of employment would be 28 April 2021.
12. The Respondent says that the Claimant started an apprenticeship as a Nursing Associate on 5 December 2019 which was not due to end until 30 March 2022. An unsigned copy of the relevant apprenticeship agreement was in the bundle; it had those dates in it. In its draft list of issues the Respondent had said that the Claimant’s contract had been varied on 19 September 2019 but I consider that the date of the Claimant’s knowledge would be the relevant one. Mr Jones told me that at the PHCM in front of EJ Corrigan, the Claimant had said he became aware of the variation to his contract in January 2020. Whether it was then or (at the latest) April 2020, Mr Jones asserted, it pre-dates October 2020 by a significant margin.
13. Similarly, the Respondent says that the complaint that Ms Hill failed in July 2020 to investigate a formal grievance is substantially out of time.

The Law

Race discrimination – time limits

14. The test for whether a complaint is out of time and, if so, whether time should be extended, is a different one for each of the complaints in this case. So far as discrimination complaints are concerned, these are governed by section 123 Equality Act 2010 (EqA), which states that

proceedings must be brought by the end of three months starting with the date of the act to which the complaint relates, or such other period as the tribunal considers just and equitable.

15. These three-month periods are often referred to as “primary time limits”. In each case, primary time limits are usually extended by a variable period of time to take account of the number of days spent by the parties in Early Conciliation (or to give at least a month after ending EC before the claim has to be lodged), as long as the prospective claimant enters EC before the primary time limit expires. If they do not enter EC within that period, no extension is given, so that time for bringing the claim expires on the same date that the primary time limit expires¹.
16. It is for the Claimant to show that it would be just and equitable to extend time; it is not to be taken as an automatic entitlement merely because there is a discretion to do so. There are factors set out in section 33 Limitation Act 1980 that may be taken into account by way of a “prompt”². However, this is not a “checklist” as such. The Tribunal is given an extremely wide discretion and should balance all relevant factors. These are likely however to include (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)³.

Unfair dismissal – time limits

17. A person may bring a claim against their employer for unfair dismissal provided they comply with the provisions of section 111(2) Employment Rights Act 1996: it must be lodged “before the end of the period of three months beginning with the date of termination” or “within such other period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable” to lodge it before the end of the three months.

Breach of Contract – jurisdiction

18. Pursuant to Article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a claim may be brought in the Employment Tribunal by an employee where that claim (at 3(c)) “arises or is outstanding on the termination of the employee’s employment”.

Evidence

19. I set out the Claimant’s case below and make limited findings of fact only in order to determine the issues for which this preliminary hearing was listed:
 - a. In relation to the complaint of race discrimination (alleged variation of contract by Mr Wright) in the Claimant’s six-page witness statement produced for this hearing, he has said that problems started between him and Mr Wright sometime in 2018. They had what might neutrally be described as a disagreement about taking

¹ See for instance *Pearce v Bank of America Merrill Lynch* UKEAT/0067/19

² As it was put in *British Coal Corporation v Keeble* [1997] IRLR 336

³ *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640

blood cultures from an elderly patient. The Claimant says he was reprimanded by Mr Wright after he refused to take the cultures. The Claimant says that to have done so would have been contrary to his training and to policy;

- b. Following further incidents with different colleagues, the Claimant says he was brought before Mr Wright again; Mr Wright said the Claimant was to do as he was told, otherwise he would be cited for insubordination and potentially dismissed. The Claimant says he acknowledged that he had spoken out of anger and unprofessionally and apologised for the way he had acted towards two colleagues in A&E but he did not accept blame for refusing to look after psychiatric patients as he considered this was not in his scope of competency. Thereafter, the Claimant believes he was micromanaged, leading to him developing a bowel disorder connected with anxiety. He believed complaints by colleagues were malicious and constituted a form of harassment, so he asked Mr Wright to facilitate mediation. I gather this did not take place. The Claimant says that he saw an opportunity to develop with the Nurse Associate apprenticeship and it was at this stage, the Claimant said in his witness statement and orally, that Mr Wright acted "with malice" by varying his contract.
- c. The Claimant did not give any indication in his witness statement as to why he believed Mr Wright had behaved in the manner alleged because of race. He said at the PH that he believed when he brought the issue to Ms Hill's attention, she did not address it out of "deference" to Mr Wright because he is white.
- d. In submissions, the Claimant said that he could not have brought his claims earlier because he had to exhaust the internal process and that did not happen until late October 2020. He did not say this in his witness statement on the time point. There was no evidence before me that this is what the Respondent's grievance procedure requires.
- e. As to the contractual redundancy pay point, the Respondent had included in the bundle for the PH a copy of the section from Agenda for Change (AfC) that relates to redundancy pay. The relevant section (16.22) is headed "Claim for redundancy payment". It says that an employee must submit their claim "within six months of date of termination of employment". However, it goes on,

"Before payment is made the employee will certify that:

- they had not obtained, been offered or unreasonably refused to apply for or accept suitable alternative health service employment within four weeks of the termination date;
- they understand that payment is made only on this condition and undertake to refund it if this condition is not satisfied".

The Claimant had not produced any contractual documentation on this point.

Conclusions

20. I therefore conclude as follows:

- a. The Claimant is clearly a man who has access to the internet and is capable of searching to find information that he needs in relation to ACAS and the submission of complaints. I am aware that he also had access to union representation throughout the relevant period, not least because he was accompanied at the September 2020 hearing (if not others) and makes numerous allegations that the nature of the representation more generally during the redundancy consultation process was inadequate.

