



## EMPLOYMENT TRIBUNALS

**Claimant:** A

**Respondent:** University Hospitals Bristol and Weston NHS Foundation Trust

**Heard at:** Bristol (via CVP video hearing) On: 11<sup>th</sup> August 2021

**Before:** Employment Judge P Cadney

**Representation:**  
Claimant: In Person  
Respondent: Mr O Issacs (Counsel)

## PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claims of unfair dismissal as set out in claims 1404827/2020 and 1404937/2020 are dismissed as having been presented out of time.
- ii) The claimant's claim of age discrimination as set out in claim 1404937/20 is dismissed as having been submitted out of time
- iii) Time is extended for the claimant's claims of disability discrimination as set out in claim 1404937/20.
- iv) Time is extended for the submission of the ET3 Response in claim number 140937/220.
- v) Case Management Orders are set out below.

## Reasons

1. This hearing was listed to determine three issues: firstly whether claim number 1404937/2020 was issued in time; secondly if not whether time should be extended for any of the claims; and thirdly whether time should be extended for the presentation of the response.
2. The claimant submitted two claims; 1404827/2020 in which she brought a sole claim of unfair dismissal; and 1404937/2020 in which she brought claims of unfair dismissal and age and disability discrimination. The claimant subsequently notified the tribunal that the claims were duplicates and the first has been administratively “closed”. However for the purposes of this hearing, and in fairness to the claimant, I will consider the position in respect of both I respect of the time points.
3. The claimant was on the books of RMR Recruitment (RMR) and her services were supplied to Weston General Hospital from 2017 until April 2020. The respondent asserts that she was employed by RMR Recruitment and her status was that of an agency worker. If correct this would be fatal to her claim for unfair dismissal, but not the claims of disability or age discrimination. The claimant asserts that she was an employee of the respondent.
4. On 21<sup>st</sup> April 2020 the claimant was notified by RMR that her shifts had been cancelled and she was not going to be rota’d for any further shifts by the respondent until the coronavirus pandemic improved. This is the first “dismissal” identified by the claimant and the basis of her disability discrimination claim. On 28<sup>th</sup> April 2020 she was informed by RMR that the respondent had taken a decision that she would no longer be offered shifts as a result of an incident in March, her reaction to it, and other concerns about her conduct. This is the second or alternative date identified by the claimant as her dismissal.
5. The claimant sought advice from the RCN from 28<sup>th</sup> April 2020. On 30<sup>th</sup> June 2020 she was notified that she would not be supported in any claim, and notified of the requirement to obtain an ACAS EC certificate and the time limits for submitting a claim. The claimant consulted ACAS on 14<sup>th</sup> July and obtained the first EC certificate giving dates of 14<sup>th</sup> July 2020 (date A) and 17<sup>th</sup> July 2020 (date B). The claimant obtained a second ACAS EC certificate which gave dates of 16<sup>th</sup> August 2020 (date A) and 20<sup>th</sup> August 2020 (date B).
6. The consequence of the facts set out above is that the primary time limit expired on 20<sup>th</sup> July 2020 or 27<sup>th</sup> July 2020. The first EC certificate enables the claimant to benefit from the clock stopping provisions extending time to the 23<sup>rd</sup> or 30<sup>th</sup> July 2020. In addition as the primary time limit expired within the month following 17<sup>th</sup> July (the

date of the first certificate) time was extended to 17<sup>th</sup> August 2020. The claimant obtained a second certificate as set out above and submitted her first claim (1404827/20) on 16<sup>th</sup> September 2020 and her second (1404937/20) on 21<sup>st</sup> September 2020.

7. In my judgement both claims were submitted out of time as the claimant cannot rely on the second ACAS EC certificate. Firstly only the first counts (*See HMRC v Serra Garrau*); and in any event the primary time limit had expired prior to the claimant consulting ACAS for the second certificate and she cannot get the benefit of any of the extension of time provisions. Put simply it is not open to a claimant to extend the period of ACAS early conciliation and thereby extend time for the presentation of a claim by obtaining a second certificate covering a period after the expiry of the first.

### Claims

8. Unfair Dismissal – The claimant alleges that she was an employee of the respondent (which is disputed) and that either the cancellation of shifts on 21<sup>st</sup> April 2021 and/or the decision permanently to refuse to offer her shifts on 28<sup>th</sup> April 2020 constitutes a dismissal.
9. The respondent denies that she was an employee and/or that if she was she did not have two year's continuous service and that the tribunal has no jurisdiction to hear the claim in any event. In a document setting out her response to the draft response the claimant accepts that her services were supplied by RMR which might make her claim for unfair dismissal very difficult to pursue in any event as this would appear to be a standard employment agency / agent / end user agreement.
10. Disability Discrimination – The claimant asserts that she has two conditions either or both of which mean that she has a disability within the meaning of s6 Equality Act 2010. In addition either or both rendered her a vulnerable person following the outbreak of the Covid 19 pandemic. The claim is difficult to follow but appears to be that she elected to continue to work despite her conditions but was allocated to the ITU which was the highest risk environment. When she raised this the first decision (21<sup>st</sup> April 2020) was made to withdraw shifts from her. The claims are not further particularised but these complaints potentially appear to raise s20 (failure to make reasonable adjustment) claims and/or s15 (discrimination arising from disability) claims. The respondent seeks further particulars of the claims and has not pleaded a substantive defence in respect of the 21<sup>st</sup> April decision; but in respect of 28<sup>th</sup> April it asserts that the decision was made on the basis of competency/complaints and not the claimant's disability or age.
11. Age discrimination – The age discrimination claim is not particularised and it is difficult to understand the basis for it.