Race discrimination – time point

- b. I deal first with the older allegations. I consider that the Claimant had found out about what he now says is Mr Wright's discriminatory conduct in varying his contract by March 2020 at the latest, because he refers in his witness statement to discussions with Ms Hill that month and in July 2020. He did not enter EC until 17 November 2020 and that was, as noted above, the date on which his EC certificate was issued. If he had put in a claim within a month of the certificate being issued, conduct that pre-dated 18 August 2020 would have been out of time, but in fact since he did not lodge the first claim until 8 January 2021, the time limit is only extended by one additional day (under "stop the clock" principles) so that we are concerned with conduct on or after 8 October 2020. Without doubt, complaints about alleged conduct by Mr Wright in or before March 2020 should have been litigated by the end of June and are out of time by seven months at least.
- c. There is, in my view, no reasonable prospect of the Claimant showing that this was a continuing act. The nature of it (allegedly varying the Claimant's contract) may have had continuing consequences but it was a one-off and there is no suggestion Mr Wright played any part in the events which followed, so there is no subsequent conduct alleged against Mr Wright. In fact, even this was said by the Claimant to have been done out of "malice" and not "because of race". It seemed to me that what the Claimant is really saying is that the professional disagreement to which I alluded at paragraph 19(a) above led to Mr Wright micromanaging him. There is also no, or no reasonable, explanation for the Claimant's failure to bring the claim in time. This is largely, I consider, because the Claimant did not think it was out of time. Nonetheless, the burden is on him to show why time should be extended.
- d. A similar issue arises with the allegation that Ms Hill failed to investigate the Claimant's grievance in early July 2020. The Claimant had until early October 2020 to approach ACAS for Early Conciliation. Since he did not go until 17 November 2020, the same date of 8 October 2020 is the relevant one for this complaint and his

claim submitted on 8 January 2021 is accordingly around three months out of time. Again, this is an allegation only against Ms Hill and while she continued (on the Claimant's case) not to investigate the complaint against Mr Wright, when the Claimant then made a formal complaint, it was investigated. There is no reasonable prospect of showing that this was a continuing act by anyone; the Claimant did not ask her to investigate again. There is however no acceptance by the Claimant that it was out of time and hence no explanation for why it was late.

- e. Further, although I recognise that the prejudice to the Claimant is that he will be unable to rely on all the heads of complaint as issues on their own account, he will still be able to refer to them as background. The prejudice to the Respondent in having to address matters going back to 2018 – or even early 2020 - that were not raised in a timely manner would have been, in my view, greater.
- f. In all the circumstances I concluded that it would not be just and equitable to extend time for these complaints and accordingly the tribunal does not have jurisdiction to hear them so that they have therefore been dismissed.
- g. So far as the remaining allegations of race discrimination are concerned, I took the Claimant's case at its highest, as I am bound to, when considering the date on which he knew his allegation against Mr Wright had been rejected. He said at the PH that this was 22 (or at the latest 27) October 2020, either of which would bring him in time if he can show facts from which the Tribunal could conclude Mr Turton and/or others acted in failing to investigate his allegations against Mr Wright because of race and thus treated the Claimant less favourably than they would have treated a hypothetical comparator. I expressly make no findings of fact in that regard.
- h. By the same token, I make no findings of fact in relation to the redundancy situation that the Claimant says was "created" and which he claims was because of race (or because he had raised a complaint about it), save that I am bound to make findings as to the date of termination in light of the remaining two issues before me, to which I return below. I consider that it is fanciful to suggest that the Claimant's employment terminated before 28 April 2021. He continued to work for the Respondent until then and continued to be paid. The act of "creating" a redundancy situation in relation to the Claimant appears therefore to have happened in or around late October 2020 when the Claimant was informed that he was "at risk" and culminated in this dismissal on 28 April 2021. That complaint of direct race discrimination is therefore in time.

Unfair dismissal point

- i. In light of my findings above, it is clear that the Claimant's claim of unfair dismissal lodged on 8 January 2021 was indeed premature (in

that it pre-dated the beginning of the three-month period after his effective date of termination) and cannot proceed.

- j. I did not accept the Claimant's belated assertion that the second claim could instead be considered to be his claim for unfair dismissal. EJ Corrigan had indeed observed that the Claimant had referred to his complaint in the second claim, but I note that this was in the context of explaining what the earlier EC certificate and claim were about and differentiating the second claim from them. He ticked unfair dismissal in the first claim, he did not tick it in the second. I infer that this was because he knew he had already claimed it and did not need to claim it a second time. It was reasonably practicable for the Claimant to bring his claim for unfair dismissal in time. It has therefore been dismissed.

Contractual redundancy pay point

- k. I accept the Respondent's submission that the entitlement to an enhanced redundancy payment arises only in the circumstances set out in the section from AfC that was in the bundle before me; the Claimant did not produce any evidence to lead me to conclude otherwise.
- l. The steps to be taken by an eligible employee are to wait for no less than four weeks and no more than six months before applying for the enhanced payment. I was told that the reason for the four-week delay before an ex-employee can apply is so that if a person leaves one part of the NHS and finds work in another part, they are not eligible for the enhanced payment, which is entirely in line with my understanding from other cases I have dealt with in this regard. The Claimant (or anyone) **could** have applied before the four weeks was up; but the entitlement to receive the payment did not "arise" until four weeks after the effective date of termination. Accordingly, it did not arise/was not outstanding on termination of his employment and the Tribunal does not have jurisdiction to hear this complaint.

Employment Judge Norris
Date: 21 August 2022