### Time Limits - Unfair Dismissal

12. The unfair dismissal claim is set out in both claims and for the reasons given above both were in my view submitted out of time. The question for me is whether it was reasonably practicable to have presented either or both of the claims in time and if not whether either or both were presented in such further time thereafter as was reasonable.
13. The claimant in her witness statement asserts that she understood that at least the first claim (1404827/20) is in time as it was submitted within one month of the date of the second certificate. However, if the second certificate did not extend time (which it did not in my view) this is incorrect. Even if it had the second claim (140937/20) is on any analysis out of time. The claimant clearly misunderstood the effect of obtaining a second certificate. However she was able to contact ACAS on the day before the time limit expired, and does not as a matter of fact assert any impediment to her being able to have presented a claim in time, rather than obtain a second ACAS EC certificate.
14. This means that in my view, sympathetic as I am to the claimant it is impossible to hold that it was not reasonably practicable to have submitted the unfair dismissal claim within time. That being the case it follows that the claim for unfair dismissal (whether by reference to the first or second claim) is bound to be dismissed.

### Time Limits – Discrimination Claims

#### Disability Discrimination

15. The burden of proving that it is just and equitable to extend time to enable a claim to proceed is on the person seeking the extension. In Robertson v Bexley Community Centre t/a Leisure Link (2003) IRLR 434, the Court of Appeal stated that when employment tribunals consider exercising the discretion under s123 Equality Act 2010, '*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 claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*'
16. Some relevant factors can be derived from s33 Limitation Act 1980 (as identified in British Coal Corporation v Keeble (1997) IRLR 336). S 33 Limitation Act 1980 requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, to -  
  
(a) *the length of and reasons for the delay;*

- (b) *the extent to which the cogency of the evidence is likely to be affected by the delay;*
- (c) *the extent to which the party sued had co-operated with any requests for information.*
- (d) *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.*
- (e) *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*

17. However, the ET has a broad discretion and those factors should not be considered or applied mechanistically; as is set out in Adedeji v University Hospitals Birmingham NHS Trust (2021) EWCA Civ 23:- “*Keeble did no more than suggest that a comparison with the requirements of section 33 might help “illuminate” the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and “the Keeble factors” and “the Keeble principles” still regularly feature as the starting-point for tribunals’ approach to decisions under section 123 (1) (b). I do not regard this as healthy... “ and “Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion... The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular ..... “the length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking”.*
18. Overall, in relation to the discrimination claims, I have taken into account the cases of Robertson v Bexley Community Service IRLR 434 CA, Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA, Pathan v South London Islamic Centre EAT 0312/13, Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 and Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.
19. In relation to the question of why the claims were submitted out of time the claimant relies on the same reason as given above, that she understood that the first at least was in time. This would still lead to the conclusion that the discrimination claims were submitted out of time and it is difficult to understand why the claimant did not include them in the first claim.
20. However, applying Adedeji (above) in my judgement the fact that the claims were submitted out of time without a good reason for doing so is only one factor; the length of the delay is not great and it appears to me that here is very little prejudice to the respondent in permitting at least the disability

discrimination claims to proceed. In broad terms the basis of the disability discrimination claims is clear. The first claim (in relation to 21<sup>st</sup> April 2020) relates to events which are causally connected to the claimant's disability; similarly the claimant contends that the true reason for determining not to offer her shifts going forward (28<sup>th</sup> April) was her disability and not the reason given. Certainly I can see no significant evidential impediment to the respondent being able to advance their defences to the disability discrimination claims. In my judgement looked at overall the balance of prejudice or hardship permits the claimant being granted an extension of time in respect of the disability discrimination claims.

### Age Discrimination

21. In relation to the age discrimination claim I struggle to see that there is any seriously arguable basis for the claim. The two events relied on as discriminatory (21<sup>st</sup> and 28<sup>th</sup> April 2020) both, on the face of it relate (at least allegedly) to the claimant's disabilities; but there is nothing to suggest in either case that age was involved at all and the claimant makes no specific allegation that it was. In her ET1 the claimant refers to being over sixty years of age but makes no specific allegations that relate to her age. Given that I have decided that it is just and equitable to extend time in respect of these events as claims of disability discrimination it is potentially arguable that to permit them to proceed as alleged acts of age discrimination causes little further hardship or prejudice. However in my judgment as they are out of and appear to have little or no merit there is no benefit to anybody in permitting them to proceed. In my judgement in those circumstances it would not be just and equitable to allow the age discrimination claims to proceed.
22. Looked at overall therefore it is just and equitable to permit the disability discrimination claims to proceed.

### Extension of Time for Acceptance of the Response in claim 1404937/20

23. The respondent has called evidence from Ms Naomi Adams as to the explanation as to why the response was submitted late. I accept that evidence. In addition there are clearly issues to be tried on the merits and it is clearly in the interests of justice to permit the respondent to defend the claim. Accordingly time is extended for the acceptance of the response, which is accepted.

### Directions

24. In order to assist the claimant my understanding of her disability discrimination claims (which are the only claims proceeding) claims is as follows:-
25. 21<sup>st</sup> April 2020– Failure to Make Reasonable Adjustments (S20 Equality Act 2010) :

- i) The respondent had a PCP of requiring qualified staff to work in ICU;
- ii) The claimant's disabilities placed her at a substantial disadvantage in being required to work in the ICU;
- iii) As a result the respondent was required to take steps / make adjustments to remove the disadvantage;
- iv) The steps/adjustments relied on are to be allocated duties in a different department/ward

26. 21<sup>st</sup> April 2020 – Discrimination arising from disability (s15 Equality Act 2010):

- i) The claimant was treated "unfavourably" in that she was not rostered for any shifts going forward;
- ii) As a result of "something arising from disability" – which is either her vulnerability to Covid resulting from her underlying conditions and/or her inability to work in the ICU.

27. 28<sup>th</sup> April 2020 – Direct Discrimination (S13 Equality Act 2010) –

- i) The claimant was dismissed/not offered any further shifts because of her disabilities (and not for the reasons given by the respondent).

28. 28<sup>th</sup> April 2020 – discrimination arising from disability (s15 Equality Act 2010):

- i) The claimant was treated unfavourably – in that she was dismissed/ not offered any further shifts;
- ii) As a result of "something arising from disability" – which is either her vulnerability to Covid resulting from her underlying conditions and/or her inability to work in the ICU

29. Direction – The claimant shall notify the tribunal and respondent in writing within **14 days of the date of promulgation of this order** whether the EJ has accurately identified her claims for disability discrimination; and if not to set out in writing any further claims not identified by the EJ.

30. Direction – The respondent has permission within **28 days thereafter** to present an Amended Response if so advised.

31. The EJ will then give further directions.

## **About these orders; variation and enforcement**

1. Any application to extend the length of the hearing bundle and/or witness statements must;
  - 1.1 Be made in good time, so as not to jeopardise the hearing;
  - 1.2 Contain an indication as to whether, and if so, in what respect, the hearing time and/or timetable is likely to be affected by the additional time needed for the extra material to be read by the tribunal, challenged in evidence and considered before a judgment can be given. Parties should note that, unless a satisfactory and/or agreed variation to the timetable is contained within an application for any significant extension, it may not be granted.
2. The parties may agree to vary a date in any order, but;
  - 2.1 Any variation agreed may not be more than 14 days after the date set above unless the Tribunal's permission has been obtained;
  - 2.2 Any variation will not otherwise affect any hearing date.
3. If any of these orders is not complied with, the Tribunal may:
  - (a) Postpone a hearing;
  - (b) Waive or vary the requirement;
  - (c) Strike out the claim or the response;
  - (d) Bar or restrict participation in the proceedings;
  - (e) Award costs in accordance with the Employment Tribunal Rules.
4. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

## **Writing to the Tribunal**

5. The parties are reminded of their obligations under rule 2 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations") to assist the tribunal to further the overriding objective and, in particular, to cooperate generally with each other and with the tribunal.
6. Unless they are specifically required to by an Order, or it is requested by the tribunal or they are applying for an order, the parties should not copy the Employment Tribunal into correspondence passing between them.
7. Whenever they write to the Tribunal, the parties must, however, copy their correspondence to each other.

## **Useful information**



8. The Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>.  
The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness. A Judgment will not be entered on the Register if it serves to dismiss a claim once it has been withdrawn.
9. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: <https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>
10. The Employment Tribunals Rules of Procedure are here: <https://www.gov.uk/government/publications/employment-tribunal-procedure-rules>
11. *Presidential Guidance - General Case Management*: <https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf>
12. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: <https://www.gov.uk/appeal-employment-appeal-tribunal>

**Note;** For further assistance in relation to the requirements of these directions and in order to prepare themselves for the final hearing, the parties are referred to the *Presidential Guidance - General Case Management* which can be found at;

<http://www.justice.gov.uk/downloads/tribunals/employment/rules-legislation/presidential-guidance-general-case-management.pdf>

**Note; online publication of judgments and reasons**

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would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

### **CONSEQUENCES OF NON-COMPLIANCE**

1. 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.
2. 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.
3. 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.

Employment Judge P Cadney  
Dated: 30 October 2021

Amended Judgment sent to the Parties: 17 May 2023

FOR THE TRIBUNAL OFFICE